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THE FIRST PART

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OF THE

REPORTS

O F

S^r George Croke K^t.

Late one of the Justices of the Court

O F

KINGS-BENCH,

And formerly one of the Justices of the Court of

COMMON-BENCH;

OF SUCH

SELECT CASES as were Adjudged in the
said Courts, from the 24th to the $\frac{44}{45}$ th of the
late Queen LEIZABETH.

*Collected and Written in French by Himself; Revised
and Published in English*

By Sir HARBOTTLE GRIMSTON Baronet,
Master of the ROLLS.

The Third Impression, carefully Corrected, with the Addition of many
Thousand of References never before Printed.

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THE FIRST PART
OF THE
REPORTS
OF
ST. GEORGE CROKER,

Justice of the Court

ADAMS 92.12
1.2

KING-BENCH
COMMON-BENCH;
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said Court, from the 25th to the 2nd of the
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Collected and Written in French by himself; Revised
and Translated in English
By Sir HARRINGTON GURTON, Barrister,
Master of the Rolls.

Printed by J. Sturges, at the Sign of the Sun, in St. Dunstons Church-yard, near the Temple.

LONDON
Printed by R. Baskin, at the Sign of the Anchor, in St. Dunstons Church-yard, near the Temple.
Printed by J. Sturges, at the Sign of the Sun, in St. Dunstons Church-yard, near the Temple.
Printed by J. Sturges, at the Sign of the Sun, in St. Dunstons Church-yard, near the Temple.

WE all knowing the great Learning,
Wisdom and Integrity of the Au-
thor, Do (for the Common good)
Allow and Approve the Publishing of this Book,
in the same Letter and Dialect as now is Printed.

Robert Foster
Orl: Bridgeman
Matthew Hale
Thomas Malet
Robert Hyde
Edward Atkins
Thomas Twisden
Thomas Tyrrill
Chr: Turner
Samuel Browne
Wad. Wyndham.

W
I am known to be a
very honest and
a very good
Allow and approve
in the name of the Lord

Robert Foster

Or Bridgman

Matthew Hale

Thomas Mather

Robert Lloyd

Edward Mather

Thomas Wilder

Henry Mather

Or Mather

Samuel Browne

Wad Wadham

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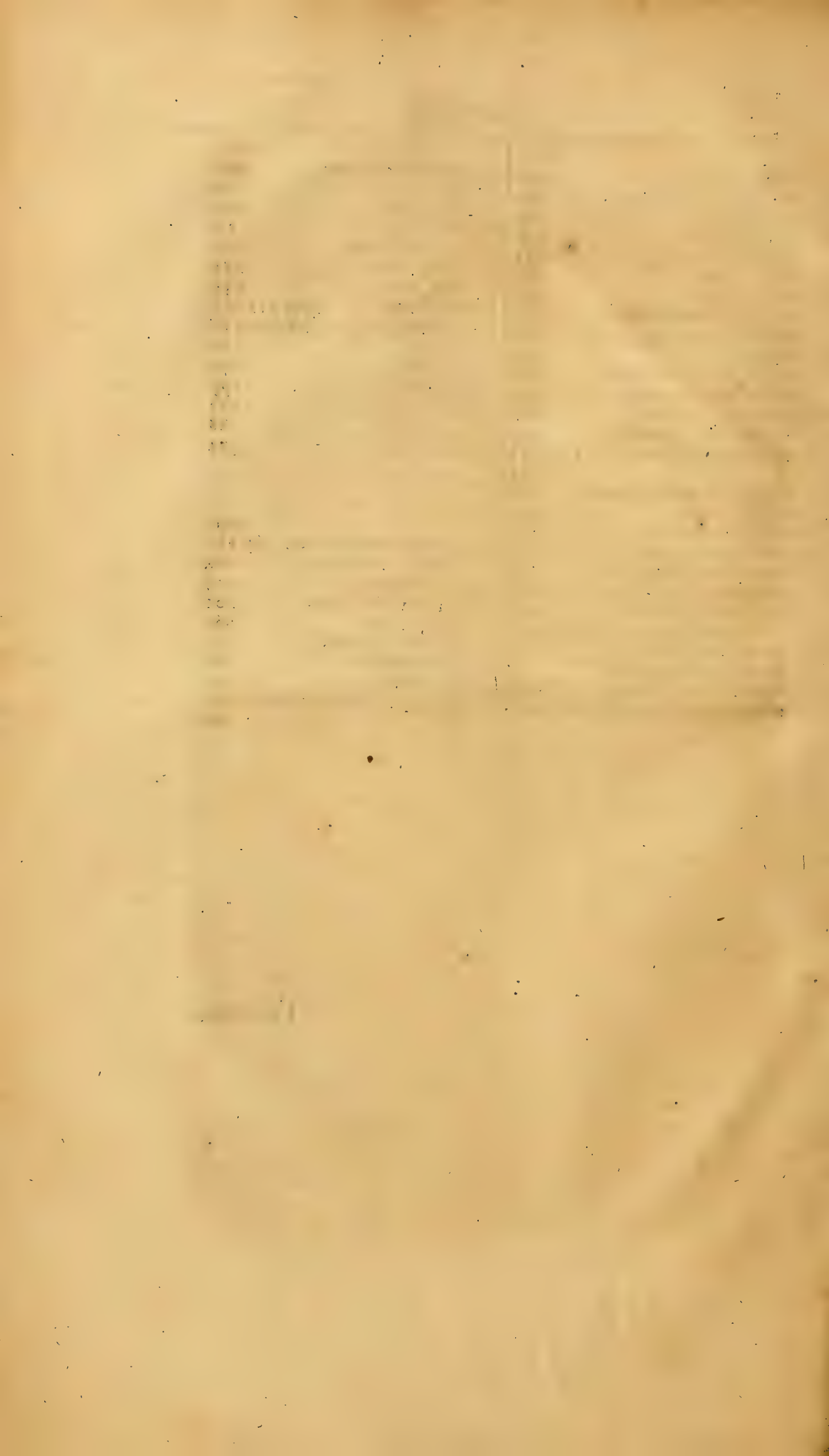
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Termino





Termino Hillarii, vicesimo quarto

ELIZABETHÆ,

In Banco Reginae.

Foster and Peacock *versus* Jo. Leonard, Int' Hill. 23. rot. 393.

A Tatchment upon Prohibition against the Defendant fermor of the Parsonage of Sevenoke in Kent, for suing for Tithes of great Wood, by the name of Silva cædua, against the Statute of 45 Ed. 3. the Defendant pleaded that for 300 loads of the said Trees, they were of Birch, of which by the Law he ought to have Tithes as Silva cædua; and as to the rest, which were of Oak and Elm, they were under the growth of twenty years; and upon the first it was demurred in Law, and upon the second Plea they were at issue. And after argument upon the first point by Clerk and Weeks of the one side, and by Fuller and Tanfeild of the other, it was adjudged for the Defendant, that he shall have Tythes of Birch, for Birch is not such Wood as the Statute intends by the name of gross boys, for it is intended of such Wood as serveth for building, and other uses of a high nature, and not only for fuel, as the nature of Birch is; and of Oak and Elm cut down before the age of twenty years, Tythes shall be paid; for until that age they are not of such value as the Law regardeth for the purposes aforesaid; and therefore as to the Birch it was awarded he should have a consultation, he having entred a non vult ulterius prosequi for the residue, &c.

(1)
Moor 907.
1 Rol. 640.
St. 45. E. 3. c. 3.

2 Cr. 199.
1 Rol. 640.
2 Inst. 643.

Post. 55:

The Bishop of Norwich *versus* Pricket.

A Ction de scandalis magnatum brought by the Plaintiff for these false and scandalous word, viz. You (prædictum Episcopum innuendo) have writ a letter to me which I have to shew, which is against the word of God, against the Queens authority, and to the maintenance of superstition, and that I will stand to prove against you. And they were at issue; and at the trial at the Nisi prius the Defendant confessed he spoke the words, where-

(2)

whereupon a Writ was Awarded to enquire of damages, which were found to 500. marks, and at the day in Banke the Court was not advised to give judgment, and the parties were adjourned; and afterward, upon good deliberation, it was Awarded that the Bishop should recover the 500. marks, and eight pound for costs; and afterwards the Bishop released part of the Costs: Nota, this Case was taken out of the Record which was entred, Hill. 24. rot. 39.

Boxes Cafe.

- (3) **A**ction for these words, Thou art burnt and hast the Pox, and after Verdict, was alledged that the Action doth not lye, for it is not said he had the French Pox, but it may be he intended the small Pox; and for saying he had the Pox generally, no Action lieth. But Wray said the Action lieth, for when it is said, Thou art burnt and hast the Pox, it shall be intended the French Pox, which usually cometh of burning, and it was adjudged for the Plaintiff.

Post. 214.

Foster *versus* Pitfall.

- (4) **E**jectione firmæ, The Case was, that one Brook devised Land to his Wife in Tail, the remainder over to another, and dieth; the wife with her second Husband aliens this Land by Fine and dieth; the question was, if the son of the Feme may enter upon this alienation, by the Statute of 11 H. 7. And all the Justices held that it is directly within the words of the Statute, for that goeth to all Estates, in Tail, or for Life, of the Lands of the Husband, or given by the Ancestor of the Husband, But Wray, Clench, and Gaudy held, that this Case is not within the intent of the Statute, for the Statute is only intended of Lands given by the Husband, or his Ancestor, for the advancement of the Wife; and although this Case is within the words of the Statute, yet it not being within the intent of the Statute, the Statute doth not extend to it; and vouched Easton and Studdes Case in the Comment, and the remainder of this Land is limited to a Stranger, and so shall not be intended to be for a Joynture, where no inheritance is reserved to the Baron or his Heirs; and the meaning of the Statute is, that she shall not prejudice the Heirs of the Baron, that the Land shall not descend to them; but here, upon her alienation nothing reverteth or descendeth to the Heir of the Husband, and so is clearly out of the Statute: Nota, that 21 Eliz. It was adjudged that if the Baron be seised of land in right of his Wife, and they levy a Fine, and the Conusee grants a Rent to them in Tail, the Baron having issue, dieth, the Feme alieneth the Rent, this is out of the Statute of 11. H. 7. for the Rent cometh in lieu of the Land.

Co. Lit. 366. a.
Co. 4. 4. a.
Post. 24.

The Lord Norrice *versus* the Marquess of Winchester.

- (5) **E**rror to Reverse a common Recovery had by the Ancestor of the Lord Marquess against Lionell Norrice, who was Tenant in Tail, the remainder to the Plaintiff. The Defendant pleads a Release of all Errors by Tho. Chapipan the last Vouchee, and the common Vouchee, and demands Judgment, &c. Plowden for the Defendant argued that all the burthen lieth upon the last Vouchee,

Vouchee, for he is to make recompence to all, and therefore he is to bring Error, and so he may releas Errors, and bar all others; and so it is adjudged 17 Ed. 2. Error 20. But all the Justices resolved the contrary, for the common Vouchee is put in only for form, and in truth he renders nothing; and therefore it is against reason that his Release should bar others that have the loss, and are entitled to have remedy by the reversal of the Judgment. Gaudy, If Execution be Sued against the common Vouchee, so that he renders in value, then upon such an Averment, the loss lying upon him, his release shall bar the others, quod Wray concessit; but here he renders nothing, and therefore shall release nothing; and they all agreed that the Case of 17 Ed. 2. was not Law, and it was adjudged that the release was no bar.

Greens Case.

Ejectione firmæ. The Case was, a Prebend let Land to Green for years rendering Rent, and a re-entry for non-payment; the Rent was demanded and was not paid, and two days after the Lessor receiveth the Rent of him, and maketh him an Acquittance by the name of his Fermor, and if this Receipt doth bar him of his re-entry, was the question; and it was clearly resolved that the bare receipt of the Rent after the day was no bar, for it was a duty due to him; but a Distress for the Rent, or a receipt of the Rent due at another day, was a bar, for those Acts do affirm the Lessee to have lawful possession; so if he maketh him an Acquittance with a recital he is his Tenant; and in this Case by calling him his Fermor, this is a full Declaration of his meaning to continue him his Tenant, and it was adjudged that the entry was not lawful.

(6)

1 Leon.

Co. 3. 64^b.

Co. Lit. 211. b.

Tanfeilds Case.

It was agreed by all the Justices in the Common Place, that the Grantee of an Annuity for years cannot have an Action of Debt for the Arrearages during the term in the Annuity.

(7)

Post. 268. con.

Yelv. 208.

Swanns Case.

It was said to be adjudged, that in Covenants perpetual, if they be once broken, and an Action of Covenant brought, and a Recovery upon it, if they be afterward broken, a Scire fac. shall be had upon the Judgment, and need not bring a new Writ of Covenant.

Valentine Hyde *versus* Hill.

Ejectione Firmæ. It was held upon evidence, that if Baron and Feme English, go beyond Sea without licence, or tarry there after the time limited by the licence, and have issue, that the issue is an alien and not inheritable, contrary to the opinion of Hussey 1 R. 3. 4.

(8)

1 Cr. 602.

1 R. 3.

Termino Paschæ, vicesimo quarto
ELIZABETHÆ, in Banco Regina.

Ecclestage *versus* Maliard.

(1)
Co. 10. 131. b.

Post. 432.
Post. 70.

DEbt. Upon an obligation to stand to the award of J.S. who awarded that one of the parties should pay to the son of the other party 5 l. which was bequeathed to him, and for not payment, Action was brought, and adjudged that the Action did not lie, for he was not bound to pay or tender the money, being to a stranger to the award. And Mich 18 & 19 Eliz. it was adjudged between Henry Norwich and Simon Norwich, that where they were mutually bound to stand to the award of Sir Edward Montague of all demands, &c. who awarded that Simon Norwich with three Sureties should be obliged to Henry Norwich for the payment of a certain sum, it was adjudged a void award; for the Arbitrator had no authority to award any thing concerning a third person; but in that case it was said, if the award had been to pay 10 l. to J. S. or that the party shall be non-suited, or discontinue an Action, it had been a good award, for they are acts to be done by the party himself; and if he tendereth the 10 l. to J. S. and he refuseth, or offers to be non-suite, or discontinue the Action, and the Court refuseth, the obligation is saved, but he ought to plead tender of payment, and offer to be nonsuited, &c. V. 22 H. 6. 46. 17 Ed. 4. 5. 18 Ed. 4. 22. & 19 Ed. 4. 1.

Margaret Marhalls Case.

(2)

Post. 25.

Hob. 283.

ERROR. To reverse an Outlary in petty treason, and alledgedeth, that whereas the offence was committed in the Reign of Queen Mary, that 1 Eliz. a general pardon was made of all treasons and felonies, that notwithstanding 3 Eliz. she was waived for this treason; and the Court said that the pardon was not general, and that they were not to take notice of it, if the party doth not take advantage of it; but it was held that she may have a Writ of Error upon this matter, because she had no day in Court before to plead this matter, but always made default; as if one hath a Release to plead, and upon a Scire facias he is returned nihil, so as he never had day to plead it, if Judgment be given upon his default, he shall have an Audita querela; but if he had been returned, warned, and appeared, and did not plead it, and Judgment is given, he hath no remedy upon the release.

The Lord Montague *versus* Sheppard.

T Respass. It was held by the Court, that Tenant by Copy of Court Roll cannot by the Common Law take Trees for House-wood, Hedge-wood, and Cart-wood, &c. as Tenant for life or years may do which have an estate certain; but a Copyholder hath not this liberty, except by special custom, and such customs are in many Mannors, and are good. (3) Post. 292. 361.

Vaſt *versus* Gaudy.

D Ebt. Upon an escape against the Defendant Guardian of the Marshalsea, for suffering T. B. which was in Execution at the Plaintiffs suit, to escape: The Defendant pleads, that he did not suffer him to escape; and gave in evidence, that the said T. B. brought an Attaint to Reverse the Judgment; and upon his prayer, the Court did bail him, that he might prosecute his Attaint Cum effectu: But this bail was not entred upon Record. And it was held by Wray, and the other Justices, that the Evidence was good, and that the Justices by their Authority, may discharge the party of the Execution, and do it upon good consideration; and the Justices use to command the Marshal to bring the prisoner before them to their Chambers, and it is a good discharge for him: For the Marshal, of himself, cannot suffer the prisoner to go out of his house by Baston or otherwise; but by the command of the Justices he may remove him, although it be to another County; and it is no escape, and the escape supposed here, is for letting him to go by bail; which is the act of the Court, and not of the Marshal, and may well be given in evidence. And Wray said, that upon Execution sued after Verdict, although the party sues an Attaint, the Court usually doth not bail him, for the Verdict is intended true, till reversed; but sometimes the Justices upon good consideration will bail him: And here although the bail be not entred, yet the Plaintiff for his benefit may cause it to be entred, and then he may have a Scire facias upon the bail, and so is not at any mischief; and afterwards the Plaintiff was nonsuited. (4) 1 Cr. 14. Co. 344. a.

The Countess of Suffex *versus* Wroth.

The Case was, Land was assured by the Earl of Suffex, by Act of Parliament, to his Wife for her Joynture, the Reversion in Fee to the Earl, of the Mannor of Burnham, with a Proviso for the Earl to make Leases for One and twenty years, rendering the ancient Rent; the Earl makes a Lease for One and twenty years, rendering, &c. and before the end of it makes another Lease by Indenture to the Lessee for One and twenty years, bearing date 30 Martii, to commence at Michaelmas following; and it was adjudged a void Lease, because for the time it is a Lease in Reversion; and if he might make a Lease to commence at Michaelmas following, he might make it to commence Twenty years after, and the Statute intended not to give him that liberty; and it being a liberty and power, it must be strictly pursued, and the Land was assured to the Countess for her Joynture, which is favoured in Law: And if the Earl might make Leases one after the other, she should never have benefit of her Joynture; which the Statute did not intend, V. 6 Co. 33. (5)

Termino Trinitatis,
Vicesimo quarto ELIZABETHÆ,
in Banco Regina.

Edward's Case.

(1)
Post. 250.
Post. 191. 308.
349. 569. 618.
888.
Yelv. 58.
2 Rol 454.

Action for these words, Jo. Edwards did wrap Gunpowder in a piece of Tow, and laid it under my Window, and put fire to it, minding to burn my house. Wray held that the words are actionable; for by such Speech the Plaintiff's good name is impaired: so to say, He lay in wait in the High-way intending to murder me. And the Plaintiff had Judgment.

Dorrell *versus* Collins.

(2)
Hob. 170.

Post. 244.

Post. 102.
Post. 456.
2 Cr. 556.

Post. 164.
2 Cr. 318.

Ejectione Firmæ. Upon not guilty, the Jury found that the Master and Schollers of the Colledge of Sinkford, were seised in the time of H.8. of the Mannor of Hodley, of which the place, &c. is parcel, and let all their Lands in Lambehurst (except the Mannor of Hodley in Kent and Suffex) to J.S. for years: And they further find, that the Master and Schollers had no other Land in Lambehurst than the said Mannor. The question was, if the Mannor passeth by the Lease? And all the Court held, That it being found they had no other Land than the Mannor, the Exception is void, because it goeth to the whole thing demised; otherwise of an Exception of part. But an Exception was taken to the Declaration, because the Plaintiff conveyed his interest by an Administrator, to whom the Archbishop of Canterbury did grant Administration of all the Goods of the Lessee in Kent and Suffex: but doth not shew how the Archbishop granted it, either as Ordinary, or by his Prerogative; and this was held by all the Court, a material Exception. But it was afterwards alledged, That all the Presidents in this Court, and in the common place, were so in general, without special shewing how; and for that they would not change the Presidents, they disallowed the Exception. And in this case it was held, That if an Administrator doth grant Omnia bona & catalla sua, a term which he hath as Administrator, doth not pass, for it is not suum, but he hath it in right of the Intestate: But if one hath a Lease as Executor or Administrator of the Mannor of D. and he granteth all his right and interest in the Mannor, the term which he hath as Executor, &c. doth pass; for he had no other right in it, and his intent is to pass it; but by general words it shall not pass.

Teat's

Teat's Case.

DEbt upon an Obligation. The Condition of the Obligation was, That if the Obligor deliver to the Plaintiff an Obligation, in which he was obliged to the Defendant, before such a day, that then, &c. the Defendant sueth the Plaintiff upon that Obligation, and recovereth, and afterward, and before the day, he delivereth the Obligation to him : The question was, if this were a performance of the condition ? Wray, and the other Justices (3)
held it was not ; although the words were performed, yet the intent was not performed : For the intent was, he should have the obligation for his discharge ; which is not by the delivery of it at the day, for it is transferred in rem judicatam : And notwithstanding the delivery of the Bond, yet he may have benefit of the Judgment. Post. 384.

Shelton's Case.

The Case was : Lessee for years grants his term by Deed, and sealeth it in the presence of divers, and of the Grantee himself ; and the Deed at the same time was read, but not delivered, nor the Grantee did not take it, but left it behind them in the same place : Yet the opinion of all the Justices was, That it was a good grant ; for the parties came for that purpose, and performed all that was requisite for the perfecting it, except an actual Delivery : But it being left behind them, and not countermanded, it shall be said a Delivery in Law. (4)
Post. 122.
Co. 137. a.
Co. Lit. 36. a.
Post. 356.

Anonymus.

A Copyholder in Fee, marrieth a Woman-Seigniorless of the Mannor, and after they suffer a common Recovery, which was to the use of themselves for life, Remainder over : And it was held by Anderson, Meade, and Periam, that the Copyhold was extinct : for by the recovery the Baron had gained an estate of Freehold, but they all held that by the inter-marriage it was only suspended : And Meade said it was adjudged in Newports Case, That if a Copyholder takes a Lease of the Mannor, his Copyhold is extinct. (5)
Moor. 185.
2 Cr. 84.
Co. 4. 31. b.

Tunbridge's Case.

Trespas for taking his Horses ; the Defendant justifieth for Damage-Feasant ; the Plaintiff replieth, That before the Trespass supposed, &c. he yoked the Horses, and tied them to the Plough, and the Defendant untied them, and took them, &c. And the opinion of the Court was clearly, That he may well sever them for Damage-Feasant : For although they are an entire Distress (6)
1 Vent. 36.

Distress when annexed to the Plough, and as Anderson said, If the Plough or Cart by chance fall upon a man, and kill him, as well the Horses as the Cart, &c. are forfeited; yet in this case they may be severed. And Manwood said, There is a difference in the Books; when the Distress is for Rent-service, there they cannot be severed; for they are an intire Distress, and he claimeth no interest in the Land, but only a Rent or Service, with which the Land is charged. But in a Distress for Damage-Feasant the party doth claim the Land it self, and he may have several Actions for Trespas for every Horse; for every one of them doth Trespas; and the Plaintiff had day to amend his Replication.

Termino

Termino Michaelis,
Vicesimo quarto & quinto ELIZABETHÆ,
in Communi Banco.

Bennet's Case.

Covenant. The Case was, A. did covenant with B. to make such Assurance as his Council should advise; the questions were two: First, If B. must give notice; secondly, What notice was sufficient? And the Court held clearly, that B. must give notice of the Assurance, for otherwise A. doth not know his Council, or their advise; and B. is not only to shew him the assurance that he is to make, but is to permit him to read it, and to go to his own Council to consider it; and A. is to have convenient time after the Assurance shewn to him, to perfect it. And the Lord Anderson said, That if B. himself doth devise the Assurance, and make it, A. is not bound to perform it; for he is only to make the Assurance, that the Council of B. shall advise, and not that which B. himself shall devise; and it is a good plea, that concilium non dedit advisamentum, 6 H. 7.

(1)

Post. 97. 298.
Lib. 5. 2b. a.
Moor. 143.
Co. 2. 3. b.
Post. 404.
Moor. 183.
Lib. 5. 19. b.

Nota, Anderson said, That if one devise Land to J. S. in Fee, and after by the same Will devise that Land to J. D. for life, both parts of the Will shall stand; and in construction of Law, the devise to J. D. shall be first. So if a devise be to J. S. in Fee, and afterward in the same Will, the Land be devised to J. D. in Fee, they are Joyntenants. And Meade said, That Case had been often moved, and always ruled; that the devise is good to them both, and they shall take as Tenants in Common, or at least as Joyntenants. And Anderson said, and it was agreed by the whole Court, That if a Termor devise to J. S. so much of his term as shall be arrear at the time of his death; this is a good devise for so much of the term as remaineth at his death; and the Case in Brooke is good Law.

(2)

Post. 330. 421.
2 Cr. 49.
Yelv. 210.
Pl. C. 541.
Co. Lit. 112. b.

Co. 8. 95. a. b.
Post. 217.

Clays Case.

A Writ of Partition being awarded, the Court was informed that at the time of the Partition made, the Sheriff was not upon the Land in person, as he is to be; and it was prayed, That the Writ should not be received, but a new Writ awarded. And the opinion of Meade, Windham, and Periam was clear (Anderson being absent) that they may well examine this matter before the return and filing of the Writ; and thereupon they examined the

(3)

Anders.

C

Under-

F.N.Br. 188.c. Under-Sheriff, and he confessed, that he was there, but not the Sheriff himself; and thereupon the Writ was stayed, and a new Writ awarded: And they held the same Law was in all cases where the words of the Writ are, That the Sheriff shall go in his own person, as in an Accedas ad curiam, Walte, Redisseisin, if Exception be taken at Bar before the return of them be received: But if the Sheriff in such Writs returneth, That he was there in proper person, and this return be received, and the Writ filed; then the Court cannot examine it, for the return is good, and the party can have no Averment against the Return, nor can have Error. And Meade said, he had seen it so ruled as here.

(4) Nota, Snagg Serjeant, moved this Case, An Abbot and Covent by Deed indented under their Common Seal, granted to Baron and Feme, being Tenants for years in possession, that they shall have the Lands for their lives; and granted further by the same Deed, That after their deaths, their children should have the Land for forty years; the question was, if the children take any benefit of this Grant, not being parties to the Deed; and by the opinion of Meade, Windham, and Periam, clearly, they shall take by way of Remainder, although there be no word of Remainder in the Deed; and as a Remainder they may take, though they be not parties to the Deed.

Co. 6. 16. b.
Post. 121.

(5) Nota. Snagg moved this Case, and demanded the opinion of the Justices in it. J. S. with a Gun at the door of his house, shoots at a Fowl, and by this fireth his own house, and the house of his Neighbor; upon which he brings an Action of the Case generally, and doth not declare upon the Custom of the Realm, as 2 H. 4. viz. for negligently keeping his fire: the question was, if this Action doth lie? and all the Court held it did; for the injury is the same, although this mischance was not by a common negligence, but by misadventure; and if he had counted upon the custom of the Realm, as 2 H. 4. the Action had not been well brought; yet *Consuetudo Regni est Communis Lex.*

Kinguel *versus* Jo. Knapman.

(6) **D**Ebt upon a Bond: The Condition was, that whereas there were divers controversies between the Plaintiff and Jo. Knapman (a stranger,) and the Plaintiff and the said J. K. submitted themselves to the Award of John Coxlin, the Defendant bound himself in Two hundred pound to the Plaintiff, that Jo. Knapman should perform the award on his part, &c. The Arbitrator Awarded, that the said Jo. Knapman should pay to the Plaintiff Thirty pound, viz. Twenty pound at Easter, and Ten pound at Michaelmas next: The Defendant pleads payment of the Twenty pound at Easter; and as to the Ten pound, that the said Jo. Knapman died before Michaelmas: And upon this it was demurred. The question was, if by the death of Jo. Knapman, the Obligation was discharged? And it was argued by Beaumont that it was not, for the Ten pound was a duty to the Plaintiff which was to be paid, and the Executor may perform it, and the Executor is to pay it, although not named; as he shall take advantage of a thing done unto, or by the Testator, Bar. 216. 45 Edw. 7. Daltons Case in the Comment. 10 H. 7. 18. But if it

2 Inst. 249.
Post. 277.
2 Cr. 300.

it be a thing which is not in their power, it is otherwise : as to make a Feoffment, 14 Ed. 3, 4. Heal contra. For the performance of the Award was a thing collateral, as 19 H. 8. 17. 17 Edw. 4. And here the Defendant that is obliged, is a stranger ; and it is not material, though it be in the power of the Executor to perform it, 38 H. 6. 2. 27 H. 8. 16. But all the Justices held the Obligation was forfeited ; but they would not give judgment, because the penalty was great for such a small duty. Post. 277. c.

Browne versus Dauks.

Action for words. Tho art a Pillory Knave ; remember Brown thou shouldst have been set on the Pillory. And the Plaintiff had judgment, though it was not said, he was set upon the Pillory. (7) Post. 31. c.



Termino Hillarii.

Vicesimo quinto ELIZABETHÆ,
in Communi Banco.

Foliamb's Case.

(1)

AN Affise being arraigned before Justice Meade in his circuit, and being adjourned to the second Saturday in Michaelmas Term to Serjeants-Inn in Fleetstreet; and day being then given to answer, that Term was kept at Hartford, a day was given to the party to answer the second Saturday in Hillary Term; and being now moved, it was held clearly, That the Affise was discontinued by the not coming of the Justices the first day; and the party is put to a Re-summmons against the Jurores, and a new Attachment against the Defendant, and to begin of new to arraign his Affise.

Fitz Case.

(2)

DEbt against him as Sheriff of Devon. Gaudy Serjeant shewed the truth of the Case to be, That upon a Recovery in Debt against A. a Cap' ad Satisfaciendum was awarded to Sir Jo. Clifton then Sheriff, and after a new Patent was made to Mr. Kircombe; and afterwards, and before notice, Sir Jo. Clifton arrested A. and left him in Execution, Kircombe dieth, and Mr. Fitz was made Sheriff, and let A. go at large. The question was, if it were a good arrest by Sir Jo. Clifton; for if it were not, it was no escape? And the Court held clearly, that the arrest was good, and it was an escape; for Sir Jo. Clifton remained Sheriff, and is not discharged of his Office, until the new Patent is shewn to him, so as he may have notice of his discharge: And if in the mean time between the sealing of the new Patent, and the shewing of it to him, he keeps a County Court, it is good.

Moor. 186.
Post. 366. 440.

Sir Lewis Mordants Case.

(3)

Memorandum, He was Sheriff of the Counties of Bucks and Bedford. The Lord Mordant his Father died, 20 April, tempore Parliamenti, it was held by all the Justices, and the Attorney and Solicitor of the Queen, that his Office by this matter is not determined;

mined; although he be now a Baron of Parliament, and that he
 yet remaineth Sheriff, Ad voluntatem Reginae, Dyers Manuscript. 13 Eliz. Post. 366.

Guy *versus* Rand.

Ejectione firmæ: The Plaintiff declared of an Ejectment of One (4)
 hundred Acres of Land, and shewed his Lease in evidence only Yelv. 166.
 of Forty Acres; and it was said he had failed of his Lease, for
 there was no such Lease, as that of which he did count. But it
 was ruled, to be good for so much as was comprised in his Lease;
 and for the residue, the Jury may find the Defendant not guilty.

Wrenches Case.

Debt upon an Obligation: The Condition was to stand to the (5)
 arbitrement of J. S. of all Causes then depending, so as the
 Award be made before, &c. in writing. The Defendant pleads no
 Arbitrement: The Plaintiff shewed, that J. S. did Award, &c. that
 the Plaintiff should release to the Defendant an Action of Account,
 then depending, and for that the Defendant should pay to the
 Plaintiff Ten pound; and this was delivered in writing, &c. And
 the Defendant had not paid, &c. Issue was taken upon the Arbi-
 trement, and found for the Plaintiff: And Plowden moved in Ar-
 rest of Judgment, that the Submission was of all Actions then
 depending between them, and the Award was, That the Plaintiff
 should release an Account, then depending; which is to be inten- Post. 86f.
 ded at the making of the Award, and not at the time of the Sub-
 mission, and so plainly out of the Submission; and so no good Ar-
 bitrement. And the Court commanded Judgment should be staid,
 till the other party answer it.

Flowerdew Serjeant moved this case. A Process issued against (6)
 J. S. to arrest him, he keeps his house to save himself from arrest, and 13 El. c. 7.
 afterwards goeth out to the Market, and to other places; and 1 Jac. c. 15.
 when he heareth again of a new Proces out against him, he keeps
 his house, and afterwards goeth at large; the question was, if he
 were within the Statute of Bankrupts. And all the Court held
 he was not, because he use to go at large; and it might be, that
 his policy would not prevent the serving of the Proces; for he
 might be met withal unwittingly.

Lawrence *versus* Netherfale.

Trespas. The Sheriff returned in Common Bank, that the De- (7)
 fendant was attached Per Catalla ad valentiam Ten pound; and
 it was adjudged a void Return: For he ought to return, that he
 was attached by one Beast or Chattel certain, and name them,
 so that they may be forfeited; for upon such general Return, none
 of them can be forfeited.

Anonymus.

If one taketh Trop petit Distress for Rent; and after taketh ano- (8)
 ther Distress for the same Rent; this not good: For he can- Moor 7.
 not avow two Distresses for the same Rent, for it was his folly
 that he took not a better Distress at the first: But Nota, in the A-
 bridgment of the Assises, it is said, That if there be not sufficient
 Distress when he Distrained, he may distrain again.

Termino

Termino Paschæ,
Vicesimo quinto ELIZABETHÆ,
in Communi Banco.

Hawley *versus* Simpson.

(1)
Moor 122.
Post. 73.
Co. 10. 129. a.

DEbt upon an Obligation; the Condition was to pay at or before the 29 of September next, at such a place, Ten pound to the Obligee. It was held by the Court, That if the Obligor tender the money the 28 day of September, at the place, and the Obligee is not there to receive it, it is a void tender; for the tender is to be the last day: But if the Obligor meet the Obligee at the place, before the day, and he then tenders it; this is sufficient, and the Obligee ought to receive it.

Co. Lit. 211. a.

Sir William Drury's Case.

(2) J. S. makes an Obligation, dated and delivered the first of May; and upon the first of June following, the Obligee maketh a Release to the Obligor, bearing date the first of March, and delivered the first of June; by which he releaseth all Actions Ab origine mundi until the date of the Release: And all the Justices were of opinion, that the Obligation was not released.

2 Cr. 264.

The Earl of Bedfords Case.

(3) **R**Eplevin, The Defendant made Cognisance as Bailiff to the Earl of Bedford; whereas, in truth, he was not his Bailiff, but took the Distress against his will. It was held, That the Plaintiff cannot traverse, that he was not his Bailiff, for it is not issuable; nor can the Earl disavow it, for he is not party; nor can the Earl have an Action upon the Case, because he is not damaged: But the party whose Cattel are taken, may bring an Action of Trespass for taking his Cattel; and if the Defendant justifieth as Bailiff, he may say De son tort demesne, & sans tiel cause, and so punish him.

Co. 8. 67. a.
Post. 540.

Bruerton *versus* Rainsford.

J. S. maketh a Lease for years, to commence after the death of a Tenant for life, or after the end of a Lease for years in being; an Estranger after the death of the Tenant for life, or the end of the Lease, enters by Tort. It was agreed by the Court, That notwithstanding the Entry, the Lessee may grant over his Term: But if he had entred, and been afterward put out, he cannot grant his Term till he re-entred. (4)

Post. 127.

Post. 175.

The Lord Cromwel *versus* Andrews.

A Taint. It was agreed by the Justices, That if there be Lessee for years rendering Rent, and for not payment a re-entry, and he payeth the Rent before the day to the Lessor, and hath his Acquittance; and at the day when the Rent is due, the Lessor demands it, and none is there to pay it, the Condition is broken; for the payment before the day, is not a payment of the Rent, but of a sum in gross: Secondly, It was ruled, That where a Lease is made rendering Rent at Michellmas, between the hours of one and five in the Afternoon, and a Re-entry, &c. The Lessor cometh at the day at two of the Clock, and continueth demanding till five, and the Rent is not paid; he may re-enter, although he was not at one of the Clock, when peradventure the Lessee was there, and tendereth it. (5)

Co. 10. 127. b.

Co. Lit. 202. a.

Post. 48. 63.

Nota, It was held per curiam, That if one lets a house rendering rent, and for not payment, &c. it is not sufficient to demand the rent at the door of the house, if it be open; but the Lessor must enter into the house, and there demand it: So if a Lease be made of Land, the Lessor must enter into the most notorious place of the Land, and there demand it, Ex relatione Fountaine, incerti temporis. (6)

Co. Lit. 201. b. c.

Co. Lit. 201. b.

2. a.

Ro. Higham *versus* Baker, Int' Trin' 22. Rot. 640.

R Eplevin. The Defendant avows for Damage-feasant: Upon a special Verdict, the case was, Thomas Higham, the Father of the Plaintiff, was seised of a Messuage called Malscals, to which no Land did appertain; and being possessed of a Ferme called Jaques, to which a hundred Acres of Land did appertain, purchaseth the Fee-simple of Jaques, and let the said Ferme called Jaques, and sixty Acres to it belonging, to Wakefield; and occupieth the other forty Acres with Malscals, by the space of ten years; and by his Will deviseth all his Ferme, called Jaques, and the Land to the same belonging, then in the tenure of Wakefield, to his wife for life. And deviseth further by these words, Item, I will, that it, and all the rest of my Lands thereunto belonging, wheresoever they lie, shall remain to my youngest son Robert, and to the Heirs of his Body, after the death of my Wife. And deviseth further his Ferme, called Malscals, and the Lands to the same (7)

Godb. 16.

3 Leon. 130.

2 Leon. 226.

Moor. 123.

Post. 300.474.

2 Cr. 75.
Moor. 7.
Moor. 124.1 Cr. 308.17.
Post. 704.

same belonging to Alice his Wife, and the said Robert, for payment of his Debts, and performance of his Legacies; and that after the death of his wife, all the said Ferme called Mascals, with the Lands to the same belonging, shall remain to Robert in Fee. And it was averred, that the Debts and Legacies were paid, and the taking was in the forty Acres, which were occupied with Mascals: And the Justices held clearly, that by the first part of the Will, the Wife had nothing in the forty Acres; for the devise to her was of the Ferme of Jaques, and the Land to it belonging, then in the tenure of Wakefield; although he saith afterwards, That it, and the rest of the Land thereunto belonging, wheresoever they lie, shall be to Robert my son, &c. after the death of my Wife. Admit that the forty Acres shall be said to pertain to Jaques, yet the Wife shall take nothing in them by implication, and Robert shall have nothing in them, during the life of the Wife; but the eldest son shall have them by descent, during her life; and what he shall have, was expressly devised to her before, and so shall not have any more by implication: And Meade said it was adjudged in Glover and Clatches case, upon that reason, That where a Devise was to one, and the Heirs-males of his body; and if he died without Issue of his body, Remainder over: If he died without Issue-male, having Issue-female, she shall not take by implication. And Anderson said, he heard Sir Anthony Browne rule this case, That where a man devised Lands to his Wife, and devised other Lands to a stranger after the death of his Wife, she shall not have those Lands by implication: For when any thing was given by exprels words, it shall not be intended, that the Devisor intended the other Land by implication: for it is to be supposed, if he had so intended, he would have given it before expressly. And Anderson said, the forty Acres cannot pass by the first part of the Will to Robert, for the forty Acres were severed from Jaques, and conjoynd and occupied with Mascals. And at this day nothing was spoken to the second part of the Will, for the Serjeants only recited the first part: But at another day the Record was read before them, and all the matter then appeared as it is at first recited. All the Justices held, That it appeareth by the latter part of the Will, that the Testator did never intend to pass these forty Acres, as parcel of Jaques, but he reputed them parcel of Mascals. And Anderson said, That Land shall pass as pertaining to a house which hath been occupied with it, by the space of ten or twelve years, for by that time it hath gained the name of parcel or belonging, and shall pass with the house by that name in a Will or Leases, &c. And here by this second part of the Will, the Wife and Robert have a Joynt-estate till all the Debts and Legacies are paid; which being averred to be paid, that estate doth cease, as it was lately adjudged in the Queens Bench: And when it is limited over, that Robert shall have it after the death of the Wife, the Wife shall have the entire estate for her life; and after her decease, Robert shall have it in Fee, and afterwards Judgment was commanded to be entered for Baker, the Abolwant, (who had married the Wife) to have Return; for the Feme by the second limitation, had the entire estate; and in the forty Acres, the taking was supposed.

Ashboroughs Case.

Fenner said it was adjudged in that Case 10 Eliz. that if the Sheriff Assign Dower by Writ to him directed, and doth not return the Writ, yet she is lawfully seized in Dower, but it is otherwise in a partition by Writ, for there a second Judgment ought to be given. And Periam said it was adjudged in Cliptons Case after he came to the Bench, that if the Sheriff take one by Capias ad satisfaciendum in Debt, if he after permitteth him to go at large, and returneth not the Writ, yet Debt lieth upon this escape against him, for there is a Record of which the party shall take advantage, though the Writ be not returned. (8) Co. 4. 67. a. Moor. 209.

Francis Gaudy did move this Case. A Fine was levied with a Render, and the Render was with Warrant, and the Officers of the Fine refused to take it by reason of the Warrant annexed, which had not been known before time; but all the Justices conceived it was good; for although it was not usual that he which Renders should Warrant the Land, because he taketh no benefit, yet if he will Warrant it, it is not to be doubted, but it is good enough, and the Officers were commanded to receive the Fine. (9) Post. 690.

Thomas Foster and others *versus* Spooner and Aford.

W^{Aste.} The place where, was Wallinford Park; Spooner one of the Defendants made default at the Grand Distress, and thereupon against him the Enquest was Awarded to enquire of the Waste and Damages; Aford pleads he had nothing in the trees in which the Waste was supposed, and upon this they were at Issue; and upon evidence the Case appeared to be, that Shelly being Lessee for years of the Park, grants all his interest and title in the said Lease to Aford, saving and accepting all the Wood and underwood growing upon the Land, and if upon this matter Shelley shall be said to be Lessee of the Wood, against whom the Action of Waste shall be brought, or Aford, was the question. And the Serjeants of the Plaintiffs part said, notwithstanding this exception, it is a good grant of Shelley to Aford of the Wood, for he that made the exception had no interest in the Trees, being only Lessee for years, and so the exception void; and in this Action the Land is to be recovered as well as Damages; and if Aford be not the Lessee, the Plaintiffs cannot know against whom to bring the Action, for Shelly hath only the Trees and not the Land, and so no Action against him; Anderson and Meade held that the Action shall be brought against Shelly, for the Trees passed not to Aford, for the interest in them that Shelly had he hath reserved, so as he shall have all the profits of them, as if Hernes, &c. breed in them, &c. Anderson said as to that which was said, that Shelly had no property in the Trees, by the Common Law, the Lessee had interest in the Trees, and the Statute doth not take it away, but prohibits him that he shall do no Waste, and makes him punishable for it; and as to the objection, that they can recover no Land, and so no Action of Waste lieth; Anderson said, if a man lets the Trees of his Park, Waste lieth against the Lessee for cutting of them; and if an Action of Waste doth not lie, yet he may have an Action upon his (10) Co. 11. 48. b.

his Case, and to this opinion Windham seemed to agree. Periam held strongly the contrary, that the exception was void by a Lessee for years, for he hath no interest in the Trees, and neither at common Law or since the Statute, is the property of the Trees in the Lessee; and although before the Statute there was no Law to punish him, yet that doth not prove he might lawfully cut them: and at this day if the Lessor cuts down the Trees and takes them away, the Lessee shall not recover according to the value of the Trees, but for the entry, &c. which Case Meede agreed; and because the Court was divided, they commanded the Jury to find the special matter, and to leave it to the discretion of the Court. And in this case it was affirmed by them all, that if a man maketh a Lease reserving the Wood, &c. he may justifie the entry to cut them and carry them away. And it was held by all the Prothonotaries in this Case, that if the Defendant in a Writ of waste, loseth by default at the grand Distress, enquiry shall be made of the waste, and to what damages; but if he loseth by confession or nient dedire, or by pleading non sum informatus, &c. the waste shall not be enquired, but only the damages, and so it was done in this Case; for as to Spooner they were commanded to enquire of the wast and damages, and as to Aford of the damages only. Nota Cooke l. 5. f. 12. citeth it to be adjudged, that the exception was void, and that waste lay against the Assignee, v. Cokes Entries 695. the whole Record of the Case, but no Judgment.

Co. 11. 52. a.

Post. 263.

2 Cr. 296.

Higgins *versus* Grant.

(5) **E**jectione firmæ. Upon evidence to the Jury, the Justices said, if one doth Demise a Mannor to which an advowson is appendant, and saith not cum pertinentiis, the advowson doth not pass. And in this Case the Plaintiff claimed under a Lease made by R. Stake Parson of Shenly, 11 Eliz. and that Mi. Poultney being Patron in reversion in Fee confirmed the Lease, and after the Statute of 13 Eliz. viz. in 14 Eliz. the Ordinary confirmed it, and 23 Eliz. he which had the Patronage in right of his Wife, together with his Wife confirmed the Lease, and all these confirmations were shewn, and it was averred, that the Patroness for life was living; and the Justices held that the confirmation by the Ordinary and Patrons were good, for the Statute doth speak of alienations, &c. by Incumbents to be void after the Statute, but doth not make void, confirmations made of a Lease before the Statute; and the Plaintiff did declare of a Lease by the Parson, but doth not aver his life, and by his death the Lease is void, and no acceptance can make it good; and the Plaintiff pleaded a confirmation by the Patron for life, and sheweth not how the Patron came to this particular estate; and the Justices held, that he needed not shew what estate the Patron had, but when he did shew he hath but an estate for life, he ought to shew how he came to it.

Co. Lit. 307. a.

Co. Lit. 77. a.

Co. 10. 64. a.

13 El. cap.

2 Cr. 53.

Co. 5. 15. a.

Post. 430.

Co. 3. 65. a.

1 Cr. 571.

Post. 154. 5.

Harris and Haies *versus* Nichols.

(6) **Q**uare Impedit. It was held by Meade, Windham, and Periam, that if two Co-partners be of an advowson, and they severally grant their

their parts to two several men, the advantage that was between the partners doth hold place between the Grantees, as the first presentment shall go to the Grantee of the eldest, and so of the others, and an usurpation of one shall not put the others out of possession, ^{22 Ed. 4.} but they said peradventure it shall be otherwise, if they were meer Tenants in Common, and did not derive their estates from Co-partners, and yet the Book in ^{22 Ed. 3. 9.} that between strangers in blood, or where two make composition to present by turn; if one usurpe upon the turn of the other, this shall not put him out of possession. Anderson doubted, but he agreed that Tenant by the Courtesie shall have the same advantage that his Wife should have had; and it was held by Meade and Wyndham, that if a man hath a Mannor which doth extend into two Towns, and he grants the Demesnes and Services in one Town, the Grantee hath a Mannor in that Town, and he may keep Court, and so hath the Grantor a Mannor in the other Town, and may keep Court there.

Co. Lit. 186.b.

Co. Lit. 186.b.

Post. 39.

Anonymus.

A Ccompt. The Defendant was adjudged to Accompt, and a Capias ad computandum issued against him to Accompt, before Auditors at a certain day, at which day he appeared and entred into accompt, and the Auditors assigned them to appear before them at another day certain, at which day the Plaintiff did not proceed. Fenner moved what shall be done in this case, if he shall be non-suited or barred of Accompt, or if the Action be discontinued; and the Court demanded of the Protonotaries, who said, there can be no non-suite, because it is after judgment, but that a discontinuance shall be entred, and the Defendant and his Sureties put without day; and if the Plaintiff will after proceed upon this Accompt, he shall have a Scire facias upon this Record ad computandum, and so the Justices did award in this Case.

(6)

Co. Lit. 139.b.
Co. 11. 38. d.Lutwich *versus* Husley.

A Slumpfit. The Plaintiff declared, that whereas the Defendant was indebted to the Plaintiff, and the Father of the Defendant was also indebted to the Plaintiff in another sum, he did assume that if the Plaintiff Paululum cessaret to demand the Debt which he did owe to him, that he would pay both the Debts, and shewed that upon this promise he did forbear the demand of his money for half a year, and for not payment of the Debt of the father, the Action was brought, and it was upon issue found for the Plaintiff. And it was alledged in Arrest of Judgment, that there was no consideration of the promise, for it is not said for how long he should forbear, for if he did forbear for a quarter of an hour or less, he hath performed the word, quod paululum cessaret; and although the Plaintiff doth alledge he did forbear for half a year, this will not help the Case. And of that opinion were the Justices, and commanded if no other matter be shewn before the end of the Term, quod nihil capiat per breve.

(7)

Post. 495. 759.

Post. 665.

2 Cr. 250.

1 Cr. 241. 2.

Pollard *versus* Scoly.(5)
13 El. cap. 8.Moor. 398.
2 Gr. 508.

DEbt. The Case was: Pollard sold to the Defendant two Oren, 22 Junii, 22 Eliz. for six pounds six shillings eight pence to be paid at All Sains next; and at the same day Scoly required of him a longer day for payment, &c. and Pollard gave him day till the first of May next, paying to him for the forbearance of his money three quarters of Wheat, which was above the value of ten pound per annum for a hundred pound, according to the Statute of 13 Eliz. and the Defendant in Debt for the six pound six shillings and eight pence doth plead this, and would avoid the contract. And the opinion of the Justices was, that the Statute doth not make the contract void, which was duely made, but doth only avoid all contracts for Usury; and this last contract is void being against, the Statute, but the first was good, being made bona fide. Nota. Hill. 20 Eliz. in Banco Regina, in an information by Mallory *versus* Bird. If one contracts to have twenty pounds for the loan of an hundred pounds, if he taketh nothing of the twenty pounds, he is not punishable by the Statute; but if he taketh any thing, if but one shilling, this is an affirmance of the contract, and he shall render for the whole contract.

Beauchampe *versus* Dale.(6)
Co. Lit. Sect.
693.

Quo minus. It was adjudged after argument and deliberation, That where a Disseisor letteth the Land to the Disseisee for life by Indenture, that this is a remitter to him, for by this he confesseth the Deed; but by his Entry to take libery, the Law hath its operation, and doth remit him against his own acceptance Ex Relatione Johannis Heale who argued this Case, and it was adjudged upon conference between the Barons and all the Justices.

Termino Trinitatis,
Vicesimo quinto ELIZABETHÆ,
in Communi Banco.

Webb *versus* Neet' Hill. 24. Rot. 410.

The Case was : Hugh Bury seised of divers Mannors in the County of Devon by his Deed Indented and Enrolled between him of the one part, Robert Kempe and Nicholas Adams of the other part, in consideration of twenty pounds paid by the said Robert and Nicholas, bargained and sold the said Mannors to the said Robert and his Heirs, to the intent that the said Robert should suffer the said Nicholas and H. Gifford to recover the said Mannors against him, which should be to the use of the said Hugh Bury for life, remainder to his son in Tail, with divers remainders over, which recovery was accordingly suffered. Haward and Brook being then Tenants of the Freehold of the said Mannors, the reversion to him against whom the recovery was, afterwards Haward and Brook dye, Hugh Bury enters, and let to the Plaintiff, &c. Two points were moved. 1. If the uses expressed in the Indent of Bargain and Sale were good? 2. If the Recovery suffered against him in the reversion where the freehold was in a stranger, shall bind the Reversioner and his Heirs? And the Court held clearly as to the first point, that the limitation to the uses as this case is, was good. 2. That the recovery is good against him in the Reversion and his Heirs, and they commanded Judgment to be entred accordingly. (1)

Post. 670. c.
Co. 3. 6. b.

Anonymus:

The Case was : The Lord granted the Freehold of a Copyhold to a stranger, the Copyholder being in possession releaseth to the Grantee all his right in the Land; the question was, if this doth extinguish the Copyhold? Anderson held it did not, and said, it was adjudged that if Tenant for life releaseth to him in the reversion, this is void, for it cannot inure as a release, for he is in possession, nor can it inure as a surrender, for want of fit words; so of Lessee for years, Dy. 251. and it is so in this Case. But Snagg said, he knew it to be ruled in a Case of great importance, that notwithstanding the words will not amount to a surrender, yet the consent and agreement of the Lessee, which is proved by the Deed, will amount to a surrender. (2)

Co. Lit. 301. B.
2 Cr. 169. If land for life made a lease for life to him in Reversion it will amount to a surrender.
Co. Lit. 335. a.
2 Land. 96.
1 Vent. 27. c.

Anonymus

Anonymus.

- (3) **A** Man condemned in Debt, renders himself to the Court, and prayeth his Sureties may be discharged, and the Plaintiff was demanded, for the Court said he may elect either his body, or to take his goods in Execution, but by this offer the Sureties were discharged.

Sir John Souch his Case.

- (4) **H**E made a Lease for years, rendring Rent, and a re-entry for not payment, and at the day a stranger came to demand the Rent; the Lessee demanded of him what Authority he had of the Lessor to demand it; and because he was a cozening fellow, and one that was notoriously infamous, and would not shew any authority, the Lessee would not pay the Rent, and thereupon the Lessor entred, and his entry adjudged lawful, for a command to receive Rent may be per parols.

Moor. 141.

Anonymus.

- (5) **A**udita querela. The question was if the Conusor shall be compelled to make mention of all the mean assignments of the Conusee, &c. And the Court doubted. Anderson said that in the time of the Lord Dyer, the Case was, that Lessee for years assigned over his term, and there were divers mean assignments. In Debt for the Rent, he ought to make mention of all the mean assignments; and because the Plaintiff could not do it, he was compelled to disfrain and avow for the Rent, for he cannot say he let the Land to one whose estate the Defendant hath: so it is in Waste.

1 *Said*. 112.
Co Lit. 121. a.

Mores Case.

- (6) **D**Ebt. And declared that the Defendant had bargained with him to give him for the Pastoring of every Horse by the night two pence, and of every Ore one penny half penny, and sheweth that he had Pastored seventy Horses and three hundred Oren, Et ideo actio accrevit to demand, &c. and he demanded more then upon his own shewing it appeared he should have, for the number of the Horses and Oren did not amount to the sum of which he had counted; and this was alledged in Arrest of Judgment, after Verdict found for the Plaintiff. And notwithstanding Judgment was given for the Plaintiff, but Fenner said that in Anslows Case, he brought a Writ of Annuity, and demanded twenty Nobles, and it appeared by his own shewing, he was to have but nineteen Nobles, and the Writ was abated by award of the Court.

2 *Ch*. 569.
y. s. f.
2 *Vol.* 129.

Audley

Audley versus Suttrel.

EJectiōe firmæ. The Defendant Challenged the Array, because the Sheriff was Cousin to the Plaintiff, which was confessed; but it was said that the Sheriff is as neer of kin to the Defendant, and upon this it was Demurred, and by advise the Array was quashed. (7)
Co. Litt. 156. 2.
Post. 663.

Anonymus.

DEbt against an Executor, who pleaded he had riens in ses maines, but certain goods, distrained and impounded, it was adjudged to be no Assets to charge him. (8)

Termino

Termino Hillarii.
Vicesimo sexto ELIZABETHÆ,
in Communi Banco.

Chamberlaines Case.

- (1) **A** Howry for Rent, and made title to it, as Cousin and Heir to Ro. Chamberlaine, that is to say, son of Anne, daughter of Ro. and for Rent arrear for sixteen years after the death of Anne he avowed; and because he made title to it immediately as Heir of Rob. and after avoweth for Rent after the death of Anne, which cannot be, for it shall be intended that she died in the life of Rob. and issue being joyned upon another matter, they were awarded to re-plead.

Wharton *versus* Morley.

- (2) **N**ota. Coke shewed to me a Report, which he said he had from Edmund Plowden, of a Judgment in the Exchequer 7 Eliz. between the said parties, that whereas a Prebend did give and grant his Land to King Ed. 6. and this deed was not enrolled, yet the grant was good and vested the Land in the King, by the proviso in the end of the Statute of 1 E. 6. for although it was not good at Common Law, yet the Statute doth make it good, or else the Statute were in vain.

St. 1 E. 6. c. 14.

Stockbridges Case.

- (3) **T**he Case was: Baron and Ferne Copyholders, to them and their Heirs, and the Baron in consideration of money paid by him to the Lord, obtaineth an estate of the Freehold to him and his Wife, and to the Heirs of their bodies; the Baron dieth, having issue, the Ferne enters, and suffers a Common Recovery, and his Heir enters by the Statute of 11 H. 7. and agreed the entry was lawful, for the Copyhold by the acceptance of the new estate, was extinguished.

Ant. 2.

Termino Paschæ,
Vicesimo sexto ELIZABETHÆ,
In Banco Reginae.

Gibbon *versus* Cordell.

Ejectione Firmæ. The Case upon special Verdict was, Heydon was seized of the House and Land in question, and came to Cordell to borrow 20 l. of him, and for assurance of the money, offer'd him the House and Land in question; and thereupon they agreed and went to the House, and Heydon called the Tenants of the House, which were Tenants at Will, and said, Sirs, I have sold my House and Land to Cordell for Twenty pound, if I pay him not the money at such a day; and if I pay him the money, I shall have the Land; and if I pay it not, then I clearly bargain and sell them to him; and puts Cordell into the House, and locks the doors; and delivereth him the Keys, and said to the Tenants, Take him for your Master. And it was argued by Godfrey and Snagg; and afterwar'd adjudged it was a good Livery, and an Estate for life, at the least, passed: But if a Fee passed, it was not questioned, because Cordell was alive.

(1)

1 Leon. 18.
Moor. 144.

Co.Lit. 48. b.

Dowles Case.

A Lease was made to A.B. and C. for their lives, Habendum to A. for life, the Remainder to B. for life, the Remainder to C. for life. It was adjudged a good limitation, and they shall take according to the Habendum; for in the premises a Joynt-Estate is given only by Implication, which is controlled by the express limitation in the Habendum.

(2)

Co.Lit. 183. b.
Post. 89.

Fisher *versus* Banks.

Audita Querela: For that the Plaintiff was in Execution in Debt upon an Obligation, and alledgeth it was made for Usury money, contrary to the Statute of 13 Eliz. And because it did appear to the Court, that he was condemned upon a Nihil dicit after he had made an Attorney and appeared; so that he might have pleaded this Plea in Avoidance of the Obligation, and then did not plead it: The Audita querela was disallowed by the whole Court; for an Audita querela doth not lie after Judgment, upon a thing he might have pleaded before; but when he is condemned by default, and had no day in Court to plead it, there it lieth: And they said, upon this reason they had over-ruled a like Case this Term.

(3)

Ante 4.

E

Sir

Sir William More's Case.

- (4) **A** Lease is made for years upon condition, that the Lessee his Executors or Assignees shall not alien without assent of the Lessor. The Lessee dieth ^{Intestate}, and the Ordinary grants Administration to J. S. who assigneth without License: It was adjudged,
 Co.Lit. 210. a. that the condition was broken, for he is an Assignee in Law.

Lee *versus* Vincent, Pasch. 26. Rot. 371.

- (5) **T**he Case was. John Lee devised his Land to Willam his Son in tail and if he depart without Issue, that his Sons in Law shall sell it (having then five Sons in Law) and dieth, and after one of his Sons in Law dieth, then William dieth, having issue a Daughter, and afterward the daughter dieth without issue, the four Sons in Law that survive sell it; the question was, if this sale were good.
 1 Leon. 285.
 3 Leon. 10. 6.
 1 Anderf. 145.
 1 Rol. 328.
 Moor 147.
 Co.Lit. 113. a.
 Post. 80.
 Geo. Wyat argued for the Plaintiff, and Godfrey for the Defendant; the points were two. First, for that the Son died, having issue, although the issue died without issue, if the sale be good. Secondly, One of the Sons in Law was dead, and being an authority, it cannot survive: But it was adjudged a good sale, because he named them not by their proper names. Godfrey said it was adjudged 4 Eliz. where one devised his Land to his Wife for life, the Remainder to his Son in Tail; and if his Son dieth without issue, that his Executors shall sell the Land by the advise of A. and B. and A. dieth in the life of the Son, the sale after the death of A. is not good; but if A. had assented in his life time, it had been good.
 1 Cr. 382.
 Co.Lit. 113. a.
 Post. 856.
 Post. 525. 6.

Roe *versus* Hartly.

- (6) **I**t was held by all the Justices, that a Writ of Error doth not lie in the Common Place, upon an erroneous judgment given in any inferior Court of Record. And this was, as they said, upon great advice. Fitz. N. B. Cont. 20. D. v. 8 Eliz. Dyer. 250.
 Moor 78.

Griffith *versus* Morison.

- (7) **A**ction for these words, Where is that Bankrupt Knave, where is that Pillory Knave? (Innuendo the Plaintiff) and averred he was a Merchant; and the words were adjudged actionable.

Major and Burgeses of Windsors Case.

- (8) **A** Capias ad Satisfaciendum was awarded to the Sheriff of Berks to Arrest J. S. who was then in custody of the Major and Burgeses of W. And thereupon the Sheriff awarded a Warrant to the Major, &c. to take him, and afterward they let him escape; and it was held clearly, that Debt upon the escape lieth against them, and not against the Sheriff: So it is of a Bailiff of a Franchise.
 Post. 153. 743.

Elton versus Wood.

The Case was, The Defendant covenanted by Indenture with the Plaintiff, that whereas he intended to marry Elizabeth Smalwell a Widow, that he would pay all the Legacies which she by her last will in writing, bearing date 1 May, 20 Eliz. did give and bequeath, and was bound by Obligation to perform the Covenants in the Indenture. In Debt upon the Obligation, the Defendant pleaded, that after the making of the Will and the Obligation, he inter-married with the said Eliz. Smalwell; which marriage continued till her death, So the Will and Devise of Elizabeth was void, and demanded Judgment, &c. And it was adjudged, that the Plaintiff shall recover. For notwithstanding it was not a Will to all intents and purposes, yet the Indenture referreth to that which did bear the name of a Will; and although it was not a Will indeed, it is not material. (9)

1 Cr. fol. 220.

The Bishop of Herefods Case.

Quare Impedit, the Case was, The Patron presenteth J. S. to the Bishop, who gave notice to the Patron, that the Clerk was insufficient; and thereupon the Patron presenteth another Clerk, and the Bishop admits the first that was presented by the Patron, and withing the six months: And the Court held clearly, that the Bishop was a disturber; for he having once refused him for insufficiency, cannot afterwards accept him. (10)

Tanfield versus Finch.

Information upon the Statute of 13 Eliz. for Usury, It was held by all the Justices upon evidence to the Jury. Finch gave to Tanfield five hundred sixty and six pounds for an Annuity of One hundred and twenty pounds per annum, during Twenty three years; this is clearly no Usury, when there was no communication before between them; to have any consideration for the loan of the five hundred sixty and six pounds; for this Annuity was purchased Bona fide, without any corrupt intent, or bargain: And if it had been Forty pound per ann. for Forty years for One hundred pound, it had been no Usury, no more then if one for a hundred pound purchase Lands worth Forty pound per ann. Another matter was in this Case, That after the Grant of the said Annuity of One hundred and twenty pound for Twenty three years for the said five hundred sixty and six pounds in hand paid, Tanfield for the assurance of the said Annuity Infeoffed Finch of Land worth One hundred pound per annum to the use of Tanfield and his Heirs; upon condition, that if the money were not paid, it should be to the use of Finch in Fee: And all the Justices held it was no Usury; for the Mortgage was only for the assurance of the Annuity. Nota, In Doctor Goads Case, Trin. 19 Eliz. in the Exchequer in an Information for Usury, Popham and Plowden held, That if a man giveth One hundred pound for an Annuity of Twenty pound per annum; this is not Usury, for he shall never have his stock of One hundred pound again: But Bell Chief Baron held clearly, if two men speak together, and one of them desireth the other to lend him One hundred pound, and for (11)

Co. 5. 69. b.

the loan of it, he will give him above ten pound per annum; and for an evasion out of the Statute, they invent this practise, That he shall grant to the other thirty pound per annum, out of his Land for ten years; or he shall make a Lease for one hundred years to him, and the Lessee shall regrant it to him, upon condition he shall pay thirty pound yearly; and every year during the ten years: In this case, the first Contract being corrupt in fraud of the Statute; this is Usury, although he never hath his one hundred pound again. But if Bona fide one buyeth an Annuity of forty pound for ten years for one hundred pound; this is no Usury, if the first Communication was not corrupt, Ex Relatione Edward Coke.

In Camera Scaccarii.

Thomas Mantell *versus* Matth. Mantell.

(12)

The Case was long debated in the Common-Bench, and afterwards brought into the Exchequer-Chamber by English Bill. Oliver Wood being Cestuy a que Use in Fee of the Mannors of Milton and Collingtree, in the County of Northampton, 13 H. 8. by his last Will devised, that his Feoffees after his death, should stand seised of the Mannors, to the use of Sir Walter Mantell and Margaret his Wife, the Daughter and Heir Apparent of the said Oliver, for term of their lives; and after their decease, to the use of John Mantell their Son, and of the Heirs of his body; and for want of such issue, to the use of the Heirs-males of the body of the said Sir Walter and Margaret, which they shall afterwards lawfully have, with divers Remainders over. Oliver dieth, 13 H. 8. and afterwards Sir Walter and Margaret have issue Walter and Thomas: Sir Walter dieth 21 H. 8. afterward Jo. Mantell dieth without Issue, Margaret his mother living: And afterward, the said Walter, the second Son of Sir Walter and Margaret, (having issue the Defendant Matthew) was attainted of High-Treason, and executed 1 Mariz; and 9 Eliz. Dame Margaret Mantell dieth, having no other issue, and the Plaintiff supposing the Land was forfeited by the Attainder of Walter the Son, obtaineth a grant of the same from the Queen by her Letters Patents; and sued the said Matthew for entring and claiming the Mannors, as to him descended as Cousin and Heir of the said Sir Walter and Margaret, that is to say, Son of the said Walter, Son of the said Sir Walter and Margaret; and upon the whole matter disclosed, it was 27 May, in the said Term, decreed by the Lord Treasurer and all the Barons, that the Title of the said Matthew was good, and the Land was not forfeited by the Attainder of Walter, he being executed in the life of Margaret, who only as long as she lived, was Tenant in Tail; and this Land did descend to Matthew as Cousin and Heir of the body of Margaret, &c. V. 3. Co. 10. The Lord Lumley's Case.

Co. Lit. 392. a.

Termino Trinitatis,
Vicesimo sexto ELIZABETHÆ,
in Banco Regina.

Rice Clampe *versus* Edmund Clampe.

REplevin. The Defendant avowed for Damage-felant in the Land, which is parcel of the Manor of C. And that this Land was Copy-hold, parcel of the said Manor, and of the nature of Borough English, and demised to Jo. Boreman and Margaret his Wife, and their Heirs, by copy of Court Rolls by the name of a Mese, containing Twelve Acres of Land, and that Jo. Boreman died, and Margaret him survived, and tooke to Husband Jo. Clampe, and had issue the Plaintiff, their eldest Son, and the Avowant their youngest son, and afterward M. died seised, and the Land descended to the Avowant, as youngest Son and Heir, by the custom, &c. who entred and took the Cattel Dammage-felant. The Plaintiff by Replication, confesses the Grant to Jo. Boreman and Margaret, and that J. B. died, and Margaret survived, &c. and took to Husband the said Jo. Clampe, and had issue the Plaintiff and Defendant; but said, That the said Jo. Clampe and Margaret surrendered the said Land per nomen of the Reversion, after the death of the said Jo. Clampe and Margaret, to the use of the Plaintiff and his Heirs, who was admitted accordingly; and afterward the said Margaret died, and Jo. Clampe did survive; and afterwards the said Jo. Clampe died, the Plaintiff entred Absque hoc, That the said Land did descend to the Defendant, as puisne Son, &c. And upon this Replication, it was demurred in Law. Coke for the Avowant prayed Judgment. First, For the matter in Law, the Plaintiffs Plea is not sufficient; for he pleaded a Surrender of the Land by the name of a Reversion, after the death of the Baron and Feme; and by that pretence, there shall be a particular estate left in the Feme, and also in the Baron; whereas the Baron had nothing before, which cannot be; for the Surrender is void. For when one is seised in Fee, he cannot by any matter in fact give away the Inheritance after his death, and so leave a particular estate in himself; but peradventure it may be done by matter of Record, and of that opinion was the Court, 38 H. 6. 8 H. 7. And it is absurd, that by a meer Grant the Baron should have an Estate for life, who had nothing before. Secondly, he said there was an apparent fault in the pleading, for the Avowant pleads, That Margaret died seised, and the Land descended to him; and the Plaintiff in his Replication traverseth the Descent, and not the dying seised, 14 H. 8. 23. And the Avowant had Judgment at the end of the Term. Nota, It was moved

(1)

Hob. 17.
2 Cr. 374
Post. 255.

Co. II. 10. 2.

Post. 89.

moved, that the Twelve Acres could not pass by the name of a Mese; but the Court gave no regard to it.

Hering *versus* Blacklow, Pasch. 26. Rot. 441.

(2)

Replevin. The Defendant avows the taking of the Cattel Dammage-felant in a certain parcel of Land, parcel of the Manor of s. and sheweth that Dame Frances Jerningham and Henry Jerningham were seised of the said Manor in Fee, and let the Land in which, &c. to him for One and twenty years, and so avowed the taking, &c. The Plaintiff in Bar to the Avowry saith, That long time before the said Frances and Henry were seised of the said Manor, King Henry the Eighth was thereof seised in Fee, and that this Land was demised and demisable by Copy of Court Roll, &c. And that King Henry the Eighth did demise this Land to the Plaintiff by Copy of Court Roll in Fee; which matter he was ready to aver, &c. And upon this it was demurred. Godfrey alledged the cause of the Demurrer: for that the Plaintiff in his Replication said, that King Henry the Eighth was seised, &c. and demised to him, &c. and doth not traverse the Seisin in Fee in Frances Jerningham and Henry Jerningham: And it may be they came to the Land by good Title of Puifhe temps, as the Land might be forfeited unto the Kings hands, &c. And in Carews Case 5 H. 7. one pleaded in Bar a Feoffment of J. S. and gave colour to the Plaintiff; the Plaintiff replieth, That long time before J. S. infeoffed the Defendant, he infeoffed him; so he was seised until disseised by the Defendant: This is ruled no good Plea, without a Traverse or Confession how J. S. came to the Land afterward. Coke contra: The Replication is good enough; for he hath by Nient dedire confessed, that Frances and Henry were seised; and he had a good Title by the Copy, before their Title: And such a confession by Nient dedire, is good, 4 Ed. 3. Replication accordingly. But the Justices said, that in the time of Ed. 3. the Judges had no great regard to pleading. And Wray said, that since that Book the Law hath been taken otherwise; and there is no question, but where the Defendant doth alledge Seisin in one from whom he claimeth, the Plaintiff cannot alledge Seisin in another from whom he claimeth, before the Seisin of, &c. without traversing, confessing, or avoiding the Seisin alledged by the Defendant; and Judgment was commanded to be entred for the Avowant.

Co. Lit. 303. a.
304.

Post. 278. 359.
384. 651. 754.

Morton's Case.

(3)

Trespas against M. for entring into his house, and taking away his goods. The Defendant pleadeth, that the Trespass was done by him and J. S. and the Plaintiff had brought Trespass against J. S. and recovered against him, and had Execution, and is satisfied, and demands Judgment if he might impeach him, &c. And upon this it was demurred. Plowden moved, that this was a good Plea; for when a Trespass is done by two, this is Joynt, and it is also severall: So that if the party be satisfied by one, this is a discharge against the other, and the Trespass is so Joynt, that if the Plaintiff doth confess that the Defendant and another did the Trespass, the Writ shall abate; for it ought to be brought against both, 8 Hen. 5. 9. 2 Hen. 7. 16. Fosters Case, 21 Edw. 4. 22 Ed. 4.

Co. It. 5. b.
Hob. 164.

and

and in 2 Rich. 3. A difference is taken between a Trespass by two, and a Felony by two: For a Felony by two, is always several; and a Pardon of one, is no discharge of the other. Wray conceived it reasonable, that the Execution and Satisfaction by one should discharge the other. Gaudy Contra: For the Trespass is always in it self several, and when the Plaintiff hath recovered against one, and is satisfied for the damages he hath done to him; this is nothing to the Trespass done by the other: But a release to one, is available to the other; for by the release he acknowledgeth himself satisfied. Clench, If one command three to do a Trespass, and they do it, and a recovery is had against him, and he being in Execution doth satisfy the Plaintiff; this is a good discharge of the others: For the commander was the principal Trespasser, and the others did it but as his servants; which Gawdy seemed to agree, Et Adjournatur.

Hob. 66.
Lit. Sect. 376.

Pinner's Case.

HE was indicted, that being Coronor of Ludlow only, Cepit Inquisitionem super visum corporis infra metas & hundredas Comitatus Hereford. And because it was not alledged where the Inquisition was taken, nor by what persons, nor their names, nor that they were sworn, The Inquisition was held to be void, and the party discharged.

(4)

Anonymus.

J. S. was indicted for entering upon a Copyholder with force against the Statute of 8 H. 6. And the force was removed, and he was restored to the possession by the Justices of the Peace; and afterward this Indictment was removed into the Queens Bench by Cerciorari; and the party traversed it, and it was found for him: And in the mean time a stranger recovered the Land by a Claim in nature of a Writ of Droit Close, in the Court of the Lord of the Manor, and was put in possession. And the question was, If the party for whom the Traverse of the Indictment was found shall be restored to his possession, against him that had recovered in the Lords Court. And it was adjudged, that he shall be restored, for otherwise he shall not have the effect of his suit; and this Court shall take no regard of the Recovery in the Lords Court, De puisne temps, of which they have no matter of Record before them.

(5)
8 H. 6. c. 9.

Smith's Case.

Action for words. For that when as R. Smith was attainted of Felony, and shewed that the Defendant said, You (Innuendo the Plaintiff) have done as ill, and worse; and it will cost you as much to be quit as it cost him. Gawdy said, the Action lieth not, for the words are uncertain; for it may be when he said, You have done as ill, or worse, He intended he had done some great offence before God; and for uncertain words, an Action lieth not; but the other Justices doubted; Et Adjournatur. And in this term, Rhodes Serjeant, moved if these words, Thou art a Knave, and a Pillory Knave, are actionable, and the Court conceived they were not.

(6)

Ant. 11. c.

Wencomb's

Wencomb's Case.

- (7) **A** Maketh a Feoffment to B. of Lands, and it was covenanted by Indenture between them, That if A. doth pay to B. at the Feast of St. John Baptist Forty seven pounds, that the Feoffment shall be to the use of A. and his Heirs, and if he faileth of payment, and B. doth not pay Twenty pounds at Michaelmas, that then also the Feoffment shall be to the use of A. and his Heirs, and covenanted to make further assurance; and afterward both A. and B. fail of payment at the days: And afterward in Hillary term next following both the Feasts, a Fine is levied to the Feoffee, and no use expressed; and all this was found by special Verdict, and that the Fine was only to the uses of the Indenture. The question was, whether the Conusee of the Fine, or the Heirs of the Feoffor would have the Land? and it was adjudged for the Heir of the Feoffor.

Sir John Peter *versus* Knoll.

- (8) **T**respas. For taking an Ox, May the first, and selling it, and converting the money to his own use: Upon not guilty pleaded the Jury found, that the Plaintiff seized the Ox as a Periot-service long time before the Trespass; and afterward, and before the Trespass supposed, the Defendant as Executor of J. S. (whose the Ox was) took it, and sold it, &c. And as to that, that it was found that the Trespass was done before the day, which the Plaintiff supposed, the Court held it not material; For being once a Trespass, it is always a Trespass. And to the other matter, whether the Lord may seise a Periot-service? Wray said he might; for this is a service which lieth not in render; but in prender; and the Lord is to have the best Beast, and it is at his election, which he will take for the best; and it is inconvenient, to put him to distrain, when he may seize: And said, it hath been so adjudged.

Holt. 590.

Harris's Case.

- (9) **H**E was indicted upon the Statute of 8 H. 6. and the Indictment was removed by Certiorari; and because the Indictment was thus, he made Entry with force, and doth not alledge of what Will, or County the party was; the Indictment was abated, for Proces of Attlay lieth upon it.

Hill's Case.

- (10) **E**jectione Firmæ. And declared of a Lease made to him by J. S. the Defendant conveyeth to himself a Title by Lease, before that Lease; and it was held no Plea, for it mounts but to a General Issue.

- (11) **E**rror upon a Judgment given against the Father; the Defendant alledged, that the Plaintiff had an elder brother in full life at such a place, viz. in M. in the County of Stafford. And upon this they were at Issue, and the Ven' fac' was of Viceneto de M. and the Sheriff returned, there was no such Will; and the Court held clearly it was no good return, for he ought to make the Pannel De corpore Comitatus 37 H. 6. 11. Accord.

Post. 201.
Co. 6. 14. b.

Grave

Grave *versus* Grave.

If an infant brings trespass by Guardian, and afterwards he was non-suit, he shall render no costs; per curiam, absente Wray. (12)

Long's Case.

A Nisi prius was granted after issue, and afterward a Superfedeas was awarded, and notwithstanding the party proceeds with the nisi prius the Justices not knowing of the superfedeas, and the Issue was tryed for the Defendant, and now this Term the Plaintiff prayeth a new Nisi prius and upon the same ven' fac' that the former was, for the trial upon the first was void, and coram non iudice, for the Justices had not power to proceed by reason of the superfedeas. And a Nisi prius de novo was granted; but the Justices said that the Plaintiff is to take good heed, that he hath none of the principal pannel which passed in the first Trial, for it is a principal challenge that he was in the first Trial. (13)

Periam Justice said, he had seen a president in the time of King H. 8. that where a Citizen of London sued another Citizen in the Common Bench; and the Mayor and Aldermen of London would have him put the matter to compromise, which he refused, whereupon they did Disfranchise him, and he shewed this matter to the Court, and thereupon they directed their Writ to the Mayor, &c. to restore him to his Franchise, they assessed a Fine of an hundred Marks upon every of them that were parties to the Disfranchisement, which they payed, as appeareth by the Record, and the Citizen was restored to his Franchise. (14)

Nota, The last day of this term a president was shewn to the Court, which was Mich. 5. H. 5. rot. 484. An Audita querela was brought in this Court, and because the Record was not brought into Court, so as the party might have execution if the matter was found for him, for this cause the judgment was that querens nihil capiat per breve. (15)

Syms Case.

Nota. It was held by the Justices, that if two joyntenants be of a Term, and the one grants parcel of the term to a stranger, by this the joynture of all is severed; yet Manwood agreed that if a man be possessed of a term in the right of his Wife, and grants parcel of it to another, yet after the death of the Baron, the Feme shall have the residue of the Term that was not granted, and it shall be only an alteration of what was granted. (16)

Maldon's Case.

Nota. If one saith to me, You shall have a Lease of my Lands in D. for twenty one years, paying therefore ten shillings per annum; make a Lease in writing, and I will seal it; this was agreed to be a good Lease by Parol, although no writing be made of it, for the intent of the Lessor is sufficiently expressed, and the making of it in writing is but for further assurance. Ex relatione Lewis. (17)

ff

Termino

Termino Michaelis,
Vicesimo sexto & septimo ELIZABETHÆ,
In Banco Reginæ.

Anthony Mildmay and Grace Uxor ejus *versus* Standish.

(1)
Moor 144.
Co. I. 175. 177.
Co. Ent. 30.

Post. 197.

Co. I. 177. b.

Action sur le Case. The Plaintiffs declared that they were seized of the Manor of Sacoke, &c. and had speech with I. S. concerning the making of a Lease to him for twenty one years, for which he was to give an hundred pound for a Fine, that the defendant knowing of it, said to I. S. That one Jo. Talbot and Oliffe his wife had a Lease of it not expired for a thousand years, & these words were spoken by the Defendant to the intent to take from the Plaintiff the Fine agreed upon, and that by reason of these words I. S. would not accept of the Lease. The Defendant pleads in bar that Sir Hen. Sherington was seized of the Land in Fee, and by Indenture covenanted with, &c. V. I. Co. 175. and Cokes Entries 30. the whole pleading of the Case. And Pas. 26 Eliz. it was argued by Fenner and Gawdy Serjeants for the Plaintiff, and by Walmsley and Pucker- ing Serjeants for the Defendant, and afterwards, Trin. 26 Eliz. Gawdy prayed Judgment for the Plaintiff. And the Lord Anderson said they were all agreed that Judgment shall be given for the Plaintiff, and shewed briefly that the cause of their Judgment was, that this is an unreasonable Lease and not Warranted by the proviso, and it was adjudged accordingly; and afterwards Mich. 26 & 27 Eliz. A Writ of Error was brought in the Queens Bench, and after argument by the Council, Wray said, that they were agreed to affirm the judgment; and that the reasons that moved them, were principally three. First, by the Indenture there are equality of estates in the Land, and equal parts conveyed to the three daughters, with a proviso by his will in writing to limit any part for payment of his Debts and Legacies, preferment of his servants, or other reasonable considerations as to him shall seem good; and this demise for a thousand years is not reasonable for the Intent of the Indenture was the advancement of his blood, &c. and for the advancement of Grace and Oliffe his daughters, and this Lease for a thousand years can be no advancement to the blood of Sir Henry Sherington, for it shall go to the Husband of Oliffe if he survive; and if he doth not it shall go to the Executor, &c. of Oliffe after her death, and by no possibility can this Chattel go to the heirs or blood of Sir H. Sh. but shall go to strangers. Secondly, Grace the wife of the Plaintiff is to have a third part by the first part of the Indenture, and by this Lease all her interest in effect is taken away, which is against the intent of the Indenture, and the consideration was the preferment of

Grace

Grace that was married to the Plaintiff, which was a great advancement to her, and for the preferment of the Heirs males, and heirs generals, and by this Lease it is wholly taken away, as if one giveth Land in Tail, provided he shall take the profits of parcel of the Land for a thousand years, this is a void proviso, for by common presumption it taketh away the benefit and interest of the Grantee in that parcel. And thirdly, this word (reasonable) is greatly to be considered, and shall be expounded strictly, especially in a proviso; for if by this proviso Sir H. Sh. had given to a servant being his Peoman, Ten pound per annum for life, this had been reasonable; yet if he had given him an hundred pound per annum, it had been unreasonable; for in the first Case, although Ten pound per annum be a great sum, yet it may be the servant was so faithful and honest as he might deserve it. Also every grant shall be expounded as the intent was at the time of the grant; as if I grant an Annuity to I. S. until he be promoted to a competent Benefice, and at the time of the grant he was but a mean person, and afterward is made an Arch Deacon, yet if I offer him a competent Benefice, according to his estate at the time of the grant, the Annuity doth cease; And for these reasons and others known to them, the judgment was affirmed.

Co. 1. 177. d.

Croker *versus* Trevithin.

The Case was: Lands were given in Tail, upon condition if the Donee or his heirs discontinue the Land, the Donor shall re-enter: the Donee hath issue two daughters and dieth; the daughters have issue two sons, and die; one of the sons discontinues the Land to another; and it was held by the Court to be a breach of the condition.

(2)
Lit. Sect. 362.
Post. 163.

The Aldermen of Chesterfield's Case.

The Queen maketh a Lease for years of Land to the men of Chesterfield, rendring Rent, and the grant was to them by the name of the Aldermen of Chesterfield; and they by the name of Aldermen of Ch. grant all their interest to Clarke in the said Land; and it was agreed by the Court that the grant by them was void, for they by the grant of the Queen have capacity to take, but not to grant the Land to another.

(3)
Post. 363.
Co. Lit. 3. a.



Termino Hillarii.

Vicesimo septimo ELIZABETHÆ,
in Communi Banco.

Thomas James *versus* Landon, Intr' Tr. 24. Rot. 1232.

(1)
Moor 181.
Co. 4. 54. a.
Co. Lit. 47. b.

Co. Lit. 47. b.

Moor 96.
2 Leon. 159.

SEcond Deliverance. The parties were at Issue, if it were the Freehold of the Plaintiff or of the Defendant. The Jury found a special Verdict, That I. S. was seized of the Land and Infeoffed George James in Fee, who died seized, and the same descended to the Plaintiff, and that afterwards the Defendant let the Land to the Plaintiff by Indenture for twenty one years, and that the twenty one years are expired, and prayed the discretion of the Court, &c. And the Justices shewed their Opinion briefly. Periam puiſne Justice, this Estoppel shall endure no longer than the Lease, for after the term expired the Indenture is but an Escrow and a piece of Parchment or Paper (*quære de hoc*, for Covenants or Debt may be brought upon the Indenture after the term expired, &c.) And he said the Difference hath always been between an Estoppel by Record and by Indenture, for if one brings an Action of Waste against a Tenant in Fee-simple, and supposeth he held of him for years, &c. and the Tenant pleads null waste fait; this Estoppel remaineth after the years expired; Windham accorded, for it is not reasonable that by this negligence, another should have his Land for ever. Meade accordant, and said it was Ruled in Brights Case, that the Jury are not bound to find an Estoppel. Anderlon, after the Term expired the Plaintiff may confess and avoid the Lease, and afterwards the Plaintiff had Judgment. V. 4. Coke 54. Nota Mich. 9. & 10. Eliz. Pleadals Case in Banco Regiæ. The Case was, a Lease was made to Father and Son for eighty years, and afterward the Father let the Land to the Son for fifty years by Indenture, upon condition that if the Father paid Twenty pound at such a day, &c. the Lease should be void, as if it were never made; the condition was performed, the Father enters, and Devileth the Land to two other of his Sons, and dieth; they enter upon the Son who

who took the Lease, and he reouesteth them, and they bring an Ejectione firmæ. And this matter was given in evidence at the nisi prius in the County, and the Jury found against the Plaintiff; upon which they brought an Attaint, and Assigned the Faux Serement in this, that they found against them, whereas they ought to find for them. And the Opinion of the Justices was, that the Son who took the Lease was Estopped to claim any other Estate than for fifty years, and the Estoppel continued after the fifty years expired, and thereupon the Grand Jury found for the Plaintiffs, and they recovered their Term and Damages, Ex relatione Lewis. Nota. If one taketh a Lease of his own Land of an Infant or Feme covert by Indenture, this is no Estoppel, for in Estoppels both parties are to be Estopped, which the Infant and Feme covert are not.

Co. 4. 53. b.
Co. Lit. 227. a.

Post. 140.

Co. Lit. 352. a.

Termino

Termino Paschæ,
Vicesimo septimo ELIZABETHÆ,
in Communi Banco.

Morris *versus* Smith & Paget, Intratur Trin. 25. rot. 731.

(1)

L Incoln Replevin. A special Verdict was given, that Sir Francis Ascough was seised in Fee of the Mannor of Castor, which did extend into the Towns of North-Kelsey, South-Kelsey, Holton and Grisby, and that in every of the said Towns he had demesne Land, and several Freeholders which held of him as of the said Mannor, and that Morris the Plaintiff was seised of the Lands in which, &c. and they did lie only in the Town of North-Kelsey, and held them of the said Sir Francis, as of his Mannor of North-Kelsey by fealty, &c. and suit at Court de tribus septimanis in tres septimanas yearly; That Sir Francis being so seised, &c. by his Deed indented and Enrolled, &c. bargained and sold to Ralph Bard, Esquire in Fee, Totum illud suum manerium sive dominium de North-Kelsey in North-Kelsey, and all his Lands, Tenements, Rents, Reversions, Services, Wards, Escheats, &c. Et omnia alia sua, regalitates, consuetudines, & hæreditamenta quæcunque situat' & existent' in North-Kelsey; and that Jo. Morris being the Tenant of the Land in which, &c. Th. Smith and others Freeholders in the said Town of North-Kelsey attuned to the said Ralph Bard; and if R. Bard had a Mannor in North-Kelsey to hold a Court, they prayed the discretion of the Court, &c. (Nota, the distress was for not doing suite at Court.) Periam Justice, held that Bard had no Mannor in North-Kelsey, for Sir Francis Ascough had no such Mannor, but his Mannor was the Mannor of Castor. And if I have a Mannor in two Counties, and have Demesnes and services in both, and I grant my Mannor in one County, the Grantee hath no Mannor, for I had no such Mannor; and in conveyances things must pass by their proper names, and a Mannor cannot be made at this day, neither by a common person or by the Queen. And he said, a Case was adjudged in the time of Queen Mary to this purpose. The Statute of 1 Ed. 3. Ordained that the Kings eldest son shall be Duke of Cornwall, afterwards the King by his Letters Patents did annex the Mannor of M. in the County of Wilts to the said Dutchy. King H. 8. (there being then no Prince) had the Dutchy in his own hand, and let the said Mannor of M. to I.S. for twenty one years, and afterward Prince Edward was born, and Duke of Cornwall by birth; it was adjudged the Lease was good: for King Edward could not by his Letters Patents make

make the Mannor parcel of the Duchy, for that muſt be by preſcription. And if the Queen granteth Land to hold of the Mannor of Greenwich by certain Services, theſe Services are not parcel of the Mannor but by reputation; and a Mannor is a thing entire which cannot be divided, but by Act in Law, as between Partners, 26 H. 8. 4. but if two joytenants make partition at this day of a Mannor, and each of them hath Demefne and Services, yet each of them hath not a Mannor, nor can keep ſeveral Courts, but muſt both keep one Court. And in the Caſe at Bar, there never was a Court kept for the Mannor of North-Kelſey. And if I have a Mannor which doth extend into A. B. and C. and Demefnes and Services in all the Towns, and I grant all the Mannor in A. the Grantee hath a Mannor, but I have none in the other Towns, but have the Services in groſs, 9 Ed. 4. but if the Mannor of D. extend into A. B. and C. and in each of them there be Demefnes and Services, and I grant all my Mannor in B. the Feoffee hath no Mannor, but the Mannor remaineth with me.

Post. 299.

Wyndham contra. Though a Mannor cannot be made at this day yet a Mannor may be divided; and although it was objected, that the Grant is totum ſuum manerium de North-K. and ſo the ſentence is falſe, for he had no ſuch Mannor, yet he ſaid the grant was good, for the word ſuum was ſuperfluous; as if an Executor hath power to ſell the Mannor of D. and he ſells it by the name of all his Mannor of D. yet the ſale is good; ſo if ceſty que uſe before the Statute, had ſold totum ſuum manerium de D. and here is no creation of a Mannor, but a dividing of it; and although a Seignior or Appendant cannot be made at this day, yet if an Advouſon be appendant to a Mannor, and the Lord grants part of the Mannor with the advouſon to I. S. it is now appendant to that part, 43. Ed. 3. 12. and the Caſe of 9 Ed. 4. is that by the grant or recovery of a Mannor in one Town, the Feoffee or recoverer of the Mannor in one Town, hath a Mannor there, and the grantor, &c. hath a Mannor in the other, and the grant of the Mannor of North-K. and of the Mannor in North-K. is all of one effect; and a Court Baron is not tied to any particular place, but may be held ſometimes in one place, and ſometimes in another. And as to the objection, that if I may make of one Mannor two Mannors, by the ſame reaſon I may make twenty; he ſaid ſo I may, and it is no miſchief, and it is better for the Tenants and Suits the nearer the Court is to them; and Anderſon accords. He conceived the conveyance in ſubſtance was good enough, yet the form of it might have been better and more conſonant to the Law, if the grant had been, totum manerium ſuum de Caſtor in North-Kel. and the Mannor had more aptly paſſed; and here the grant is of the Mannor, and of all his Hereditaments in North-K. and by this word (hereditament) the Mannor will paſs. And he agreed that a Mannor cannot be made at this day, and that the Queen cannot make a thing parcel of a Mannor at this day; as if ſhe grants Lands to hold of her as of her Mannor of Green. by a certain Rent, this Rent is not parcel of the Mannor. Nota, Mr. Bard ſaid his conveyance was made by Wray and Manwood, and that their opinion, and the opinion of Carell of the Inner-Temple was clear that the grant was good to convey a Mannor in North-K. and that Carell held, that by force of this grant he might keep a Court-Leet in North-K. for there was a Leet within the Mannor of Caſtor, and this might be well divided.

Inſtr. de Leg. 451.

Ante 19.

Post. 210.

Post. 103.

Co. 4. 26. b.

Termino

Termino Trinitatis,
Vicesimo septimo ELIZABETHÆ,
in Communi Banco.

Lovelace *versus* Lovelace.

(1)
Moor 371.
2 Leon. 35.
1 Anderf. 132.
Co. Lit. 27. b.
Co. 7. 41. b.
Post. 478.

W *Aste.* The Case was: I.S. being seised in Fee of Land, devised it to I.D. and to his eldest issue male (he having no son at that time) it was adjudged no estate taylor, but for life only; and if he then had a son, it was all one: but a devise to one and his issue-male, is an estate tail; but here the word Eldest will not permit that construction.

Edward Hyde *versus* Morley, Intrat. Mich. 26. & 27. rot. 1602.

(2)
2 Cr. 449.

A *Udita querela* against the Defendant for suing Execution against the Plaintiff of the Manor of Wakeley in the County of Hertford upon a Statute Merchant of a thousand pounds, which one Edward Halfide did acknowledge to him, and shews that the said Halfide was at the time of the Statute seised of the said Manor, and afterwards sold it to the Plaintiff, and the Plaintiff being thereof, seised, the Defendant by his Deed, &c. remisit & relaxavit to the Plaintiff totum & quodlibet jus titulum, interesse, & demanda quæcunque the said Morley habuit, habet, vel habere debuit, vel debet, de & in manerium prædictum, &c. Necnon omnes & omnimodas actiones, sectas, executiones, & demanda quæ ipse, vel hæredes, executores, &c. tunc habuere, vel habere possint, de aut versus præmissa, vel versus prædict. Ed. Hyde, &c. pro vel concernent aliquam materiam ratione præmissor, &c. And upon this it was demurred, and the Case was argued by Fenner for the Plaintiff, and Walmsly for the Defendant; and it was adjudged that this release was a good bar of the Execution upon the Statute. V. Pas. 39. B. R. Plac. 2 contra adjudged.

2 Cr. 449.
Co. 8. 154. a.
2 Rol. 470.
Post. 552.

Clare *versus* Pepys.

(3)

VV *Aste.* and declared that P. was seised in Fee of the Land, and made a feoffment to the use of himself for life, the remainder to the use of A. the mother of the Plaintiff in Fee, that A. died, and the remainder descended to the Plaintiff; and for waste done after her death, the Action was brought; the Defendant pleaded that he was seized in Fee absque hoc that he made a feoffment, &c. And the Jury found that he made a feoffment, and that it was to the use of himself for life without impeachment of Waste, the remainder Uelupra. And it was moved, that this Verdict was for the Defendant, and although it was not found that he was

was seised in Fee; yet it being found, that he held for life without Impeachment of Waste, it appeareth to the Court, that the Plaintiff hath no cause of Action: and of that opinion was Windham, but the other Justices contra; for they said, the Jury have found more then they needed, and compared it to the case of 12 H. 8. 1. where the Defendant hath matter of Justification, and doth not plead it: And the Plaintiff had Judgment. Co. Lit. 282. a.
Post. 69. 79.
140. 283. 431.
481. 506. 634.

Foxes Case.

NOta, Justice Rodes said, That in that case it was adjudged, where a Minister was deprived for an offence Tempore Parliamenti, and the offence was afterwards pardoned by Parliament, and then the Parliament ended; the Deprivation was utterly void: for the pardon relateth to the first day, and the party need not sue to Reverse the Deprivation. (4)
Post. 789.
Co. 6. 14. a.

Anonymus.

DEbt was brought against I. S. as Executor, and pending this Action, J. D. brought Debt against him as Administrator, for a true Debt, (whereas in truth he was Executor) J. S. confessed the latter Action, and pleads this Recovery in bar of the first action: And it was resolved to be no good Plea. 1. Because the Recovery was had against him as Administrator, and so is void, although this had been only a Plea to the Writ: and a stranger shall not falsifie that which is only to the Writ. 2. He that first sueth shall first be served, and the Executor might have pleaded the first Action against him that brought the second. (5)
Post. 471.
Dr. & St. 77 a.

Termino Michaelis,
Vicesimo septimo & octavo ELIZABETHÆ,
in Communi Banco.

Sidnam *versus* Worthington

(1)
Post. 59.

Post. 138.

Post. 94.

Yelv. 41.
2 Cr. 19.
Post. 1. 194.
282.

A Sumpfit, And declares, that whereas one Hulledge was sued in the Queens Bench by Cheeke, and the Plaintiff at the instance of the Defendant became surety for him, that Cheeke recovered, and had execution against the Plaintiff; the Defendant afterwards promised the Plaintiff, that if Hulledge did not pay the money which the plaintiff had paid to Cheeke, that the Defendant would pay it; and avers that H. did not pay it, nor the Defendant upon request, &c. And upon the first motion, Wyndham and Anderson held the action did not lie; because the promise was not made at the time of the request: Anderson said That if I promise one that hath served me, I will give him ten pound, it is Nudum pactum. Periam and Rhodes, contra. And Rhodes said in the Case put by Anderson, if I require one to serve me, and he doth so for one year, and after the year, I promise him in consideration he hath served me, to give him ten pound, an Action lieth. But if one agreeth to serve me for a year for twenty shillings for his wages, and after the year, I pay him the twenty shillings; and in consideration of his service, do promise to give him twenty shillings more; this is no consideration, And the principal case being moved again, at another day, all the Court held it a good consideration, by reason of the request precedent; and the Plaintiff had Judgment.

Greene *versus* Ardene.

(2)

D Ifceit for not Summons in a Formedon in Remainder. The Summoners and Ueyors were examined by the Court, as it was held they ought to be, and not by the Clerks, whether they spake the words, or the Bailiff, and at what time; and it appeared they did it after Sun-set: And by all the Court, the Summons was not well made. But they said, that an Arbitrement made in the night, was good, Nota. It was so adjudged between Franklin and Davies, Intratur Mich. 12 & 13 Eliz. Rot. 1330. in this Court, where in Debt

Debt upon an Obligation, conditioned to stand to the Award of Serjeant Lovelace and Manwood; so as the said Award be made before the ninth day of October, &c. and it was made the eighth day of Octob. at ten of the Clock in the night, and ruled good, for dies naturalis comprehends the day and night, And Pasch. 26 Eliz. in this Court, between Samms and others, where the condition of the Obligation was to stand to the Award of Mr. Lewknor: So as the said Award be made before the 21 day of July, &c. ready to be delivered to the parties requiring the same; and he made the Award upon the 20 of July, at ten of the Clock in the night; and the making of the Award in the night, was ruled good; but the doubt was, Because the Condition was ready to be delivered to the parties requiring the same; and it was not a seasonable time to require it in the night. And Fleetwood said in the principal Case, That it hath been adjudged, that a Letter of Attorney being to deliver Seisin, and he doth it in the night, that it was good.

Brightman *versus* Keighly.

Debt against the Defendant, as Executor to J. S. he pleaded fully administred, &c. And upon a special Verdict, it was found that J. S. made the Defendant his Executor, being then within age; and thereupon the Ordinary committed Administration to A. and B. who Administred; and that they had in their hands, when the Defendant came to his full age, of the Goods of the Testator, Six hundred pounds; and the Defendant at his age proved the Will, and then released to A. and B. all Actions. And it was adjudged, it was Assets. Anderson said, the doubt was, because it was uncertain what he released, and for that only an Account lieth: But here the certainty appeareth by the Verdict, And Periam said, If an Executor doth release an Account, and it is not certain what he shall recover, it is not Assets; but if it can appear, or he proved that so much was due, it is Assets. For the Law presumeth, he hath received so much as he doth release, and the Plaintiff had Judgment.

Nota, Rhodes said, That in 17 Eliz. it was ruled, that where one made his last Will, and by it did Will, that none shall have any dealing with his Goods, until his son came to the age of eighteen years, except J. S. That by this J. S. was Executor, during the minority of the son: And that it hath been adjudged, that when as one upon his death-bed said to his Wife, That she shall pay all, and take all; by this she was Executrix.

The Lady Rich *versus* the Lord Rich.

Covenant. The Case was, the Lord Rich did Covenant that certain Lands conveyed to the Plaintiff for her Joynture, are of the value of One thousand pounds per annum, and so shall continue, notwithstanding any act done, or to be done by him; and the Action was brought, for that the Lands were not of the yearly value of One thousand pounds: And it was adjudged

Post. 615.
1 Cr. 107. 496.
2 Cr. 644.
Post. 762.

against the Plaintiff: for the words (notwithstanding any Act) extends as well to the time of the Covenant made, as to the time future: And though they were not then of that value, the Covenant was not broken, except some act done by him were the cause of it.

Dales Case.

(5)

2 Cr. 474.

Dilceit. For that the Defendant sold to the Plaintiff certain goods as his own goods, Ubi revera they were the goods of a stranger; and it was alledged, that the Action did not lie, because it was not alledged, that the Defendant Sciens that they were the goods of a stranger. And for that reason Periam and Windham held, the Action did not lie; but if it had been so alledged, the Action did lie: For it may be, the Defendant did know no otherwise, but that they were his own goods; but if he had affirmed they were his own Goods, then the Action would lie. Anderson contra, for it shall be intended, that he that sold had knowledge, whether they were his Goods, or not, 42 Affsar. 8. And it was afterwards adjudged against the Plaintiff.

Reynold's Case.

(6)

3 Co. 52. b.
Post. 439.

Audita querela. For that he being in execution, was suffered to go at large, and was afterwards taken again; and the Court would not allow it: But then Puckering alledged, That the Plaintiff had witnesses to prove, that he paid the money when he was at large. And the witnesses being sworn, and the truth appearing to be so, the Audita querela was allowed.

Beverley *versus* Cornewall.

(7)

Owen 2.
Andersf. 148.
Moor 224.
269. 241.
Gouldb. 44.
Co. 7. 28. a.

Co. 7. 28. a.
2 Cr. 54.
Post. 119. c.
Post. 790.
2 Cr. 216.

Quare Impedit. Upon Demurrer, the Case was, Simon Kelham being Parson of the Rectory of Somerly, of the value of Ten pound, took the Church of Rappelly without any Dispensation, and was instituted and inducted, and so continued for twelve years; and afterwards by reason of this Plurality, Beverley presented Berry, who was instituted and inducted, and so continued for divers years, and died; and afterwards the Queen presents the Defendant Ratione lapsus in the time of Kelham, who was instituted and inducted, and the Plaintiff brought the Quare Impedit against the Archbishop of Canterbury and Cornewall; and it was adjudged, that the Quare impedit did lie; for in this Case, Tempus Occurrit Regine. And Judgment was given, That the Defendant should be removed. Nota, afterward Mich. 30 & 31 Eliz. which was entred, Trin. 30. Rot. 1306. Another question did arise between the same parties; Beverley pending the Quare Impedit was outlawed at the suit of Bawdes; and he being so outlawed, and Judgment given for him in the Quare Impedit, the Defendant Cornewall religned, and took a new Presentation from the Queen, by reason of this outlary in

in Beverley, and he was instituted and inducted, and afterwards he revertereth the Outlary, and brings Scire facias to have Execution of the Judgment. Cornwall pleads this Presentation, by reason of the Outlary, and demands Judgment, &c. For the Presentation was vested in the Queen, and executed before the Outlary was reversed; and by the Reversal it shall not be divested: But afterwards it was adjudged, that the Plaintiff shall have execution; For upon a Recovery in a Quare Impedit, any Incumbent that cometh in pendente Placito, shall be removed, 7 Co. 28. Moor 269.

Termino

Termino Paschæ,

Vicesimo octavo ELIZABETHÆ,

in Communi Banco.

Dame Killigrews Case.

- (1) **D**ower. The Tenant vouched the Heir, and prayed he might be summoned in the same County, and he was summoned and entred into the Warrant, and confessed the Dower: It was moved against whom the Judgment should be. And the Court was in great doubt; for it did not appear, that the Heir had sufficient to render Dower; for it would be in vain, and a great mischief to the Demandant, if they give Judgment for her, when peradventure the Heir had nothing, or not sufficient to render Dower; and they commanded Presidents in this Case to be searched.

Anonymus.

- (2) **D**ebt upon an Obligation to pay Forty pound at Michaelmas Eve, the Defendant pleaded a Concord between the Plaintiff and him; that if he gave him a Hawk, and twenty pound at Michaelmas day, the Obligation should be void, and said, That he gave the Hawk and twenty pound at the day; and the Plaintiff accepted it. And this was held no Plea; for it appeareth, that for not payment at the day, the Bond was forfeited, and so became single; which cannot be discharged by such a naked Averment in fact or such an acceptance, although the agreement was before the day; but Acceptance before the day was a good discharge.

Co. 5. 117. a.
Lib. 9. 79. a.
Post. 304.

Nota, That Cestuy a que use at this day, is immediately and actually seised and in possession of the Land; so as he may have an Assise or Trespass before Entry against any stranger who enters without Title; and this by the words of the Statute of 27 H. 8. viz. that Cestuy a que use shall stand and be seised, &c. And this was the opinion of divers Justices.

Playne's Case.

- (3) **A** Lessee for years was obliged to pay his Rent, in debt upon it, he pleaded, that the Lessor was bound in a Statute; and upon that an Extendi facias was awarded to seise the Lands and Tenements of the Lessor into the Queens hands, which was executed accordingly, and upon that a Liberate was awarded, and mean

mean between the Extendi facias, returned, and the Liberate awarded, the Rent was incurred; for which he is chargeable to the Queen, and demands judgment. And the opinion of the whole Court was clear to the contrary; for before the Liberate awarded, Nihil operatur, for he remains always Tenant to the Lessor, and chargeable to him for the Rent: and the Writ before is but of form, when it speaks of the seiling into the Queens hands; for it was never seen, that Lands were seiled upon that Writ.

I Cr. 149.

Termino

Termino Trinitatis,
Vicesimo octavo ELIZABETHÆ,
in Banco Reginae.

Cropp *versus* Hambleton.

(1)
Godb. 38.
Moor 223.

Ant. 15.
Co. ro. 129. a.
Co. Lit. 202. a.

TRepas upon special Verdict; the Case was, Cropp let to the the Defendant Land for years, rendering Rent at Michaelmas, with a Re-entry for default of payment at Michaelmas, or twenty days after. The Lessee for two years used to pay the Rent to Mary Briggs servant of the Lessor, and he accepted it at her hands; and in the third year he paid the Rent to the Lessor, and in the fourth year paid it within the twenty days to the said Mary Briggs, and prayed her to pay it to the Lessor; who within the twenty days tendered it to Cropp, who refused to receive it, and blamed her for taking it; and at the last day of the twenty days Cropp demanded the Rent, and it was not paid; and thereupon he entered: The question was, if his entry were lawful? And after Argument, it was adjudged for the Defendant, for the Condition was not broken: And the Court held, that the tender of the Rent to the Lessor himself at any day within the twenty days, although it be out of the Land, is good, and he ought to receive it: And when he paid it to Mary Briggs, and she tendered it to the Lessor, this she did as servant to the Lessee for that time, and is as good as if the Lessee had tendered it, Ex relatione Coventry.

Burdet's Case.

(2)

The Case was. The Dean and Chapter of Ely were seised of a Mannor, in which the custom was, That the Copyholders may Surrender out of Court, to the use of a stranger in Fee; they make J. S. their Steward Ad exequendum per se vel sufficientem deputatum suum. J. S. maketh A his Deputy Hac vice, to take a Surrender of Baron and Feme to the use of the Baron and Feme for their lives, Remainder over in Fee; and the words were further in the Deputation Et ulterius ad faciendum & exequendum quantum in me est. The said A. by force of that Deputation, takes a Surrender from the Baron and Feme, upon condition, that the Lord shall grant it to them for their lives, Remainder over in Fee, the Surrender was executed accordingly; the Baron and Feme die, he in the Remainder enters, the Heir of the Feme ousts him, and he brings Trespass. 1. It was agreed, that this Deputation Hac vice, was good: 2. That although the authority to take the Surrender was

was absolute, and A. took the Surrender upon condition, yet it was good, by reason of those words, Et ulterius ad faciendum, &c.

Anonymus.

Error: The Error assigned was, that the Defendant in the original Action of Debt, was named *nuper de London*, and in the exigent *de London*. And all the Court held it to be an Error, for the original was the foundation of the Suit, and the exigent is to pursue it without variance, and the word (*nuper*) being omitted out of the exigent, it was erroneous. (3) Post. 50.

Sir Thomas Cockaine and his Wife *versus* Witnam.

Action for words: At the Nisi prius the Defendant pleaded concord puis le darraigne continuance, judgment si al enquest, &c. And by all the Justices it was no Plea, but he ought to conclude, Judgment si actio, &c. and so in all Pleas pleaded since the last continuance; then it was moved, if Judgment shall be given upon this, or a new Nisi prius granted, and upon good advice judgment was given for the Plaintiff, for it was a confession of the matter in issue: And the words were, My Lady Cockaine did offer two shillings to a woman with child to get her a drink to kill her child, because it was gotten by J. S. Sir Tho. Cockaines Butler; And it was moved the Action did not lie for these words, but it was adjudged for the Plaintiff, for by them the Ladies credit is impaired; and if true, there was cause to bind her to her good behaviour, although it was not said she did give money, or any hurt was done, but that she offered, &c. this Case was adjudged, Hill. 19 Eliz. Intratur, Mich. 17 & 18 Eliz. Rot. 183. Ex relatione Chamberlaine. V. 4. Co. 16. b. (4) Post. 747.

H

Termino

Termino Michaelis,

Vicesimo octavo & nono ELIZABETHÆ,

in Banco Reginae.

Crispe versus Golding.

(1)

A Sumpsit: upon issue joyned that non assumpsit, it was found for the Plaintiff. Walmsly Serjeant moved in Arrest of Judgment, that the consideration upon which the Action was brought, was not well alledged, for the Plaintiff declared that I. S. was seised in Fee, and made a Lease to him for years, ²⁴ Eliz. by vertue whereof he entred and was possessed; and being so possessed, the Defendant upon communication between him and the Plaintiff assumed that if the Plaintiff would seal and deliver to him a Deed of Assignment of his Lease and Interest in the Land, that he would pay to him a hundred pound, and alledged that he did seal and deliver a Deed of grant, &c. but doth not say he was then possessed; and if he were not, the grant was void; and so no consideration. 2. He doth not alledge, that he did grant his Lease and Interest, but that he sealed and delivered a Deed of grant, which is not a grant. Curia contra, for when it was alledged that the Plaintiff was once in possession, it shall be intended he did so continue till the grant, and it shall be intended a good grant, and the Lease and interest passed by it; and it was so adjudged.

Lancelot versus Johns.

(2)

E Rror upon a Recovery in Debt and Outlary upon it. 1. Error; the Defendant brought Debt against Lancelot and I. S. and the Sheriff returned, quod non habent bona aut catalla quod summoniri possint, whereas it ought to be per quod summoniri, &c. 2. It ought to be, neque eorum aliquis habet. 3. It is returned quinto exacti fuere per quod utlagati existunt, whereas it ought to be per judicium Coronatorum utlagati, for they are Judges, and the certificate is to be by them. 4. In the Original he was named Launcelot, and in the Exigent Lancelot. 5. He was outlawed in Hustingis, and doth not say in Hustingis de Communibus placitis; and for these Errors the Judgment was reversed. V. 2 R. 3. 13. 14 Ed. 4. 6.

Co. Lit. 288. b.

Ante 49.
Post 104. 116.
240. 592.

Allen versus Yorke.

(3)

The Case was; Allen was condemned at the Suit of Yorke in the Queens Bench in Action upon the Case, and damages assessed to 4000 l. Yorke dieth, being satisfied of 1000 l. parcel of the 4000 l. and his Wife being Executrix, brings a Scire facias for the 3000 l. residue, and the Court doubted. V. 4 & 5 Mar. Dyer 165. 19 R. 2. Execution.

Ano-

Anonymus.

ERror. Upon a judgment given in a Formedon, the Error assigned was, that the Action was brought against three, whereof one was within age, and Judgment was given by default, whereas Judgment is not to be given against an Infant by default, and upon this it was demurred in Law (the Infant was brought into Court to be seen, and he was of the age of seven years:) the Court doubted after argument by Andrews, and would advise. (4)
 2 Cr. 465.
 Post. 309.
 V. Dyer 104.

H 2

Termino

Termino Hillarii,
Vicesimo nono ELIZABETHÆ,
in Banco Reginæ.

Morgan versus Kiffe.

(1)

Action for words, that the Plaintiff maintained, victualled, and helpt to let go certain Pyrates, contrary to the Law of the Realm and the Proclamations made. Upon not guilty it was found for the Plaintiff, damages sixty pound. And it was moved in arrest of Judgment, that the words were not actionable, for it is not alledged that he knew them to be Pyrates, or maintained them in their Pyracy. Coke contra, for when it was alledged he maintained Pyrates, &c. it shall be intended in malam partem, and that he spoke them maliciously, and that he maintained them knowing them to be Pyrates. And it was adjudged in Sir Henry Leas Case against Penniston, where P. said to Sir Henry, he maintained Thieves, that an Action did lie; and afterwards the Plaintiff had Judgment: for when it is said he maintained them against the Law and Proclamations, it shall be intended in the worse sense; and although Pyracy is tryable by the Civil Law, yet by the Statute of 33 H. 8. our Law taketh notice of it.

2 Cr. 59.
Co. 4. 13. a.
Post. 251. 487.
746.

Pettywood versus Cooke, Paschæ 28. Rot. 374.

(2)

Ejectione firmæ. The Case was, Hawkins was seised in Fee of three Houses in Bury, and devised them to his Wife for life, the remainder of one of the Messuages to Robert his son and his heirs, the remainder of one other of the Messuages to Christian his daughter and her heirs, and of the third Messuage to Joan his daughter and her heirs, having only these three Children. And did further will, that if any of them died without issue, that then the Survivors shall enjoy totam illam partem equally divided between them; Christian taketh Husband, and hath issue the Lessor of the Plaintiff, and dieth; after Ro. dieth without issue, then the Feme of the Testa-

Post. 695.

tor

toꝝ dieth; Joan being the Survivor, enters into all the part of Robert, and taketh Husband, and hath issue the Defendant, and dieth. And the question was, if the issue of Joan shall have all the part of Robert, as a devise to his Mother and her heirs, or if the issue of Christian shall have a moiety with her as Co-partner. And the Case was argued by Golding foꝝ the Plaintiff, and Coke foꝝ the Defendant; and all the Justices held, that by the Devise only an estate foꝝ life is limited to the Survivor, and the Fee doth descend by course of Law aswell to the issue of Christian which first died, as to the Survivor; and though the words are, that the Survivor shall enjoy totam illam partem, that is, all the Messuage, and not according to all the estate the party dying had in the Messuages foꝝ no estate being limited, it shall be intended but an estate foꝝ life, and the Plaintiff had judgment.

Post. 696, 743.

The Sheriffs of Norwich *versus* Bradshaw.

Action upon the Case upon an escape: The Plaintiffs declared that whereas J. S. recovered against the Defendant in Debt nine pounds and ten shillings, and a capias was awarded to take him in Execution, by force whereof they made their Warrant to the three Serjeants, &c. there to Arrest him, who did Arrest him, 25. Feb. &c. he escaped from them, and afterwards was not found in the said County, per quod they were bound by reason of the escape to answer the Debt, necnon to expend money foꝝ the search of him, to their Damages twenty pounds. Upon not guilty, the Jury found he was arrested circa the 26. of Febr. and then and there seipsum rescussit. And it was alledged in Arrest of Judgment, that the Declaration was not good, foꝝ two causes. 1. That they alledge that they made a certain Warrant, and say not sub sigillo sigillat' and a Warrant without Seal is not sufficient. 2. They alledge that they were chargeable with the Debt, but say not they were charged, nor shew not that they were otherwise damnified; and if they be not damnified, they have no cause of Action, foꝝ it may be the party will never Sue them, or they may die before Suit, and then the Suit is gone: and an exception was taken to the Verdict; foꝝ the Arrest and Rescue is supposed to be 26. Feb. and the Jury find it was circa 26. Feb. which is uncertain whether it were before or after that day; and if it were after the day, it will not maintain the Declaration, foꝝ then it cannot be a rescue the 26. day; but if it were before the day, then it continueth a rescue at that day. Curia contra in omnibus. As to the first, it is usual form, when the Sheriffs Warrant is pleaded to Arrest one, to say that they made a Warrant, &c. but do not say sub sigillo, &c. 2. An Action lieth by the Sheriffs upon this escape before the party Sue them, foꝝ the party arrested did wrong to them by the escape and rescous, and they are always chargeable to the other party; and if they stay till they are sued, perhaps the party that escaped may die in the interim, or will fly the County, that they cannot hear of him; and in Holt and Hills Case in this Court, it hath been adjudged that an Action lieth foꝝ this escape, and the party shall not take advantage of his own tort. And as to the exception to the Verdict, it is good enough, be the rescous before the day or after the day supposed in the Declaration, so as it be before the Suit commenced. And so Clench said it hath been adjudged upon great

(3)

Post. 124.

Post. 124.

Post. 264.

Co. 5 24. 2.

Post. 237. 293.

349.

Co. 3. fol. 52. b.

F.N.Br. 130. b.

advise;

advise, where a Trespass was found to be done after the day alleged, for the day is not material. And the Plaintiff had judgment.

Alford *versus* Lee. Hill. 29. Rot. 556.

(4)

DEbt upon an Obligation: the Case upon Demurrer was, the Plaintiff and Defendant submitted themselves to the Award of certain persons, of all matters, &c. and were obliged each to other to stand to the Award: they made an Award that they should release each to other all Actions before the Feast of St. Peter then next ensuing; the Defendant in the Eve of the said Feast makes a Release to the Plaintiff, and delivers it to one Primme to the use of the Plaintiff, without his assent or knowledge, and when the Plaintiff heard of it, he disagreed to it; and if this were a performance of the award was the question. Cooper argued it was not, for it taketh no effect as a release till the agreement of the party; and it is delivered to a stranger who will peradventure not deliver it without Suit, and perhaps will never deliver it. And relied upon 20 Ed. 3. Account 70. Atkinson contra, for it is immediately a release, and he cannot plead against it, non est factum, nor can countermand it, and the Plaintiff may agree to it when he pleaseth, and cited Tawes Case,² Eliz. Dyer. And afterwards in Trin. 29 Eliz. it was adjudged a good performance of the condition, because no place was appointed by the Arbitrators where the release should be delivered, and it may be the Plaintiff will absent himself out of the County, that the Defendant cannot find him, and they relied upon Tawes's Case.

Co. 5. 119. b.
Post. 627.

Post. 143.

Termino

Termino Paschæ,
Vicesimo nono ELIZABETHÆ,
in Banco Regiæ.

Gray versus Jefferies.

T Respals upon the Case: and supposeth that he in 24 Eliz. (1) put Th. Gray his son and heir apparent to the Defendant; to be his Apprentice in the Art of a Taylor for seven years, and that the Plaintiff was seized of Lands in the County of B. in Fee of the value of twenty pounds, which Lands after his decease are to descend to the said Th. Gray; the Defendant the first of May 28 Eliz. vi & armis did assault the said Th. and strook him with a Spade upon his back, by which he became lame and decrepit, by reason whereof he lost his marriage, and could not marry him as before, to his damages two hundred pounds; and upon this Declaration the Defendant did Demur in Law; and it was argued by Tankfield of the one part, and Halton of the other; and the same day without any further argument it was adjudged for the Defendant, for the Justices said it doth not appear by any Book that the Father should have an Action for the loss of the marriage of his son and heir, except when a Stranger takes him by force and marieth him; but if the son marry himself, or a Stranger procureth him to marry one, the father hath no remedy; Post. 77^o. and trespass for beating or battery of the son, lieth not for the father, but the son only shall have the Action; also in this Case he is bound Apprentice for seven years, and so till the seven years are past, the father hath nothing to do with him, and cannot marry him during that time, and so cannot have an Action for loss of his marriage, which perhaps will never come to him.

Nota, It was held by Wray and Clench, if one cut Trees which are (2) or may be Timber-Trees, as Oaks, Elms, &c. although they be Ante 1. under the age of twenty years, no tithes are due; And so if Trees of that age be cut, and new Germings grow, no tithe due, though Co. II. 48. b. they be cut under that age.

Love versus Pigott.

It was said there are divers Presidents, that if a Lessee for years (3) be sued in Court-Christian for Tythes, he in the Reversion may have a Prohibition.

Tre-

Trevilian *verſus* Lane.

(4)

Ejectione firmæ. The caſe was, Avice Trevilian Tenant for life, remainder in tail to Thomas her ſon, remainder in fee to the heirs of Avice. Avice and Thomas make a Leaſe for three lives by Indenture; Avice dieth, Thomas grants the Reverſion to B. in fee to the uſe of his laſt Will; and afterwards deviſeth the Reverſion for years and dieth; the three Leſſees for life die, the Diſſeeſee for years enters, the heir of the body of Thomas ouſts him, and he brings Ejectione firmæ. The queſtion was, if the Leaſe for three lives be a diſcontinuance to toll the entry of the iſſue. Drew argued that the entry of the iſſue was lawful, for the Leaſe for three lives being made by Deed, was the Leaſe of the Tenant for life, and the confirmation of Thomas, and ſo no diſcontinuance, 13 H. 7. 14. Comment' 140. 13 Ed. 4. 4. but if it had been without Deed, then it had been the ſurrender of Tenant for life, and the Leaſe of him in the remainder, for otherwiſe nothing would paſs from him. Coke contra, that it was a diſcontinuance, for a Leaſe for three lives was more then they both could make, and ſo is a Tort, and the Reverſion was gained by Tort, but in whom the Reverſion was, it may be doubted. * But it was adjudged that it was no diſcontinuance, Ex relatione Johannis Walter.

Poſt. 253.

Co. 1. 77. a. acc.

* Co. 1. 76. a.

Poſt. 252. 3.

Co. 2. Inſt. 673.

2 Roll. 22.

(5)

Eaſt Skidmore & Foame *verſus* Vaudſtevan.

Covenant: For not performing certain Covenants in an Indenture between the Plaintiffs Maſter of the good ſhip of A. of which Robert Pitman was owner of the one part, and the Defendant of the other part; and the concluſion of the Indenture was, In cujus rei teſtimonium, the parties aforeſaid to theſe preſents have ſet their Hands and Seals, and all the Plaintiffs and the ſaid Rob. Pitman ſet their Seals to one part, and the Defendant to the other part; and in the Indenture there were divers Covenants to be performed by the Plaintiffs and by the ſaid Ro. Pitman to the Defendant; and è converſo, and there was a claule in the Indenture, that the Plaintiffs and the ſaid Ro. P. bound themſelves to the Defendant to perform the Covenants; the Defendant pleads that the Indenture was delivered to the Plaintiffs, and to the ſaid Tho. Pitman (and ſo miſtakes Thomas) for (Robert) pleads the releaſe of the ſaid Tho. of all Covenants; and thereupon the Plaintiffs Demurred, for two cauſes: 1. The releaſe was pleaded by T. P. whereas no ſuch man was named in the Indenture, and this was held a great miſtake and without defence, and the Roll was commanded to be ſearched. 2. And the chief matter was, admitting the name had been right pleaded, and that R. P. had releaſed, if this releaſe was good. Coke argued that forasmuch that only the Plaintiffs in the premiſſes of the Indenture were parties of the one part, and the Defendant of the other, although R. P. is afterwards named in the Deed, it is a void Deed as to him, and no Covenant made to him or by him is good, for he is a ſtranger to it, and his ſealing and delivery is not material, as if I. S. by Indenture between him of the one part, and I. D. of the other, demiſeth Lands to I. D. and A. B. it is void to A. B. And he answered the caſes put by Godfrey of the other ſide, 4 Ed. 2. Obligation, where

2 Inſt. 673.

2 Roll. 22.

Poſt. 58. 115.

an

an Obligation was made by I.S. & ad majorem rei securitatem inveni J.D. Fide-Jussorem, and I.D. put his Seal to it; this was his deed: Which Case he agreed; for it is not mentioned whose Deed it is; and so is the Deed of both which are named, and put their Seals, &c. So when an Incumbent grants a Rent, by the assent of Patron and Ordinary, and they put their Seals to it: this is not their Deed, but only their Agreement to it: And the case of 39 Ed. 3. 9. is upon the same reason of 4 Ed. 2. And in Mich. 29 & 30. it was adjudged for the Plaintiffs, and the principal cause was the Misnomer, which the Court held could not be amended: And Wray said, they conceived the matter in Law to be also for the Plaintiffs.

Sir Waler Aston *versus* Whetenall.

Vaste. Error was brought of a Judgment, in an Action of Waste, and the Error assigned, that the Plaintiff in the Action did count, Quod cum fuisset seignior of the Land, he did demise the same to the Defendant for years, and he had done Waste. The Defendant pleaded Nul Waste fait, and found against him, and Judgment given: And the Error assigned was, That he saith Quod seignior &c. but said not of what estate; and so may be intended but an estate for life. And Godfry and Beaumont said, That the Declaration ought to comprehend certainty, and shall not be good by intendment: And although the Declaration had been good, if he had not mentioned any Seisin; yet when he alledges Seisin, and that insufficiently, the Declaration is not good, as Partridges Case, Comment. reciting a Statute, &c. but Shute and Clench, Justices, held the Declaration to be good; for the allegation of Seisin is not material, when it might have been left out; and it is helped by the words subsequent, viz. Ad exhereditationem, which explain how he was seised; and it being but matter of Form, it is helped by the Statute of Jeofail's after Verdict. Gawdy doubted, Et Adjournatur.

(6)
Co. 9. 27. a.
Post. 65. 87.

Post. 236.

Disply *versus* Sprat.

Ejectione firmæ. They were at issue, and in the Venire facias one of the Pannel was named Tho. Barker of D. And in the Distringas jurat' he was left out, and Tho. Carter de D. put in his place; and at the nisi prius, Tho. Carter was sworn, and with others tried the Issue. Coke alledged this in Arrest of Judgment; for now there were but eleven of the Pannel, Tho. Carter being mistaken, and falsely named for Tho. Baker, as in a Ven. fac. a Juroz was returned by the name of George Tompson, and in the Distringas jurat' he was named Gregory Tompson, and sworn at the Nisi prius; and this was held a void Verdict. But the Court said, there is a great difference between a mistake in the name of Baptism, and in the surname; for a man can have but one name of Baptism, but may have two surnames.

(7)
Co. 5. 42. b.
Post. 319.

Co. 5. 43. a.
Post. 222. 328.
258. 866.

Windsmore *versus* Hubbard, Int. Trin. 27. Rot. 850.

Ejectione firmæ. The Case was, the Lord Sturton by Indenture between him and J. S. let certain Land to J. S. for life, Habendum to

(8)
Owen. 138.
Goldb. 51.

Hob. 313.
Hutt. 87.
Post. 89. 121.

Hob. 313.
2 Cr. 564.
Ante 56.
x Post. 121.

Post. 491. 82.

1 Inst. 41. b.

to him and A. B. and C. his three sons Successive. The first question was, If they all took an Estate, because the sons were not named in the premises of the Deed? Secondly, the question was, If they take, whether they take jointly, or not? And thirdly, if they take no way, whether there shall be an Occupant for the life of the three others; so as it shall be a Lease to J. S. for his own life, and for the life of the three sons. And after Argument by Coke and others, the clear opinion of the Court was, that the sons shall not take in possession, because they are not named in the premises of the Deed, nor shall they take by way of Remainder; for the intent was, to give the Land to them in possession, 18 Ed. 3. 59. Brpke Leases 54. The only doubt was, If there shall be an Occupant; but Wray laid, There can be no Occupant; for it being limited to the Father for his life, this is a greater estate then for the lives of others, (V.5. Co. Rosses Case) And the three sons are named as persons to have an estate, and not to make a limitation of an Estate. And Trin. 29. it was adjudged, That there was no Remainder, and that there shall be no Occupant, Ex Relatione Walter. Nota, Delapers case, 17 Eliz. Tenant by the Courtesie, grants over his Estate; the Grantee deviseeth it, and dieth: This was held a void Devise, and out of the Statute of Wills; and it was held, That although the Devisee doth first enter after the death of the Devisor; yet he shall not have the Land as an Occupant, for there shall be no Occupant of an Estate of Tenant by Courtesie, or Tenant in Dower, which are Estates created by Law. Ex Relatione Edward Coke.

Termino Trinitatis,
Vicesimo nono ELIZABETHÆ,
In Banco Reginae.

Marsh *versus* Kavenford.

A Sumpfit. And did count that whereas at the request of the Defendant, there was a Communication of a Marriage between the Plaintiff, and the Daughter of the Defendant; and that afterwards he Married her, that afterwards the Defendant promised to pay him one hundred pound. Egerton and Foster argued, that this was no consideration; for it is past, and had no reference to any act before: But if the Marriage had been at the request of the Defendant, and after the Marriage he promised, &c. This had been good. Popham, Daniel, and Coke contra. For the Fathers natural affection doth continue, and her advancement is sufficient cause of the promise. And they said it was adjudged in the Exchequer, that a promise of ten pound in consideration of counsel given to one; this was good, though the counsel was given before; and it was here adjudged for the Plaintiff. (1)

Ante 42.
1 Cr. 409.
Post. 715.

Rainscroft *versus* Lawney, Pasch. 27. Rot. 167.

Error of a Judgment in the Common Bench; for that the Record was, that the Defendant obtulit se per Cutting Attornatum suum, and left out his Christian name, and the Judgment was reversed. (2)

Post. 75. 328.

Cottington *versus* Hulett, Pasch. 29. Rot. 186.

A Sumpfit against an Executor upon the promise of the Testator; and in the Declaration it was not averred, that he had Assets to pay Debts, &c. but Mich. 29. & 30 Eliz. it was adjudged, that the Declaration was good, and the Plaintiff recovered. (3)

Co. 9. 90. b.
2 Cr. 294.
1 Rol. 921.

Ash *versus* Wood.

Error. The Plaintiff counts in Replevin Quod adhuc detinet, and the Jury assessed the value of the Beasts, and damages entirely, whereas they ought to sever them; for he may have the one, and not the other; and the Judgment for this cause was reversed. (4)

Giles *versus* Ferrers.

The Assise of Mufance, the Plaintiff counts that exaltavit domum, the Jury find that crexit, and Exception taken to it; but the Court was informed by the Grammarians, that the words were of one sence. (5)

Post. 176.

Termino Michaelis,
Vicesimo nono & tricesimo ELIZABETHÆ,
in Banco Regiæ.

Peeke *versus* Wyrall.

(1)

REplevin. The Defendant made Cognisance as Bayliff of Tho. Pigott, Esq; for Damage-felant. The Plaintiff replied, That Sir John Goodwin was seised, &c. And that he and all his Ancestors, &c. had used to have for him, and all his Tenants for years, and at will, &c. Common in the place where, &c. For all their Horses and Colts, and he put in the Horses, &c. The Defendant rejoined, that in the place where, &c. it was used time out of mind, &c. That if the Horses of Sir John or of his Ancestors, &c. did come there by Escape, and were not put in; that it should not be lawful for the said Tho. Pigott, &c. to distrain them Damage-felant, but to put them out peaceably, and said, That the place, &c. was inclosed, and that the Plaintiff broke down the inclosure, and put in his Cattle, for which he distrained, &c. Absque hoc, That Sir Jo. Goodwin, &c. had Common in the place where, aliter, &c. Walmsly moved this was no good Traverse; for he did not confess that Sir Jo. Goodwin had any Common, and therefore he ought to Traverse Absque hoc, that Sir John had any Common there. Curia; That pleading had been better; for in truth he hath not confessed any Common, &c. but it seemeth good enough as it is: For this liberty that his Cattle shall be there without being distrained, is in nature of Common; and therefore he might plead as he did: But they ruled, that the Defendant should mend his Plea, or that a Demurrer be joyned.

Knight *versus* Mory.

(2)

REplevin. The Case was, Shelley makes a Lease for years, Proviso quod non licebit, to the Lessee, to alien his term without the assent of the Lessor; the Lessee deviseth the term to his son, the Lessor assenting to it. Three points resolved, 1. This is a condition: 2. A devise in general, is a breach of the condition: 3. As this case it is no breach; for nothing passed till the Lessor his assent was obtained; for it was a condition precedent: And though in the principal case the Devisee did enter by the consent of the Executor, and had not licence of the Lessor, yet it is not material.

Post. 330. 331.

Anonymus

Anonymus.

NOta. Coke moved this Caſe to the Juſtices, to know their opinion, he being (as he told me) to make his Award in it. Tenant in Fee-ſimple, ſoweth the Land, and before the Corn was ſevered, deviſed the Land to A. for life, Remainder to B. for life, and dieth. A. dieth before the Emblements were ſevered; the queſtion was, whether the Executor of the Tenant for life, or he in the Remainder, ſhould have the Emblements; for he ſaid clearly, That the Executor of the Deviſor had no colour to have them. Wray and Shute held, That he in the Remainder ſhould have them, for by the Deviſe of the Land they paſs with it; and when they paſs by reaſon of the Land, and come not by the ſanctiſication of the firſt Tenant for life, they ſhall go with the Land: But if the firſt Tenant for life here granted them to another, it had been otherwiſe; for by the Grant they are quaſi Chattels ſevered from the Land. And Wray ſaid, it hath been adjudged in this Court, that where Baron and Feme are Joyntenants of Land, and the Baron ſoweth the Land, and dieth before Severance of the Corn, the Feme ſhall have it. Clench doubted in the principal caſe; for he conceived that the Executor of the firſt Tenant for life ſhall have them, as Chattels veſted in him: And he ſaid, if Land be ſown, and then the Land is deviſed to J. S. for life only, and before Severance the Deviſee dieth, his Executor ſhall have the Corn, and not the Reversioner: Which caſe Wray and Shute denied, but ſaid if it were ſo, it is not like the caſe a Remainder. And Popham Attorney being demanded his opinion, agreed with Wray in the principal caſe, but doubted of the caſe of Baron and Feme.

(3)

Hob. 132.
Poſt. 464.
1 Rol. 727.Co. Lit. 55. b.
1 Rol. 727.Prat & Uxor *verſus* Taylor.

Aſumpſit. That whereas the Wife of the Plaintiff in conſideration that the Defendant ſhould marry her Daughter, had given to him ten pound; he promiſed to the Wife, that if he did not marry her daughter, he would repay the ten pound, and averſ he did not marry her, &c. Upon Non Aſumpſit pleaded, and found for the Plaintiffs, it was alledged in Arreſt of Judgment, that the Delivery of the money by the Feme was void, and then the promiſe made to her is alſo void. And although the Baron agreeth afterward to the Delivery and Promiſe (as it appeareth by his bringing the Action) yet this cannot make the Promiſe which was void, to be good; for there was no conſideration at the time of the Promiſe. Another matter was moved, That the Baron and Feme did joyn in the Action, where it ought to be brought by the Baron only; for it is void to the Feme being during Coverture, and it is as a Promiſe made to the Baron only: But it was adjudged, that the Action was well brought; for the agreement of the Baron maketh the promiſe good ab initio to the Husband, and it being made to the Wife, they may joyn in the Action.

(4)

Anonymus

Anonymus.

- (3) **A**ction for these words, Thou hast sitten upon the Pillory; but faith not in what manner. Harris moved, that the words are not actionable; and so it was the opinion of the Justices, who said he might well demur upon them.

Donnes Case.

- (4) **A**ction for these words, If you had had your deserts, you had been hanged before now. Coke moved, that the Action did not lie; for that he did not shew any cause why he should be hanged, and deserts might be in his mind concerning God; Curia contra. For it shall be intended, he had committed an offence, for which, the penalty of death was due to him. Wray said it hath been adjudged, that where one writ the name of another upon a Wall, writ also, That if this man had his deserts, he should have been hanged on these Gallows; and drew a pair of Gallows on the Wall; and it was adjudged, that an Action did lie for this.

Moort 243.

Post. 384.
Post. 470.

Gallies *versus* Budbery.

- (5) **D**ebt upon an Obligation. The Case upon Demurrer was, the Plaintiff being possessed of a term for six years of a Tavern in Gracious-Street, let the same by Indenture, with Plate, and divers Utensils in the House, to the Defendant for three years. The Defendant in consideration thereof, did covenant with him and his Assignees, that De mense in mensum mensatim, he would upon request render to him and his Assignees an account for every Tun of Wine he did sell there, and pay him for every Tun sold thirty shillings; and there were divers other Covenants on his part (some in the Affirmative, and some in the Negative) he pleaded Covenants performed (which was ill in that,) the Plaintiff replieth, That upon the last day of July, he required the Defendant to give him an account of a Tun of Wine sold at such a time, which he refused to do; the Defendant rejoined, that before that time, the Plaintiff being possessed of a term in the Tavern for divers years, part whereof were yet to come (but doth not shew what time in certain, nor the Commencement of it; and therefore it was agreed by all, it was ill in that) granted the residue of the said term then to come to B. to which grant he Attorned; after which time he did not refuse, and upon this the Plaintiff demurred. Drew for the Plaintiff argued, that notwithstanding the residue of the term was granted over; yet the Account was to be made to the Plaintiff, and not to the Assignee, for it is a thing collateral; and the Assignee is to have only that which goeth with the house, and Assignee is in Deed and Law, as an Executor; Coke contra: For this is as a Rent reserved, and in nature, and lieu of the Rent: But he said, that the request of an Account was to be within the month. And this request, as appeareth by computation, was the day after the month; which being referred to Kempe, he certified the same accordingly; and for that cause, Judgment was given against the Plaintiff.

Co. Lit. 303.b.

Co. 8. 120. b.
Post. 284. 318.

Worcester

Worcester *versus* Stone, Trin. 27. Rot. 453.

The Case upon special Verdict was. The Plaintiff made a Lease to the Defendant for years rendring Rent, upon condition, That if the Rent were behind at the day, and ten days after (being in the mean while demanded) and no Distress to be found upon the Land, that the Plaintiff might re-enter: And the Jury found, that the Rent was behind at the day, and ten days after, and that a sufficient Distress was upon the Land till three of the Clock in the Afternoon of the tenth day; at which hour the Lessee drove out his Cattle, and at the last hour of the tenth day, the Lessor came and demanded the Rent, and it was not paid, nor any distress upon the Land; The question was, If the condition was broken? Daniel for the Plaintiff argued, that the condition was broken, for there was no Distress at the time of the demand, and the words are, If it be lawfully demanded, and no distress found, &c. And it is not sufficient to have it at any time of the ten days, but at the proper time for the demand, which is the last instant of the tenth day: For otherwise, if there be a Distress at any time within the ten days, though but for a quarter of an hour, it would dispence with the condition; and then the Lessor must attend all the ten days, which would be inconvenient. Wray and Shute, The condition is not broken; for the intent of the words is, If no Distress be found at any time within the ten days, then a Re-entry; and therefore, if a Distress be found there at any time within the ten days, this is sufficient. Clench doubted; but it was afterwards adjudged against the Plaintiff, because he made no demand in the mean time. (6)

Ant. 15.

Sir John Parrot's Case.

COke said, It was adjudged in that Case, That a Debt upon Record by Recovery, or otherwise, cannot be attached by the Custom of the City of London. (7)

1 Rol. 552.
Post. 886.

Madox's Case.

An Indictment against him was reversed, because the Indictment was of a Nuisance to a horseway, whereas it ought to be the Queens High-way, or the High-way. (8)

Co. Lit. 56. a.

Robert Browne & Uxor *versus* Garborough.

A Sumpsit, and declareth of a promise made to the Feme dum sola sinit, and alledgeth, That whereas a communication was between Jo. Browne Father of the Plaintiff Robert, and the Defendant, Cousin of the said Robert Browne, and the said Feme, when she was sole, of a marriage to be had between the said Plaintiffs; and the said Jo. Browne promised to the Feme, that if the marriage did take effect; that he would assure to them such Land, &c. And the Defendant (9)

Post. 619.

2 Cr. 228.

Defendant did then promise to her, that if J. Browne did not perform his promise, that the Defendant would give her one hundred pounds, and alledges, That the marriage did take effect, and the Lands were not assured, &c. Upon non assumptit it was found for the Plaintiff. Shuttleworth Serjeant moved in Arrest of Judgment, That there was no sufficient consideration to ground the promise; for the Feme was a meer stranger to the Defendant; and there was no reason for him to give her one hundred pounds in Marriage. Gawdy and Shute conceived it a good consideration, for it was alledged, That the Defendant was Kinsman to Ro. Browne the Plaintiff; and it is to be intended, that by reason of these words she was induced to marry R. Browne, which otherwise she would not have done, and they commanded Judgment to be entred for the Plaintiffs: And upon a Writ of Error brought, the Judgment in Trin. 30 Eliz. was affirmed; for peradventure she trusted the Defendant, rather than Jo. Browne, and the Defendant was Cousin to the said R. Browne Plaintiff.

Yate, Brooke, Clement, & duo alii *versus* Windnam.

(10)
Post. 155.

Error upon a Judgment given in a Writ of Partition against the now Plaintiffs, at the suit of the now Defendant. And divers Errors were assigned, the Defendant Pleads a Release of all Errors made to him by the said Brook and Clement, who were summoned and seivered, and concluded upon it against them all, and demanded Judgment Si actio. And upon this it was demurred in Law. And now Tanfield for the Plaintiffs argued, That the Judgment shall be reversed: The first Error was, that the said Windnam Plaintiff in the Writ of Partition demanded Partition, according to the Statute of 22 H. 8. and declared, That whereas he and the others held four hundred Acres of Land in Common, in six parts to be divided, viz. The Plaintiff W. two parts; the said Brooke one part; the said Clement one other part; and the other two, each of them a moiety of the other sixth part, &c. but shewed not their several titles to the said six parts; nor any manner of title, how the Lands ought to be divided in that manner: And therefore the Declaration is not good, for the Writ and Declaration ought always to comprehend their title; and therefore in a common Writ of Partition between coparceners, it comprehends the title, that it was the inheritance of their Ancestor, and descended to them, a Fortiori in this case where their parts are so unequal. And although in a Writ of Partition, no Land is demanded, yet it ought to comprehend their title, 36 H. 6. in a *Quem reddidum reddit*, which demands no Rent or Land, yet he ought to make a title; for he demands an Attornment upon a Grant of a Rent, which is against common right. So 11 H. 4. in waste brought by two, supposing it to the disinheritance of one, they ought to shew how their title came to the Land, in this manner to have an Action which is so against common right: So in every Writ of Waste, he ought to make title, viz. That he demised the Land, or that he had the Reversion Ex assignatione; and he cited a Judgment in a Writ of Error between Hide and Unton, That in a Writ of Partition, the Title must be comprehended in the Writ or Declaration, specially between Joyntenants, or Tenants in Common.

2. Error,

Post. 288.

2. Error that the Defendants in the Writ of Error did come and confess the partitions, yet it was Awarded that the Defendants should be in misericordia, which is not to be in this Action, where there is no tort objected against them, and when they confess the Action. 3. Error for that upon the Judgment after the Writ of Partition was returned, served in all points by the Sheriff, the words of the Judgment are that Particio prædicta inter partes prædict' stabilis & firma teneat, whereas it should be teneatur; but upon the view of the Record, it was teneatur. 4. As to the matter of the Demurrer, if this release (admitting the judgment to be erroneous) doth bar them all of a Writ of Error; and he conceived it did not, for it is merely real, to which all the parties have interest, and though the judgment be intire, yet this release is no bar, but the judgment shall be intirely reversed, as 45 Ed. 3. 10. two coparceners have title to a Writ of Ward of the body; one releaseth, this doth not bar the other, but he shall recover the entire for both, so 30 H. 6. in an Assise by two, one releaseth, this doth not bar the other, it being a thing of inheritance; so in this Case; but afterwards Gawdy Serjeant which argued for the Plaintiff, did agree that this release can be no bar to the other. And Hill. 30 Eliz. the Case was argued at large by Gawdy and Coke, that the Declaration need not comprehend the title, for it shall be intended that they have the Fee-simple, till the contrary doth appear; and by intendment he that bringeth the Action cannot have confusion of the title of the others, for every of them cometh in by a several title; and they shewed divers Writs and Declarations of Partition, and one in Michaelmas 26 & 27 Eliz. between Cheney and Berry, that in a Writ of Partition between Tenants in Common, title needed not be shewn. And of that opinion was the whole Court, and said they would not reverse the Judgment contrary to so many presidents. And as to the second Error, that the Judgment was Idem in misericordia, they said if the Defendant came in upon the first summons, and such Judgment be given, it is erroneous; but it was alledged they came in upon the Pone, and then it is good. And the Court moved the parties to agree, but afterwards the Plaintiffs caused the Writ to be discontinued.

Co. Lit. 168 a.

Co. 5. 97. b.

Ante 57.

Co. 5. 49. a.

The Bishop of Gloucester and Savacres Case.

Error upon a Judgment given against them in a Q. Impedit brought by the Queen, in which the Bishop pleaded that he claimed nothing but as Ordinary, &c. The question was, if the Writ lieth in both their names, or ought to be brought only in the name of Savacre. Coke argued, that the Bishop ought not to joyn in the Writ, for he had no loss, and relied upon the Case 29 Aff. 14. Attaint, and 6 Ed. 3. 7. Mallory and Winter contra, for the Bishop is party to the Record, and relied upon 3 Ed. 3. & 2 Ed. 3. and they said a Writ of Error in this Case is but as a Commission to examine Errors as 10 H. 4. 4 is, and if more be named in a Commission then needeth, it is not material; and afterward it was awarded the Writ was well brought, for Wray said the Bishop hath loss, for by this

(11)

2 Cr. 94.

B

Judg.

Judgment, the Writ shall be to the Arch-bishop for admission and institution, and so he hath loss, and therefore may joyn.

Bracebridge *versus* Vaughan.

(12)
23 H. 6.c. 10.

Co. 10. 101.b.

DEbt upon an Obligation : it was agreed by the Court that where the Marshal of Queens Bench taketh Bond for the easement or delivrey of a prisoner in Execution, this is void by the Statute of 23 H. 6. although he be not named in the Statute : for Wray said divers persons are intended in the purview of the Statute which are not mentioned in the Statute.

Hare *versus* Gorge.

(13)

Trespas : The Defendant pleads an Arbitrement in bar, that the Defendant should pay to the Plaintiff twenty shillings, upon which the Plaintiff Demurs, because he doth not alledge a place where the submission was 9 H. 6. 5. and doth not alledge performance of the Arbitrement, and doth not answer to the *vi & armis* ; and for these causes it was adjudged for the Plaintiff.

John Fuller *versus* Robert Spackman.

(14)

DEbt upon an Obligation : The condition to stand to the Arbitrement of Tho. Colehill of all matters, Suits, Quarrels, Actions, and Debates whatsoever now depending between them, and being at Suit of Law, or otherwise in controverisie between them, so as the Award be made before such a day, &c. in writing, the Defendant pleads the Arbitrement in writing made such a day in this manner, that the Plaintiff shall enjoy quietly certain Tythes in D. without interruption of the Defendant, &c. and that he had suffered him to enjoy them, &c. which is all contained in the Arbitrement, and demands judgment, &c. the Plaintiff replieth, that besides that the said T. Co. did by the said writing Award that the Defendant at a day, &c. should pay to the Plaintiff five pounds in full satisfaction of all Accounts, Suits at Law, Arrearages of Tythes, and Tythes unjustly taken at any time from the beginning of the world to the day of the Obligation, &c. and alledges that the Defendant did not pay the five pound, and so assigned the breach, &c. and upon this it was demurred, and the cause was, because the Plaintiff did not aver that there was any Suit depending, &c. at the time of the submission : for if there was not, the Award was void and out of the submission ; but without any great Argument it was adjudged by Shute and Gawdy (being only present) for the Plaintiff, and their reason was, that it shall be intended to be awarded for matters in Suit, and an Averment needs not, for otherwise every Award may be avoided by such nude surmise.

Clecott *versus* Dennys, Int. p. 29. rot. 144.

Action upon the Case: And alledgeth that he had Sued a Latitat against J.S. directed to the Sheriff of Devon, intending to Declare against him in Debt, and J. S. was Arrested, and in prison at his Suite; the Defendant pretending to be Deputy to the Sheriff, took bond of him, and let him at large, by which he had lost his Suit, &c. the Defendant pleads that the Sheriff made him his Deputy to Bail all Prisoners Vailable in the said County, and thereupon he took Bond of J. S. and delivered it to the Sheriff, and let him at large, &c. And upon this it was demurred, because he doth justifie as Deputy, and sheweth no Deed of Deputation, 28 H. 8. Br. Deputy 17. Wyat argued that a Deputation is good without Deed, for a Deputy doth things only as a servant, and in right of his Master, and so may be made without Deed; otherwise of an Assignee, 11 Ed. 4. 1. 12 Ed. 3. Monstrans de faite 65. And of that opinion was Gawdy, V. 23. Ed. 3. Barr. 259. 8. R. 2. Avowry 260. (15)

Sir Anthony Sturlyn *versus* Albany.

Assumpsit: The Case was, The Plaintiff had made a Lease to J. S. of Land for life rendering rent: J. S. grants all his Estate to the Defendant, the rent was behind for divers years; the Plaintiff demands the rent of the Defendant, who assumed that if the Plaintiff could shew to him a Deed that the rent was due, that he would pay to him the rent and the arrearages; the Plaintiff alledgeth that upon such a day of, &c. at Warwick he shewed unto him the Indenture of Lease, by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years; upon non assumpsit pleaded it was found for the Plaintiff, and damages assessed to so much as the rent and arrearages did amount unto: And it was moved in Arrest of Judgment, that there was no consideration to ground an Action, for it is but the shewing of the Deed, which is no consideration. 2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages, for he hath other remedy for the rent; and a recovery in this Action shall be no bar in another action; but it was adjudged for the Plaintiff: for when a thing is to be done by the Plaintiff, be it never so small, this is a sufficient consideration to ground an Action; and here the shewing of the Deed is a cause to avoid Suit; and the rent and arreages may be assessed all in Damages; but they took order that the Plaintiff should release to the Defendant all the arrearages of rent before execution should be awarded. Nota, in this case it was alledged that it hath been adjudged, when one assumeth to another, that if he can shew him an obligation in which he was bound to him, that he would pay him, and he did shew the obligation, &c. that no Action lieth upon this Assumpsit, which was affirmed by the Justices. (16)
Post. 150.
1 Cr. 343.
Post. 644.
1 Cr. 343.
Post. 70. 150.
75. 470.

The Lord Mordant *versus* Bridges.

Action de scandalis magnatum, for these words, My Lord Mordant did know that Prude robbed Shotbolt, and bid me compound with Shotbolt Moor 686: (17)
R 2 for

for the ſame, and ſaid he would ſee me ſatisfied for the ſame, though it coſt him an hundred pounds ; which I did for him, being my Maſter, otherwiſe the evidence I could have given, would have hanged Prude. (Nota, in truth he ſpoke thoſe words before Juſtice Shute in an evidence in conſpiracy by Prude againſt Shotbolt ; but it was not ſo alledged now.) Upon not guilty pleaded, it was found for the Plaintiff, damages a thouſand pounds. And by Popham and Egerton it was alledged that the Action did not lie ; for the words he knew, &c. are not actionable : for a man that knoweth another hath committed Felony, is not bound to purſue him. And as to the other words he commanded him to compound, &c. he might lawfully compound with the party robbed to ſtop his appeal, and to the intent he might get his pardon in the mean time. But it was adjudged for the Plaintiff, for the words ſhall be taken as ſpoken in the worſe ſenſe, and to the diſgrace of the ſaid Plaintiff, &c. and a Writ of Error was brought in the Exchequer Chamber, and Error aſſigned in the point adjudged.

Poſt. 537.

Bright *verſus* Hubbard, Hill. 27. Rot. 128.

(18)

IS. ſeiſed in Fee of Copy-hold Land, deviſed it to his Wiſe for life, and that ſhe ſhould ſell the reverſion for payment of his Debts ; and after in Court did ſurrender the Land to the uſe of his Wiſe for life according to his Will and Deed ; the queſtion was, if the Wiſe could ſell the Reverſion, and adjudged ſhe might ; for he having made his Will before, and deviſing it in ſuch manner as afore-mentioned, and after ſurrendering it, &c. and referring it to his Will ; this is to be intended according to the intent there limited and appointed, and ſhe ſurrendering it upon condition to pay twelve pounds ; this was held a good ſale according to the Will.

Anonymus.

(19)

DEbt upon a Bond: The Caſe was, the Defendant did owe to the Plaintiff certain mony upon a Bond, and certain mony for Wares ſold, as it appeared by his Book ; at the day of payment upon the Bond, he tendered the mony according to the Bond ; the Plaintiff did accept it, and ſaid it ſhould be for the Debt due by his Book, and not for the other Debt ; but the Defendant ſaid he paid it upon his Bond and not otherwiſe, and the Plaintiff croſſed his Book, pretending the Book-debt to be diſcharged, and brought Debt upon the Bond ; and it was adjudged againſt him, for the payment is to be in that manner that the Defendant would pay it, and not according to the words of the Plaintiff how he would accept it.

Frith's Caſe.

(20)

DEbt upon two Obligations, of which one was not then forfeited, for the day of payment was not come ; the Defendant pleads to that a releaſe, and took no advantage of it, that it appeared it was not forfeit, and to the other he pleaded another plea ; and upon

on both they were at Issue, and found for the Plaintiff. And this matter was alledged in Arrest of Judgment, that it did appear upon the Obligation shewn, that the day of payment was not yet come, and so the Plaintiff is not to have judgment upon it. But it was adjudged for the Plaintiff for both; because the Defendant might have taken advantage of it, but did not, but waived it, and pleaded a Collateral matter, which was found against him. 9 Ed. 4. the Defendant pleads that the Plaintiff had a Co-Executor who was in life, which had released to him; and upon this they were at Issue, and found for the Plaintiff, and awarded he shall recover, because the Defendant might have abated the Action being brought by the Plaintiff alone, and had waived it. Bartlet of Council with the Plaintiff.

Ant. 41.
Post. 111.

Forde *versus* Rolls.

A Sumpleit by the Plaintiff as Administrator of J. S. against the Defendant, upon a promise made to the Testator, after Issue the Plaintiff was non-suited; Golding for the Defendant prayed Costs upon the Statute of 8 Eliz. which giveth Costs against him that sueth maliciously; but if the Suit had been upon a Bond or Record, or Shop-book, and the money had been paid, yet no Costs, for he had a ground and colour of Suite; but the Court denied to give Costs, for it cannot be said to be sued maliciously, being for another; neither can it be known but the Plaintiff had colour to sue.

(21)
St. 8 El. cap. 2.

1 Cr. 229.

Scavage *versus* Freeman, &c.

Appeal by the Plaintiff against Freeman and four others as principals, and against More as Accessory; the Plaintiffs after the parties which were Appelled, did appear, declared against all the principals together in French, and after against the Accessory in French, and after the four principals severally by himself made their defence in French, which was, Vous aves cestuy I. Fr. in proper person que defend' le tort & force & tous felonies & murders & ceo que est encounter le corone & dignite de nostre seigniores le Roigne & tout ceo que le defend' doit & demand oyer de breief & returne de ceo, which was read, and then he pleaded in bar in French, que de ceo felony in ceo manner que il est appell in nest culpable & ceo il est prist de prover per son corps, and so waged battel, and in the same manner it was done by the three other principals, and the fifth principal, and the Accessory pleaded severally not Guilty, and put himself upon the Country.

(22)

Cranmers Case.

Nota: Walmsly Serjeant said it was adjudged in that Case, that whereas the Queen had granted Lands, reserving a Fee-Farm Rent, with a condition of re-entry for not payment, and afterward the Queen grants the Fee-Farm Rent to J. S. in Fee, and then the Rent was behind, that the Queen shall not re-enter, for by that means she should defeat her own grant, which would be a tort to the Grantee of the Rent.

(23)

Foster

Foster *verſus* Scarlett.

(24)

Ant. 4.

Ant. 67.
Poſt. 75.

Aſumpſit: The Plaintiff declareth, that whereas he and one Willington did ſubmit themſelves to the Arbitrement of A. and B. of all matters, &c. the ſaid A. and B. awarded that the Plaintiff ſhould releaſe to the ſaid Willington all Debts which he owed him; and that Willington ſhould aſſure to the Plaintiff certain Lands which he held for life, the reversion to the Plaintiff; and that the Defendant and one Putter which did pretend to have a Leaſe in the ſaid Lands ſhould ſeal a Deed to the Plaintiff that they ſhould aſſure to the Plaintiff their Leaſe and Interest in the ſaid Land; and further alledgeth that after the ſaid Arbitrement, in conſideration that the Plaintiff did aſſume to the ſaid Willington to ſtand to and perform the ſaid Arbitrement, the Defendant did aſſume that he and the ſaid Putter upon a requeſt made Sibi would convey the ſaid Land to the Plaintiff; and further alledgeth that he had performed the ſaid award on his part, and that he had requeſted the Defendant, that he and Putter would convey the ſaid Land, &c. which they had not done. Upon non aſumpſit it was found for the Plaintiff; and it was alledged in Arreſt of Judgment, that here is no conſideration to bind the Defendant, for he took no benefit thereby. But the Court held clearly the contrary, that it was a good conſideration, for by reaſon of the promiſe the Plaintiff was drawn to make the releaſe; and it is not material, that the Defendant took no benefit by it. Secondly, it was alledged, the Defendant did aſſume that he and Putter upon requeſt made Sibi would convey, and no requeſt is made to Putter, but only to the Defendant, and it ought to be made to both, for Sibi is the plural number, and ſo ſhall be intended, upon a requeſt made to both. But Coke and Godfrey argued that the word Sibi may be referred to the Defendant only, for this word comprehends the ſingular number, as well as the plural, and ſo may be referred to the Defendant that is firſt named; and the requeſt is to be made to him that did promiſe, which is the Defendant; and relied upon 22 Ed. 3, 4. But the Juſtices ſaid that the word Sibi is to be referred to both, for both are to do the act; and it was afterwards adjudged that the Plaintiff nihil capiat per billam.

Knight *verſus* German, Trin. 29. rot. 669.(25)
Poſt. Paſc. 31.
El. pl. 12.

Error upon a Judgment in an Action upon the Caſe: Two Errors were aſſigned. 1. Error, for that in the ſaid Action the then Plaintiff declared, that whereas he was of good name and fame, the now Plaintiff intending to detract from his name and fame, and put his life in jeopardy, did maliciously cauſe a Bill of Indictment of Felony to be written, and the ſame being ſo written, at ſuch a Sessions of the Peace at Newgate, exhibited the ſame to the Grand Jury, Et falſo depoſuit omnia in ea contenta fore vera; whereupon he was Endicted of the ſame Felony, and after arraigned, and found not Guilty, and thereupon brought the Action, and upon not Guilty pleaded, found for him; for which he had Judgment to recover ſeventy two pounds for Damages and Coſts; ubi revera upon this matter ſhewn, no Action doth lie. 2. Er-

2. Error that the exigent upon the judgment, supposeth only seventy pound was recovered and not more. As to the first matter the Court was in doubt; but Wray said that this Endicement being written and preferred maliciously, it is not reason but an Action should lie to punish it; and if two conspire maliciously to exhibit an Endicement, and the party be acquitted, he shall have a conspiracy; so when one doth it, this Action upon the Case lieth. But Shute and Gawdy contra that the Action doth not lie, for then every Felon that is acquitted will sue an Action against the party; but for the second Error, they held clearly it was well assigned, for there was no such Judgment for seventy pound, and though it was the default of the Clerk, yet it cannot be amended to make the Outlary good. And it being moved at another day, the opinion of all the Court was that the Action lieth not when the Endicement is preferred by the party grieved, and he pursueth it according to the Law: and the Statute of West. 2 cap. which doth give damages where the party is acquitted, doth prove this, and this Case remaineth at Common Law, V. 27 H. 8. 27 Aff. 12. and 7 H. 6. 14. Post. 564.

Savel *versus* Wood.

Prohibition against a Parson who Sued for Tithes in the Spiritual Court: and surmised that the Clerk of the said Parish, and all his predecessors assistants to the Minister there (26)
Divina Celebranti, had used to have five shillings of him, &c. for the Tithes of the place, where, &c. Moor 908.
Coke said this prescription is void, for it is in Post. 276.
one person only that hath no perpetuity, but is dative and removeable, 32 H. 6. 5. And if it be a good surmise, yet there is no cause but a consultation shall be Awarded, for it is to come in question in the Spiritual Court, whether the Parson or the Clerk hath right to the Tithe. Post. 136.
And he said it was lately adjudged in Bush and Hunts Case, where the Vicar sued for Tithes, and a prohibition prayed upon surmise that he had used time out of mind to pay the Tithes to the Parson, that it was not a sufficient surmise for a prohibition to entitle another to the Tithes, for that shall come in question in the Court-Christian. Post. 251. 307.
Nota, afterwards, Hill. 30 Eliz. it was moved 317.
again by Gawdy and Fleetwood Serjeants for the Plaintiff, that it was a good prescription, because the Parsonage was a Parsonage Impropriate, and by intendment it commenced by the act of the Parson, viz. that he made a composition that the Tithe of that Land should be paid to the Clerk in discharge of himself, & that he had used time out of mind, &c. to pay to the Clerk five shillings in discharge of all Tithes, &c. And the Court said, if this special matter be shewn in the surmise, perhaps it might be good by reason of the continuance, and that by this the Parson is discharged from finding the Clerk, with which peradventure he shall be charged, and so is as a payment of Tithes to the Parson himself; but such matter is not shewn, and by common intendment Tithes are not to be paid to the Parish Clerk, and he is no party in whom a prescription can be alledged; and thereupon they Awarded a consultation.

Topliffe *versus* Wilson.

- (27) **A**ction for these words : Mr. Topliffe hath forged and counterfeited a Certificate to a Commission out of the Exchequer, and hath forged and counterfeited Mr. Birckets and Mr. Savels hands the Commissioners, and hath put their hands to it, by reason whereof he got a Verdict in the Exchequer, whereas otherwise he must needs have had the foil. Upon not guilty, it was found for the Plaintiff, damages ten pound. And it was alledged in Arrest of Judgment that the Action doth not lye, because it was not shewn what Commission it was, nor in what Suite, so as the Defendant might give answer to it, but Judgment was given for the Plaintiff.

Ards *versus* Simpson.

- (28) **E**jectione firmæ : Upon special Verdict, the Case was, the Father was Tenant for life, the remainder to his daughter and heir apparent (being a Feme covert) in Fee ; the father makes a Feoffment to divers uses with Warranty, and after levieth a Fine with Warranty and dieth ; the daughter for her self, and in the name of her Baron, and by his consent, enters within the year after the Fine, claiming the Land as her inheritance, and afterwards they let the Land to the Plaintiff. 2. questions, first if this entry by the Feme only be good ; 2. if this warranty descending upon her during the coverture shall bind her. And it was held by the Justices that this entry by her self alone (the Baron agreeing to it) is good. 2. That the Warranty descending upon her during the coverture, where her entry is congeable, doth not bind her. And at another day Fuller and Gray moved that although the Warranty doth not bind the Feme after the death of the Baron, yet it shall bind the husband, for he might have entred before the descent of the Warranty, which he not doing, is bound as a descent during the coverture ; but it was adjudged for the Plaintiff, for the Warranty doth not descend upon the Baron but upon the Feme only, and being void to bind her, shall not bind him.
- Co. Lit. 366.a.

Mary York *versus* Allen.

- (29) **S**cire facias upon a Recognisance : The Case was, One was quarto exactus in an Action against him, and afterwards was quinto exactus 23 Nov. 27 Eliz. and afterwards the pardon came which had relation to all offences before the first of November ; if by this the Outlary be discharged was the question, for the Outlary was after the time unto which the Pardon had relation ; and prima facie the Justices held that it was discharged, but they would advise, V. 36. H. 6. 25. & 37. H. 6. Quatermain's Case. And the next day it was moved again, and it was then adjudged that the Outlary was discharged and void, for the contempt and offence was pardoned, and then the Outlary after is void.
- Co. 5. 49. a. b.

Scot versus Scot.

THe Case was, Recoverers to an Use before the Statute of 27 H.8. (30)
 make a Lease for 99 years by indenture, rendring 10 l. per annum;
 the Lessee by the same Indenture covenanted with the Recoverers,
 that he will pay the Rent to certy a que use his Heirs and Assignees,
 proviso semper that if the said certy a que use doth not make his Heir-
 male his Assignee, that then he shall pay the Rent to the Recoverers,
 their Heirs and Assignees; and afterwards certy a que use dieth, and
 doth not make his Heir-male his Assignee, the Lessee doth not pay
 the Rent to the Recoverers; the question was if his Estate
 was forfeited, and that this proviso makes his Estate conditional;
 and after argument, it was adjudged that it was no condition, that
 went to the Estate, but only abridged the covenant: Then was a
 nother question, if the Rent be reserved at two Feasts, viz. Michael-
 mas and our Lady day, and it is Arrere at our Lady day, and not de-
 manded at that day, if he may demand all at Michaelmas day, and it
 was held he cannot, and a demand in that manner is void for all.

Co. 2. 72. a.
 Post. 242.

Allen versus Andrews de Graies Inn, Trin. 29. Rot. 1003.

DEBT upon an Obligation of 300 l. which was conditioned to (31)
 pay 14 l. yearly to the party, during the life of the Wife of
 the Defendant; at Michaelmas or within one month after at D. the
 Defendant pleads that two days before the end of the month he
 came to D. and there tendered the 14 l. and none was there to re-
 ceive it; which matter, &c. and concluded not, that he was tout
 temps priit, and upon this it was demurred in Law, if this tender
 were good. And the Justices held, that if the tender had been to
 the Plaintiff himself in person, within the month, if he had come thi-
 ther, this peradventure had been good; but it seemeth hard to
 tender it when the Plaintiff was absent; and to compel him to at-
 tend all the month was not reasonable: but by Wray, it is more
 reasonable that the last day shall be for one to tender, and the other
 to receive; but they were in doubt of this case. But Clench said,
 if one be obliged to pay another 10 l. at Michaelmas, or within ten days
 after, and no place is limited for payment, then if the Obligor
 meet the Obligee within the ten days, and doth tender the 10 l. the
 Obligation is laved; for perhaps at the last day he cannot find him.
 And the Justices held, in this case, the Defendant need not plead,
 tout temps priit, for this sum cannot be intended parcel of the sum
 contained in the Obligation; for peradventure more shall be paid
 during the life of the Feme, then the sum in the Obligation doth a-
 mount unto. But afterward it was adjudged for the Plaintiff.

Ante 14.

Ante 14.

Morris versus Kirke.

A Sumpfit, and declares that whereas he had expended divers (32)
 sums of money for the Defendant, amounting to 25 l. the
 Defendant promised to pay him all the sums of money which he
 had

Post. 78.
Post. 85. 91.
132. 179. 229.

had expended for him, and alledgeth that licet sapius requisitus, the Defendant had not paid, &c. upon non assumpsit, it was found for the Plaintiff. And it was now alledged in Arrest of Judgment, that the Plaintiff ought to have alledged the day and place of the request, for it is issuable, and it is not like to a common action upon the Case where a duty is due, for there it is payable without request, and it is in nature of an action of Debt; but here an action is only maintainable upon the promise, and is not payable without an express request, and shewing what is due. And so it was adjudged.

Preston versus Tooley, Trin. 29. Rot. 768.

(33) **E**rror upon a judgment in an Assumpsit, brought in the Common Bench, Pas. 28. Rot. 927. The Case upon the Record was, Tooley brought an Assumpsit against Preston, and declared that whereas John Gibbons by his writing Obligatory sealed with his Seal, 26 Eliz. in forma & natura scripti Obligator' sine recognitionis secundum formam statuti stipulæ apud Westmonasterium, de debitis pro merchandisi in eadem emptis recuperand' ordinat' & provis' debito modo confect' coram Christophoro Wray Capit' Justiciario, &c. recognovit & concessit se teneri in mille libris, &c. juxta formam dicti Statuti, &c. And that afterwards upon the Twenty eighth day of March. 27 Eliz. at London, at the request and instance of the Defendant, he had delivered the said writing Obligatory to him, ad inspiciendum, and safely to keep and redeliver to the Plaintiff within six days after, and that the Defendant in consideration thereof, did then assume to him, that if he did not redeliver it within the said time, that he would pay him, when required, 1000 l. and alledgeth that licet the Defendant had not redelivered the said writing Obligatory, within the said six days after the said delivery, and licet the said Plaintiff after the said six days passed, viz. at such a day and place required the said Preston to pay the said 1000 l. according to his promise; he had not paid, and refused to pay, to his damages of 1000 l. upon which the Defendant did demur in law, and for cause shewed that there was no sufficient consideration to charge him. But after divers arguments it was adjudged a good consideration to charge him, and thereupon a Writ of inquiry of damages was awarded, upon which it was found that by the not performance of the promise the Plaintiff sustained damages 200 l. and for costs of suit 53 s. 4 d. which were accordingly adjudged to him; and 17 l. 6 s. and 8 d. more for costs. And upon all this matter a Writ of Error was brought. 1. Error assigned was, that the said Statute was meerly void, for it is alledged to be a Statute Staple, according to the Statute for the Recovery of Debts, made at Westminster, &c. Whereas it is a meer Statute Staple which is to be acknowledged before the Mayor, &c. According to the Statute of 27 Ed. 3. and not before any other; and this is acknowledged before Wray Chief Justice, Sed non allocatur, for it was held clearly to be well enough alledged, for it is a Statute Staple acknowledged according to the Statute of 23 H. 8. and it is pleaded according to the usual course of pleading such Statutes. 2. Error, That there was no time certain alledged, when he delivered the Statute to the Defendant, but only it is alledged, that at such a day he was possessed of the Statute,

Statute, and delivered it to the Defendant at his instance and request, sed non allocatur, but I did not hear their reason. 3. Error out of the Record, that the Plaintiff quarto die obtulit se against the Defendant per Attornatum suum, but shewed not who was his Attorney, and if he had no Attorney, it was Error. Curia Contra, because it is not the Course of the Common Bench, to enter the name of the Attorney, till after the Declaration; and in the Declaration it is said that he appeared per Tho. Warren Attornatum suum. But Egerton shewed a president where the Entry was, that one appeared by Cutting, Attornatum suum, and shewed not his Christian name; and this being alledged in Error, the Judgment was reversed, which the Court here did agree; for where he medleth with his name, he ought to name him truly by both names. 4. Error, which was not put in the Record, that it was alledged licet he had not delivered it within six days, &c. so he doth not precisely affirm it. Curia contra; for it is a good affirmation, as Buckleys Case in the Comment. 5. Error, that the consideration was not sufficient, for it appeareth not that the Defendant had any benefit by the shewing it to him, but rather charge and trouble to keep it, and to look on it. But as to this the Court would hear no argument, for they held it clearly a good consideration; and this was the point disputed in the common Bench, and therefore they commanded the Judgment should be affirmed. But Egerton Solicitor moved that the Judgment might be stayed for another day, and then moved another Error, that upon the Writ to enquire of Damages, the Plaintiff had no day given him in Court, and no day was given to the Defendant then to appear, and vouched 8 H. 7. Rot. 29. in the Book of Entries, fol. 273. where the Error was assigned, and admitted good; and this he said was a manifest Error, and the Court said, they would advise of it; but afterward the next day it was moved again, and this Error over-ruled; for they said the course of the Common Bench was to give no day. But all the presidents in this Court are otherwise, and the death of the party Plaintiff abateth the Writ. And the Judgment was affirmed.

Post. 545.

Ante 59.
Post. 153.

Ant. 67. 70.

Yelv. 97.
Post. 144.

Co. 11. 6. b.

The Maior of Lawnsfons Case.

TRESPASS against him for taking a quarter of Corn; he justified for that it was within the Town of L. and it was Damage Feasant in his Freehold; the Defendant pleads that they were by Charter in the time of Queen Mary Incorporate, &c. and a market was granted to them, and the place where, &c. was appointed for the Market place, and he brought his Corn on the Market day, and set it there, and the Defendant took it; and upon Demurrer, it was adjudged without argument; that upon this matter the Mayor could not justify the taking.

(34.)

Co. 10. 94. b.

Post. 117.

Dinham *verſus* Beckett.

(35)

Co. 10. 89. b.
90. a.
Co. 10. 89. b.

TRrepas for breaking his Cloſe. Defendant pleads that I. S. was ſeiſed of the Land, and let it to I. D. and he as his ſervant entered, and gave no colour to the Plaintiff; and for that cauſe the Plaintiff demurred. And it was argued by Griſſich of the one part, and by Shirley on the other part. And Griſſich ſaid that when the Defendant doth make a ſpecial title to himſelf or to any other, he ought of neceſſity to give colour to the Plaintiff; but when he pleads a general plea, or that it is his freehold, it is otherwiſe. 2 Ed. 4. 8. Shirley contra, becauſe the Defendant doth make no title to himſelf, but doth juſtify as a ſervant, 18 Ed. 4. 3. Wray ſaid he ought to give colour, though he juſtifieth as a ſervant, but moved the parties to relinquish their demurrer, and plead to iſſue, which they did.

Gabriel Widow *verſus* Peter Clerke.

(36)

3 Inſt. 194.
1 Rol. 537. 7.
Moor 247.

BILL of Debt for 40 l. upon the Statute of 23 H. 6. brought by the Plaintiff, tam pro ſe, quam pro Domina Regina. And declared that whereas Anthoney Wolley. 27 Eliz. had ſued in the Court of Nottingham, before the ſaid Defendant then Mayor, and I. S. and I. D. Sheriffs there, according to the cuſtom of the ſaid Town, a plaint of Treſpaſs ſur caſe againſt A. the Plaintiff, upon which a Capias was awarded by them, to O. B. Serjeant and Officer of the ſaid Court, to take the ſaid Plaintiff, and have his body before them at the next Court, viz. 1. Septembris, to answer, &c. and that afterward, viz. 23 Auguſt, 27 Eliz. the ſaid O. B. arreſted him, and that he committed him to the priſon of Nottingham, under the cuſtody of the ſaid P. Clerke, Mayor of the ſaid Town, and keeper of the Queens Goal there; and alledged further, that he being then in priſon, 28 Auguſt, 27 Eliz. did offer to the ſaid Mayor, Keeper of the ſaid Goal, ſureties, &c. to appear at the next Court, to answer to the ſaid Anthony Wolley in the ſaid action, which ſureties he then reſuſed, and kept him in priſon until, &c. againſt the form of the ſaid Statute, per quod actio accrevit: the Defendant pleads nihil debet, and found againſt him; and this Term it was moved in Arreſt of Judgment, that the Action lieth not againſt the Mayor, for the ſureties were not to be offered unto him, but to the Serjeant, for the Mayor was the Judge to award the proceſs, and cannot be an Officer to himſelf to take the bail. Alſo the Warrant is, that he ſhall take his body and keep him till the next Court, viz. 1 Septemb. and ſo till that day is come he is in the cuſtody of the Serjeant, in whatſoever priſon he is committed. Alſo the ſurety offered is not according to the Statute, for it is that he ſhall appear ad reſpondendum, whereas it is to be only for his appearance, and not for his answer; Sed non allocantur, for it was held clearly that the Plaintiff is to recover, for the Serjeant is but the inferior Officer; and although the Mayor is Judge in ſome reſpects, yet he may be an Officer for keeping the Gaol; and here he is not only the Judge, but the Sheriffs alſo, and the Plaintiff being in priſon under him, it is proper to offer ſureties to him; and ſo is the

Poſt. 168.
1 Cr. 138.

the common course in London, upon plaint before the Sheriffs, and a precept to the Serjeants to Arrest one, the sureties shall be found and offered to the Sheriffs. 9 H. 6. 19. And when the party is brought to the Gaol he is under the Mayors custody, and not of the Serjeants. And they held clearly that the surety offered was according to the Statute, and commanded judgment to be entered accordingly, but it was stayed till the next day, and then Walmisly Serjeant said, that the Action is not well brought, for the Statute of 18 Eliz. cap. 5. is, that no Action shall be brought but by information or original Action, and not otherwise, and this is by Bill of Debt. Coke; this Action in this Court is the proper original action that is sued in this Court, and so is within the intent of the Statute, 2 R. 3. 17. 27 H. 6. 5. Also the said Statute of 18 Eliz. is to redress disorders in common informers, but here he that sueth is the party grieved. But the Court held it will be hard to maintain this Action to be sued here, for the Statute is in the negative, that it shall not be sued otherwise, which doth not refer to any person, but they would advise. Daniel said he was of Council with the Gaoler of Bostin in a Bill brought against him in this Court, and it was abated for this cause, that it was not by information. And afterward, Ter. Pasch. it was for this cause only adjudged for the Defendant; and it cannot be helpt by the Statute of 18 Eliz. for Jeofaile, for this is not matter of form but substance, by misconceiving the Action.

1 Cr. 196.
2 Cr. 94. 5.
Co. 10. 101. b.

18 El. cap. 5.
Co. 6. 19. b.
1 Rol. 537.
3 Inst. 194.
Moor 412.
Post. 544.

Hector Nunns Doctor of Physick *versus* Gee,
Pasch. 29. Rot. 498.

Covenant, and declareth that whereas the Queen by her Letters Patents granted License to him, his Deputies and Assignees, to buy Spanish Wool, and to transport it hither, &c. he by this Indenture bearing date, &c. granted to the Defendant, and to Roger Norwood, the said License for eight years, with divers Covenants to enjoy it, in consideration whereof the said Defendant did Covenant and grant to him, to pay to him one hundred pound every year at two feasts, viz. the Annunciation and Michaelmas, and further that every year at the Feast of the Annunciation, or within Twenty days after he would make a new Obligation of one hundred and fifty pound, for the payment of the said one hundred pound the next year, and alledges in fact that the Defendant had not paid him the fifty pound due to him at Michaelmas, 28 Eliz. and that he did not make an Obligation at the Annunciation, &c. and for those Covenants broken he brought the Action; the Defendant pleaded that in the Indenture there is contained proviso semper, that if the Defendant doth not every year make the Obligation at the Feast of the Annunciation, or failed of payment of the money at the day, that then and from thenceforth the said Indenture and every Clause, Article, and sentence therein should be void, and of none effect; and shewed that he failed in making the Obligation at the first day, and so the Indenture is void, and demands Judgment, si actio. And upon this it was demurred in Law, Owen and Wood argued that the Action did lie, for this Covenant broken before the Indenture became void, and therefore it is not reason

(37)

Post. 916.

Post. 245.

Post. 600.

reason but the action should well lie; but they agreed that for the Covenant for payment of the money no action did lie, because the Indenture was void half a year before, by not making the Obligation; and the Indenture is, that then and thenceforth the Indenture should be void, and so for all the time before he remaineth chargeable, as in case of Lease for years, and for rendering Rent, and for not payment the Lease to be void; although the Lease becomes void, yet for Rent due before Debt lyeth, so upon the Statute of 13 Eliz. of Leases made by Parsons, that upon non residency for eighty days, the Lease shall be void, and that all Obligations, Covenants, &c. for enjoyment of it shall be void, yet it was adjudged 26 Eliz. inter Walls & Cox, that where a Parson made such a Lease by Indenture, in which were divers Covenants on the Lessees part, and after the Lease, &c. became void by non-residency, &c. that for a Covenant broke before, an Action of Covenant did lie. But Wray said, the cases are not alike; for in that case the Covenant was plainly broken, and the Lease and Covenants after became void; but here the thing that makes the Indenture void, is the breaking of the Covenant, so they are both at one time, and so he hath lost all his bargain, and all his benefit of the Indenture, and the other party is at large, and so no priority here. But they would advise. But in Trinity Term following, it was adjudged for the Plaintiff; but I heard not their reasons; but it was said that the reason was, that the intent of the party was, that it should be void only to have benefit of Covenants broken in futuro, but for the Covenants broken before it was never their intent, but that the party should have advantage of them.

Simons *versus* Sweete.

(38)
Moor. 247.

Co. 11. 98. a. b.

Post. 689.

FAux imprisonment. The Defendant justified, because the Plaintiff said to J. S. that the Mayor of Barstable was a fool, which the Mayor hearing of, commanded the Defendant being an Officer, &c. to imprison him, and upon Demurrer it was adjudged no Plea, but for such words he might have bound him to his good behaviour, but was not to imprison him; yet if the Mayor had been in publick place of Justice, and he had called him by such opprobrious words, he might imprison him.

Hubbards Case.

(39)
Ant. 74.
Post. 98.

Action for Trover and Conversion, and doth not alledge a place of Conversion, which is a thing material and being alledged in arrest of Judgment, the Bill was abated.

Bland *versus* Maddox.

Prohibition, It was agreed clearly that a Layman may be presented to a Prebend, for non habet curam animarum; and Coke said, all the possessions of Prebends were at first the Bishops. 7 Ed. 3. 5. Co. 3. 75. b. 30 Ed. 3. 26. and de mero jure do pertain to the Bishops. (40) Mo. 261.

Carter *versus* Goddard.

Error. The Case was; Goddard brought an Assumpsit, and his Writ was in consideration, that he would procure J. S. to assign to Carter such a term in certain Lands, that he would pay him 40 l. and alledged that he at his procurement had assigned, &c. but in the Declaration it was not alledged that he had assigned the term, &c. and so no consideration; and this was assigned for Error. Coke prayed it might be amended; for when the Clerk had the Writ before him, which was good, and would not pursue it, but leave out a thing comprised in the Writ, which he had before him for his information, this is amendable, 13 H. 7. 21. 11 Ed. 4. 2. And the opinion of the Court was, that it should be amended for that cause; and they said, so was the opinion of the Justices of the Common Bench. (41) Lib. 8. 159. 2. Post. 119. 170. 435.

King *versus* Robinson. Pasc. 29. Rot. 90.

Assumpsit: The Plaintiff declared that the Defendant did assume to do such a thing, &c. and upon non Assumpsit it was found he did assume to do that and another, which he had not performed, and it was resolved against the Plaintiff; for the Justices said, where the Plaintiff declareth that in consideration of one thing, the Defendant assumed, &c. and the Jury find in consideration of that and another thing he assumed, he hath failed of his Assumpsit, and the Justices denied the Case of 32 H. 8. Bro. Verdit. Nota, it was said that Pas. 14 Eliz. Catlin did cause a Record of Pas. 21 H. 7. to be read in the Queens Bench, of a Judgment given before Fineux Chief Justice, and the Case was, A Woman in London had given to the Plaintiff flattering words equipollentia to a promise of Marriage, and by that means he delivered to her money and other things, and she had caused the Plaintiff to retain Counsel for her, and to travel about her Suits in Chancery, and afterwards the Woman refused to marry him, and married another, in disseit and fraud of the Plaintiff; the Woman traversed all the matters alledged against her, and part was found for the Plaintiff, and part against him; and this was one matter found for him, that the woman had given unto him blanda verba matrimonio equipollentia, and the Plaintiff had Judgment for those particulars that were found for him, and he was amerced for the other; and this was an Action upon the Case, for the disseit in not marrying him; for he did not declare of any promise of Marriage in facto. And Catlin said it was to be noted, that (42) Ant. 41. Post. 149. 660. 2 Cr. 504. Post. 147.

that the Plaintiff had judgment, although but part found for him, and part against him, which is contrary to that (as he said) that hath been ruled here twice or thrice, that if an assumpsit be brought upon several things, and part only is found for him, the Plaintiff shall have no judgment for any part. But Southcote said that the Record shewn was an Action for divers disceits; which being traversed, and part found for the Plaintiff, and part against him, yet judgment may be given for the Plaintiff, for the part, &c. but of an entire promise, it is otherwise; for there failing in part, he fails in all.

Bonifaut *versus* Sir Richard Greenfield.

(43)
Ant. 26.

Co. Lit. 113.a.

Co. Lit. 113.a.

THe Case was; Tremaine seised of the mannoz of D. devised the same to I. S. and three others, and to their heirs, to the intent and purpose, that the Devisees should set it for the best profit, and convert the money thereof coming, to the performance of his Will; and in the conclusion of the Will, he maketh them four his Executors, and dieth. One of the four refuses to meddle with the Will or sale, and the other three sell the land in the life of the fourth; the question was, if the sale was good. The case was argued by Popham and Egerton; and it was adjudged that the sale was good by the three, either by the Common-Law, or by the Statute of 21 H. 8. for when he deviseth the Land to four to sell, &c. and afterwards maketh them his Executors, this doth tant' amount as if at the first he had devised that such his Executors should sell; and in such a case at the Common-Law, the sale by three, the fourth refusing, was good, for they three may perform the Will without the fourth, but the Statute maketh it clear.

The Queen *versus* Blaucher.

(44)
Moor 541.
26 H. 8. cap. 3.

Post. 397.

THe Question was, if that upon a traverse to the certificate of the Bishop of Lincoln for not payment of tenths upon demand, nor within forty days after, whether the benefice be void by the Statute of 26 H. 8. cap. 3. that enacts that after such default, and certificate thereof made to the Court under the Seal of the Bishop, that it shall be void. Manwood chief Baron said, it hath been a great question if this certificate of the Bishop be peremptory, or that the party shall be admitted to his traverse of it. And upon great deliberation between the Barons, and by the advise of the other Justices, it hath been clearly held that the certificate is not peremptory, for the Bishop doth it only as an Officer, scilicet, as Collector of the Tenths, and not as a Judge, as in the case of Bastardy. And here is to be a default in the Parson, viz. not payment, which is triable per pais, for otherwise all the Parsons of England may be put out of their Parsonages by such nude surmise and bare certificate without any answer; and the Law never intended to make the certificate so peremptory. And Baron Gent said, he had known it so ruled in his experience upon an issue, upon avoidance, or not avoidance, upon

upon that Statute in a Quare Impedit. And all the Barons held in the principal Case, That the Officer of the Bishop, which is to demand the Tents, ought also to be authorized to receive them: for he cannot appoint them to be paid at another place, or to another person; for the Parson is to pay them at his own house, and to the person that demands them in the name of the Bishop: And they said it had been so formerly ruled.

M

Termino

Termino Hillarii,
Tricesimo ELIZABETHÆ,
in Banco Reginae.

Arthur Robfert *versus* Andrews & Ann. Uxor' ejus,
& Cocket. Intrat. Trin. 22. Rot. 583.

(1)

ERror of Judgment in the Common-Bench, in an account which is entered there; Term. Pasch. Rot. 940. where Andrews and his wife, and Cocket declared against the said Arthur Robfert; That he the 20 of August, 10 Eliz. Ap'd Filly in Com. Norf. was the Receiver of the money of the said Cocket and Ann. Dum sola fuit, viz. by the hands of Jo. Wafe, one hundred pound to render an account, when he should be required; yet the Defendant being required to do it, had refused, to their damages two hundred pound: The Defendant pleads, that he was never their Receiver of the said one hundred pound, or of any parcel of it, by the hands of the said Jo. Wafe, to render an account, &c. And upon this they were at issue; and it was found by special Verdict, that the 10 August, 10 Eliz. one Osbert Muntford gave the said one hundred pound for the relief of said Cocket and Ann, and delivered the same to the said Jo. Wafe, then his servant, to the intent he should deliver it to the said Arthur Robfert, for the relief of the said Ann and Cocket; and that he the said 20 August, 10 El. did deliver it to the said Arthur Robfert, for the relief of the said Ann and Cocket, according to the said intent; and if upon the whole matter Arthur Robfert shall be said to be the Receiver of their money, by the hand of the said Jo. Wafe, Prout, &c. They prayed the discretion of the Court; and it was adjudged, he shall be said to be their Receiver Prout, &c. and that he shall account with the said then Plaintiffs, for the said one hundred pound. And afterwards by virtue of a Writ of Capias ad computandum directed to the Sheriffs of London, the said Arthur Robfert was taken, and brought to the Bar, and committed to the Fleet, Quousque, &c. And afterwards Auditors were assigned to him by the Court to hear his account, and he found Hainpernoys in two hundred pound

pound, to enter into account before them, and to finish it, &c. and to appear in Court De die in diem, until Judgment was given thereupon, and to satisfie all the arrearages, which by the Court he should be adjudged to satisfie, or to render his body to prison, until he had satisfied. And hereupon he entred into account, and alledges; That he had maintained the said Ann dum sola fuit, (who afterwards intermarried with Andrews) and the said Cocket by the space of eight years, at D. in the County of M. and had expended the said One hundred pound for the relief of the said Ann and Cocket; and so prayed to be discharged: And upon this they were at issue, that he had not expended the said One hundred pound for the Relief, &c. And it was found for the Plaintiffs, and damages assessed above the said One hundred pound, Ratione interplacitationis compoti prædicti twenty pound, and costs ten pound. And upon this Verdict, Judgment was given for the then Plaintiffs, and the costs were increased by the Court; and upon this Judgment, Arthur Robfert brought a Writ of Error. Fenner Serjeant for the Plaintiff, assigned divers Errors. 1. The matter in Law, which was adjudged in the Common Bench, viz. That they declared he was their Receiver, to render an account of the One hundred pound; whereas it was found he received the money for their relief, and not to account. But the Court held clearly, That when he received the money in that manner, he received it to their use, and is accountable if he did not expend it; and it is as if he had received it to their use by express words. 2. Error, That they declared that he was their Receiver Ad computandum; and he is not accountable, unless he did not expend it in their maintenance, and so ought to have a special Writ, and declare specially, Sed non allocatur; for they to whose use the Bailment was made, can have no other Writ; for they cannot suppose he received it Ad Merchandisandum, for that is false, and he had no such authority; and in that case his costs were to be allowed him. 3. Error, That in the Writ and Count, he is supposed to be Receiver of their money, by the hands of Jo. Wafe, whereas it ought to be by the hands of Osbert Munford; for Wafe delivered it as his servant, and it may be said the delivery of the Master; and by the hand of the Master, the Receipt ought to be supposed. Coke answered, That whereas the servant doth contract; this shall be said to be the contract of the Master, and he only charged for it, 11 Ed. 4. 6. But here they convey only a possession by the hands of Wafe, but conveyed no interest by him; and therefore may count, that he received it by his hands. 4. Error, For that the Writ was, and they accounted that he was their Receiver, to render an account when required; which is false, for no request was mentioned upon the delivery. Coke, The Law implieth it, 21 Ed. 4. 42. 5. Error, The Writ of Account was brought in Norfolk, and the Cap' ad computandum was awarded to London; whereas it ought to have been to the Sheriff of the County where the Action was brought. Coke said it was helped by the Statute of Jeofails, and he appeared upon this Proces, and so had made it good; and Error in Proces cannot be alledged after In nullo est erratum pleaded; for if it had been alledged, the other party might have alledged Diminution. 6. Error, for that before the Auditors the Defendant alledged, That he had expended the One hundred pound for the relief of the Plaintiffs;

and they replied, That he had not expended the One hundred pound, but said not, nor any part; for if he had expended any part, it is not reason he should give an account of that part; and Judgment given upon an ill issue, is erroneous. Coke, that inasmuch as it is a Collateral-issue, he is only to joyn with his adversary, and is to add nothing to it; but in a General-issue it is otherwise: As in an Action of Waste for cutting twenty Oaks, the Defendant ought to plead, That he did not cut the said twenty, or any of them; but in Debt upon an Obligation, that he shall do no Waste: And the breach is assigned, That he cut twenty Oaks, it is sufficient to plead he did not cut the said twenty Oaks, *Modo & forma, &c.* 2 Mar. Dyer 115. 7. Error, it doth not appear to the Court, that there was an original Writ, for it is not certified, and the Defendant hath pleaded in *Nullo est Erratum*; and therefore cannot alledge Diminution, 20 Edw. 3. Error 2. 9 Edw. 4. 32. and Judgment given where there is no Original, is erroneous. Coke, If the Plaintiff assigneth for Error, that there is no Original, and the Defendant pleads in *Nullo est Erratum*, he cannot after alledge Diminution; but this error being assigned *Hors de Record*, the Court here may write to the Common Bench to certify it; for by the Writ of Error, all is certified which is with the Chief Justice there, which is only the body of the Record; but the original and judicial Writs remain with the *Custos Brevium*; and other Officers, which are never certified but where Error is assigned for want of them. 8. Error, That the Plaintiff had Judgment to recover Damages and Costs, and it is a Positive Law, he shall have none in a Writ of Account; as 2 Rich. 2. & 14 E. 3. Damages. And although there is a President in the Book Of Entries, where in an account, damages were given, the reason is, because the goods were delivered *Ad Merchandisandum*; and to have increase; but it is not so in this case. But it was answered, That in the first Judgment to have an account, damages shall not be recovered; but here damages are not given *Ratione detentionis compoti*, but *Ratione interplacitationis compoti*, where the Plaintiffs are delayed by the Defendants Plea: And although goods are given to merchandise, yet he shall not recover damages for the detainer, but all shall be put in the arrears of the account. And in the Old Magna Charta it is shewn in what Writs damages shall be adjudged, and a Writ of Account is one of them: And in the Book of Entries, fol. 17. Damages are given in account. And afterward, notwithstanding these Errors, the Judgment was affirmed.

Crow's Case.

(2)
 Error of a Judgment in Trespass of Assault and Battery, because the Judgment was *Quod sit in misericordia*, whereas it should be *Quod capiatur*. Tanfield moved, That this is for the Plaintiffs benefit, and is the default of the Clerk, and so shall not be assigned for Error; but the Judgment for that cause was reversed. 29 Edw. 3. 29. 14 Eliz. Dyer 315.

Levellin versus Watkins.

Error to Reverse an Attary, because the original was against Levellin, with a single L. and all the mean Proces was versus Llevellin, with a double LL. and the Proces was against two, and the Sheriff returned Quod non sunt inventi, and doth not say, Nec eorum aliquis: And the Judgment was for these Causes Reversed. (3) Post. 104. 198. 248.

Griffling versus Wood.

Error for that in an Action in an inferiour Court; the Declaration was in English, whereas by the Statute of 36 E. 3. c. 15. all Entries are to be in Latin: And although it was said the custom there was so used, yet this cannot be good against a Statute, and the Judgment was reversed. And Evens said, That divers Indictments had been discharged for this cause. (4) Post. 185.

Devenly versus Ann Welbore.

Assumpsit against the Defendant as Executrix of George Welbourne, and declareth, That in consideration that the Plaintiff would assure certain Lands to Tho. Percy at the instance of the said George; he assumed, That if Tho. Percy did not pay him yearly upon request ten pounds, and ten Load of Faggots, that he would pay them; and alledgeth in fact, That he did assure the Land, &c. to the said Tho. Percy; and that the said Tho. Percy Licet sapius requisitus did not pay the said ten pound, and ten Loads of Faggots; nor the said George in his life, nor the Defendant since his death: Upon Non Assumpsit, it was found for the Plaintiff. Coke moved in Arrest of Judgment, that the Declaration was not good; for the payment of the ten pound, &c. was to be upon request, and a request is material, for otherwise, the Defendant is not chargeable: And therefore the request, and the time and place where to be expressly alledged; and of that opinion was the Court, and Judgment given, that the Plaintiff Nihil cap' per billam. (5) Ante 74.

Wikes *versus* Morefoots.

(6)

Post. 485.

TRespass. It was held *Per curiam*; That if one takes my Horse, and sells it in a Market, Overt and Toll paid for it, but he enters his name falsely in the Toll-Booth; yet the sale is clearly good, and the property altered, if there was no Cobin in the Vendee: For the Misconfer of the party is nothing to him, when he buys it *Bona fide*; and is not Conisant of the Tortious taking; and they advised the Plaintiff to discontinue his Suit, and ordered that small costs should be assessed; and it was so done.

Moor 249.
4 Inst. 180. I.

King's Case.

(7)

Mo. 249.

King was indicted; for that whereas he was bound by Recognisance to be of Good Behaviour, he had said to one Kirton, That he was a Pelter, and a teller of lies, and a Drunkard; and that he would make him a poor Kirton; and that he had entred and broke the Close of Kirton: For which, an Action of Trespass *vi & armis* lieth; and the question was moved by Coke, If these be causes of the breach of his Recognisance? For it is a common course in such cases to indict men, which will be evidence in a *Scire facias* upon the Recognisance. Wray and Gawdy conceived at first, That they are no causes of the breach of the Recognisance; for the party doth not break his Good Behaviour, except he doth something in act or shew, which tends to the breach of the Peace: As if he goeth in warlike manner with weapons, or is in company of riotous Malefactors, although nothing be done, or threatens another to beat him, or to fight with him. These (although nothing be done) are breaches of the Good behaviour: But when he speaks only words of reproach, which may procure another to break the Peace; this is no breach of the Good behaviour. And they held clearly, that the entry into the Close was no breach, being done peaceably, and he might pretend title to it; although in an Action, it is supposed to be *Vi & armis*, and *Contra pacem*. And Wray said, That nothing shall be said a breach of the Recognisance, but that which sounds to the hurt of another, and by Intendment may be a breach of the Peace; as Assault, Menace, &c. And he said, If one be leading of his Horse; and he that is bound to his Good behaviour, doth take it from him: This peradventure may be a breach of the Good behaviour; for it is an assault upon his person, although he take it peaceably. Clench contra: For the words being spoken in disdain and reproach, shall be said a breach of the Recognisance; for it may be cause of the breach of the Peace, as well as carrying of weapons, or having a great company following him, as 2 Hen. 7. is; and the words being malicious and opprobrious, give occasion of blows; but the entry into the Close is no breach. Shute doubted of the words, because they were opprobrious and spoke in malice, and do provoke another to break the Peace. And the Court said they would advise. V. 4 Inst. 180. & 181.

Smitr's Case.

HE was indicted at the Sessions of the Peace in the County of Oxon, for forging a false Deed, against the Statute of 5 Eliz. And now Tanfield moved, that this Indictment was not well taken before the Justices of the Peace, for they have no power to take it; for the Statute is, that Justices of Oyer and Terminer, and the Justices of Assize in their publick and open Sessions, shall have power to inquire of such offences, and give them no authority to Justices of the Peace in their Sessions to inquire of it. And of that opinion were all the Justices, that the Indictment taken before them was void; for they have several and distinct Authorities and Commissions, one to hear and determine, which is to be kept in a place, and at a time certain, and is to be adjourned to a certain time, and a Commission of the Peace, by virtue whereof they are to keep their Ordinary Sessions; and this Indictment was taken before them *Ad Sessionem Pacis*: And Ewens said to them; so it hath been ruled within these two years. But Popham Attorney said, that he had known divers such Indictments taken, and never contradicted, and the parties had suffered the punishment of the Statute: And thereupon the Court said, they would advise; but in this Term the Indictment was discharged.

(8)

Co. 9. 118. a. b.
Post. 697. 601.

Higham *versus* Reynolds, Mich. 29 & 30. Rot. 562.

Trespas for entring and breaking his House, and cutting six posts of it, 1 May, 28 Eliz. The Defendant pleads, that as to the breaking of the House, and all the Trespas except the cutting of the three posts of the House, not guilty. And as to the cutting of the said three posts, he said, that upon the said first of May 27 Eliz. it was the Free-hold of one Anthony May, and he by his command entred and cut the said posts, which is the same Trespas, &c. Absque hoc, that he was guilty of any Trespas before the said seven and twenty years, &c. but doth not traverse the time after, &c. And upon this Plea it was demurred; and it was argued by Brecknam of the one part, and by Alham of the other part. And first, Exception was taken; for that the Defendant pleads as to all the House, not guilty, and avers justifieth as to the three posts; and so pleads not guilty to one thing, and justifieth for the same thing, which is no good pleading; as 21 Henry 7. 31. The second Exception and Cause of the Demurrer principally was, for that he saith it was the Free-hold of Anthony May, and justifieth by his command, 27 Eliz. which was a year before the Trespas supposed, and traverseth the time before 27 Eliz. but saith nothing to the time after 27 Eliz. and relied upon 5 Edw. 4. and other Books, that he ought to traverse the time after, as well as the time before. Third Exception, that he saith it was the Freehold of Anthony May, and doth not aver his life; but that Exception was overruled, that it shall be intended he had the Fee, when he pleads generally it was his Free-hold. Alham answered as to the two other Exceptions, and said as to the first, That although the Defendant pleads not guilty generally to the whole House, yet he may after justify as to parcel; for he hath pleaded not guilty to all, except this special parcel, and so is 35 H. 6. And as to the second

(9)

V. ant. 57.
Co. 9. 27. a.

second Exception, he said the Plea was good, although he doth not traverse the time after : For when he pleads his Freehold, or the Freehold of another, it shall be intended so to continue, except the contrary be shewn, and therefore need not traverse the time after ; and so is 5 Edw. 4. 15. And to this opinion the Court inclined, but they would advise of it ; but afterwards it was adjudged for the Plaintiff.

Gosnal versus Kindlemarsh.

(10)

Post. 262.

DEbt upon an Obligation, dated 25 March, &c. The Condition was, That the Defendant be not absent from his Benefice by the space of eighty days, nor permute or resign without the assent of the Patron, That then, &c. the Defendant pleads the Statute of 13 Eliz. By which, all Leases of Parsons made of their Benefices where they are absent, by eighty days Et ultra ; and all Obligations for enjoying them shall be void ; and alledgeth, That he was absent by the space of eighty days, but saith not Et ultra. Upon which Plea it was demurred ; and it was moved by Coke, That this was an incurable fault in the Plea ; for he ought to have said he was absent eighty days Et ultra ; for he may be absent for eighty days, and come again in the night of the eightieth day ; and this must be expressly alledged, and not by Implication. Coment. 143. And of that opinion was the whole Court, but they moved the parties to agree, and in the mean time they would stay judgment.

Bagnall versus Stokes.

(11)

Post. 666.

Post. 595.

Prohibition, and surmised, That the Defendant sued him, being an Executor in the Spiritual Court for a Legacy ; whereas the Plaintiff had a Release, but had only one witness to prove it ; but a consultation was granted : But if he had surmised, that he had pleaded this Release in that Court, and produced his Witnesses ; and that they would not allow it, because it had not two Witnesses : This had been a good Surmise. And it was said the Plaintiff is at no mischief ; for he may have a Prohibition after Sentence given in that Court.

Hamond versus Barker.

(12)

TRespass. Upon evidence the Case was. J. S. by Deed inrolled in Chancery, bargained and sold a House and certain goods to the Plaintiff, and after took the goods again, and would avoid this bargain and sale inrolled, by Durels of Imprisonment. Godfrey said it cannot be avoided by such nude matter in fact. 7 Edw. 4. 5. 39 Hen. 6. 32. 13 Ed. Elstoppel 18. 48 Edw. 3. 33. For being inrolled, it is a thing of Record. Morgan contra ; and he said, A Deed inrolled is no Record, but a thing recorded, 16 Henry 7. 5. and cited Browne and Weston's Opinion in one Morley's Case accordingly : The Court said, the case was doubtful, and they would advise ; but afterward they conceived it would be hard to avoid the Deed by Durels, but no Judgment was given, because the parties agreed.

Richard

Richard Scovel *versus* Jo. Cabel, Trin. 29. Rot. 193. 1 Leon. 317.
Moor 267.

Ejectione firmæ, The Case was, Leverage made a Lease to Stephen Cabell, Jo. Cabell, and William Paine by Indenture, To have and to hold to them for term of their lives. Proviso, and it is covenanted and granted between them, that the second shall not occupy the Land during the life of the first; and the third shall not occupy during the life of the second; and afterwards the first occupieth all and dieth, and then the third enters, and made a Lease to the Plaintiff who was put out by the Defendant; and all this matter was found by special Verdict. And the question was, if this Proviso be a Limitation of the first estate, and severeth the estate which was given to the three jointly, and makes each of them in Remainder one after the other? or it be only a nude Covenant. Harris for the Plaintiff, that there is a joint Estate given to them expressly by the Premises of the Deed; and the words after in the Proviso cannot sever the estate, and divide it so, that one shall take after the other; and the Proviso is void and repugnant to the Premises, and cited a Case in Bendloe's Reports to be so ruled, 14 Edw. 6. Heale contra: The Proviso is an Explanation of the Premises of the Deed, and may stand with it, and is a Limitation of their estates, how each of them shall take, and cited 8 Edw. 3. Ante 25. a Lease unto two; Habendum to one for life, Remainder to the other. And he said he had known it resolved in this Court, where a Lease was made to three, Habendum to them for their lives, Successive prout nominantur in the Deed; this made each of them in Remainder after the other: And in the Common Bench it was ruled, that whereas a Lease was made to three for their lives, Habendum to them, to the use of the first for life, and after to the use of the second for his life, and so to the third, they were several estates one after another, so here; their intent appearing to be so. Gawdy held strongly, That the Proviso shall not controul the express Limitation before. Shute and Clench contra: because their intent appeareth; and one cannot have Covenant against the other, if they occupy not according to the Limitation of their Estates. V. Residuum, Mich. 30 & 31 Eliz. in Banco Regina Placito 1. Ante 58.

Carden *versus* Tuck.

Ejectione firmæ. Upon special Verdict it was found, that J. S. being seised of a Messuage, to which a Garden and Curtilage did belong, joynd together and inclosed with a Wall, and there was no way to the Garden, but through the Messuage; he devised the Messuage to his second son, in Fee, and mentioneth not the Garden or Curtilage, nor saith Cum pertinentiis; if the Garden and Curtilage pass, was the question. And after argument by Heale of the Plaintiffs part, and Drew for the Defendant, it was adjudged, that the Garden and Curtilage did pass; for they agreed clearly, That a Curtilage is as parcel of a house, and shall pass in case of a Feoffment, without saying Cum pertinentiis, as a Stable or Dovehouse: But they doubted of a Garden, because it is but a place of pleasure, but afterwards they resolved the Garden did pass; for it is as well for necessity, as pleasure. (14)

Anc 30.
Co. Lit. 56. b.

John Harris *versus* Nicholas Bowden.

(15)
F.N.Br.95.D.
2 Cr. 234.

Action upon the Case, because the Defendant at D. enticed the Plaintiff to play at Dice at a sport called Five or nine, intending to deceive him, and get his money; and he by the Defendants perswasion did play with him at the said sport; and the Defendant in playing at the said sport, delivered to the Plaintiff Quosdam talos veraciter titulos, to play with; and when the Dice came to the hands of the Defendant, he by practice, falsly and fraudulently, Quosdam alios talos falso & subdole titulos, quos numeros quinque vel novem, aliquo jactu unquam attingere scivisset, adtunc & ibidem projecit, and then played with the said false Dice; by which, the Plaintiff lost to the Defendant divers sums of money, amounting to: Forty one pound six shillings eight pence: And the Defendant falsly and fraudulently, under the colour of getting, took and carried away the said money, to his damages two hundred marks; The Defendant pleaded not guilty, and it was found against him; and it was alledged in Arrest of Judgment. 1. Exception, that the word talos was no word for Dice, Sed non allocatur; for it is a proper word for Dice. 2. Exception, that the word lucisset was written with a c, which is for shining; but the Record was viewed, and it was written with an s, and the Plaintiff had Judgment.

William Willoughby's Case.

(16)
Post. 664.

He was indicted before the Justices of Assise, for that he Vi & armis had inclosed certain Land, in which Williams and others had common, time out of mind, &c. And Exception was now taken to the Indictment, because it concerneth only the interest of particular persons, and was no common Nulance to the Queens people; and it concerning a private commodity of certain persons, and not of the Queen, or her people in general, the parties grieved are to have their Action upon the Case, 27 Ass. 10. And Madox case was adjudged the last Term, That for a private commodity, remedy shall not be by Indictment. 2. Exception, That it was Vi & armis, and a man cannot inclose his own ground, Vi & armis. 3. Exception, That the Telle of the Indictment was at the Gaol-delivery, in the County of Nottingham, before Robert Shute, Francis Gawdy, and other Justices of the Peace of the Queen, &c. in the said County; and for this cause it was alledged to be void, for at a Gaol-delivery they have no authority to take such Indictments. And this was held a material Exception; but the Justices said they would advise, &c.

Knight *versus* Fortipan, Mich. 29 & 30. Rot. 265.

(17)
Co. 4. 22. b.
Post. 148.662.

TRespals. The Case was, a Copyhold was granted to one for life, Remainder to an Infant in Fee, they joyn in a Surrender to A.B. who was admitted Tenant for life, and he in the Remainder dies, and the Heir of him in the Remainder enters; and if he may enter, or shall be put to his Dum fuit infra ætatem, was the question. And it was argued by Tanfield and Atkinson, and the Entry was adjudged lawful: For a Surrender is but a Conveyance by matter of Fact, and no higher, and the Heir may enter, and bring Trespals before Admittance.

Trewinian

Trewinian *versus* Howell.

ERROR of a Judgment in Assumpsit against the now Plaintiff, as Executor to T. Trewinian his Brother, in which Howell declared, That whereas the Testator was indebted to him in a certain sum; the said Trewinian, the then Defendant, did assume, That if he had goods sufficient, that he would pay him; and alledged, that he had goods sufficient. And upon Non Assumpsit, it was found for the then Plaintiff, who had Judgment; and upon this, Error was brought; and the principal Error assigned was, That there is no sufficient consideration alledged; for the having of goods was no consideration, but in consideration he would forbear to sue, &c. this had been a good consideration. But it was said of the other party, that he being Executor, his promise (he having Assets) doth bind him, for he is in duty to pay it: And Daniel said, It was adjudged in one Hudson's case, that a promise of the Executor to pay a debt, is binding, if he hath Assets, otherwise not. And so Coke said, it was adjudged in Sir William Cook's Case, that such a promise is good without any other consideration, if he hath Assets of the Testator in his hands, otherwise not; for the consideration is only by reason of the act and debt of the Testator: And therefore shall bind me no further, then the goods of the Testator amount. 2. Error, That the Judgment was general, and not De bonis Testatoris as it ought to be; for by such a General Judgment he shall be charged of his own good; and the Court said, they would advise. But at another day (Absente Wray) it was adjudged, the Judgment should be affirmed; for it was a good Assumpsit, and he shall be charged De bonis propriis, being of his own promise. (18)

Co. 9. 94. d.
Post. 406.

Osbaston *versus* Garton.

ERROR of a Judgment in an Assumpsit, where Garton declared, that Osbaston did assume to pay to him for every stone of Wooll he delivered to him, six shillings ten pence, and saith, that he delivered to him so many stone of Wooll as amounted to thirty nine pound ten shillings; and alledged further, that Licet sapius requisitus, to pay the said thirty nine pound ten shillings he had not paid; the Defendant pleaded Non Assumpsit to pay the said thirty nine pound ten shillings, Nec aliquam inde parcellam, and found against him, and Judgment: Two Errors assigned, 1. That he saith Licet sapius requisitus, but sheweth not the day and place of the request; and this is not properly a debt, but riseth by reason of the delivery of the stones of Wooll; and therefore ought to expressly alledge a request, being a duty that accrueth with the Commencement of the promise, and not before: And of that opinion was the whole Court. 2. Error, For that the Issue was, that he did not assume to pay the thirty nine pound ten shillings, &c. which is not alledged in the Declaration; but that he assumed to pay for every stone of Wooll six shillings ten pence, which amounted, &c. and so no Issue was joyned: And of that opinion was the Court, and the Judgment was reversed. (19)

Ante 74.

Albany *versus* Sir Anthony Sturline.

- (20) **E**Rror in the Erchequer Chamber upon a Judgment in Banco Regis in an Assumpſit; the Writ of Error ſuppoſed, that the Recovery in the Action was of two hundred two and twenty pound damages, whereas in truth the damages and coſts aſſeſſed by the Jury did amount to ſo much; but the Court did adjuſt to the Plaintiff De incremento twelve pound; ſo as all the damages did amount to Two hundred thirty four pound; and it was ſaid now in Court, that there is no Recovery of Two hundred twenty two pound only. So the Writ was no Warrant to remove the Record, 9 Hen. 6. But Popham moved, That the Writ of Error was well brought; for it needed not to have mentioned all the damages, but only what was found by Verdict, and might leave out the other. Curia contra; For when the damages are aſſeſſed, they are entire, and cannot be divided; and thereupon awarded, that the Writ of Error was not well brought.

Ow. 44.
Moor 272.
1 Leon. 135.

Broker *versus* Charter, Mich. 29 & 30 Eliz. 2 116.
in Communi Banco.

- (21) **T**Reſpaſs. It was found by Verdict, that Sir Ralph Rowlet being poſſeſſed of a Term, did make his laſt Will, and thereof did make the Lord-Keeper Bacon, Catlin Chief Juſtice, and others, his Executors, and deviſed the Term to the Lord Catlin, and died. All the Executors writ a Letter to Dr. Dale, Judge of the Perogative Court, that they could not intend the execution of the Will, and deſired him to commit the Adminiſtration to Henry Goodyer the next of kin to the Teſtator; and the Adminiſtration was accordingly granted; but the Register entred the cauſe, for that the Executors did defer Suſcipere onus Teſtamenti. After this, Catlin entred upon the Land deviſed to him, and granted it over; the doubt was, if this grant was good. Firſt, If the Letter be a ſufficient renunciation? Secondly, If they once reſuſe? if they after Adminiſtration granted, may adminiſter at their pleaſure? Dr. Ford declared to the Juſtices, that by the Civil Law, a renouncing may be as well by matter in fact, as by a judicial act, and they may reſuſe by Parol, and cited a Rule in the Civil Law, Non vult eſſe hæres, qui ad alium vult transferre hæreditatem; and Hæreditas eſt totum jus quod deſunctus habuit. And to the ſecond matter he ſaid, Qui ſemel repudiaverit hæreditatem, amplius hæreditatem petere non poteſt; and qui ſemel repudiaverit ſhall not after be Executor Quia tranſit in contractum: And that Executors cannot reſuſe for one time, but for ever; but they may pray time to adviſe of taking upon them the Executorſhip, and it ought to be granted; and in that caſe the Ordinary is to grant in the mean time Letters Ad colligendum, &c. but is not to grant Adminiſtration. And for theſe reaſons there being a reſuſal, the Grant made after Adminiſtration committed, was void; and ſo was the opinion of the Court.

Co. 9. 37. a. b.

Termino Paschæ,
Tricesimo ELIZABETHÆ,
in Banco Reginae.

Prowse *versus* Cary.

Action for words, Thou hast procured false witnesses to swear in such an Action: Upon not guilty, it was found for the Plaintiff. Glanville moved an Arrest of Judgment, that the words are not actionable; for it is not alledged, that he suborned or procured them to swear falsely; or that he knew they would swear falsely. Curia contra: For when it was said, he procured false Witnesses, it is intended in Malam partem, That he procured them to swear for him, which would swear falsely: But if the words had been, You brought in false Witnesses, Action did not lie for them. (1.) Post. 99.

Mildward & alii.

An Indictment upon the Statute of 8 H. 6. against them was discharged; for the Statute was recited, That if any be of his Lands and Tenements expelled or disseised, or be held out with force, and saith not Manu forti; for the words are Manu forti expelled or disseised: Secondly, the Statute is recited, That the party grieved may have his recovery Per assisam novæ assise, whereas it is to be Disseisinæ: And the parties had restitution. Nota, The Record of the Indictment was removed in Michaelmas Term last. (2.) Post. 461.

Jerome & Avicia Uxor' *versus* Phear & Neale,
Hill. 29. Rot. 515.

Trespas, of Assault and Battery, and wounding of the Feme Plaintiff; the Defendant pleaded, That the Village of New Sarum was an ancient City, and that time out of mind it had been used there: That upon complaint to the Major of a Battery and Affray, that he as a Justice of Peace shall send his Serjeant at Mace, or an Officer Conus, for the party to come before him and answer, &c. And alledgeth in fact, That Jerome the Plaintiff had made a Battery; and thereupon complaint was made to the Major; he sent the Defendants (being Constables there) to attach him, and to bring him before the Major to answer, &c. Whereupon they came to him to attach him, and the Feme Plaintiff eos impedivit; whereupon they laid their hands upon her Molliter, to cause her to desist, that they might attach him, which is the same Trespass, &c. and demand Judgment Si actio, &c. And upon this Plea; (3.)

Plea, it was demurred in Law. Coke argued for the Plaintiff, and alledged, That the Plea was insufficient for four causes. 1. That the prescription was void, and against Law. 2. That they came to attach him, but saith not within the City; and it may be intended in another place out of the City. 3. The Defendants alledge, that they did Moliter lay their hands on her; which is the same Trespass, but answer not to the battery and wounding, nor traverse it. 4. They justified at New Sarum, but do not traverse the Trespass which was supposed in Middlesex: And for the first point, Coke said it is against Magna Charta, and 25 Ed. 3. 4. 42 E. 3. 3. that none shall be imprisoned, but by reason of Indictment, or due Process of Law, and not upon complaint; and a prescription to be a Justice of Peace cannot be, for the authority of a Justice of Peace commenced by the Statute of 1 Edw. 3. and before that time they were only Conservators of the Peace: And the other matters are apparantly vitious, and no defence can be made of them; and the Court commanded that Judgment should be given for the Plaintiffs, and principally for the two latter points; for they would not speak to the first, because it touched the authority of Majors, &c. But the next day they commanded Judgment to be staied, and that the Plaintiffs should come before them; by which it seemeth, they intended to make a composition.

Nicholson versus Lyne.

(4) **A**ction for words, that the Plaintiff being a Minister, the Defendant said of him, That he had two Wives, to cause him to be deprived: Upon not guilty, it was found for the Plaintiff. Coke moved in Arrest of Judgment, that the words were not actionable, for it is a Spiritual fault; as to call one Heretick, &c. But it was answered, that forasmuch as the Plaintiff was a Minister, This is a Defamation, and cause of Deprivation, if true; yet Judgment was given against the Plaintiff.

Pearle versus Unger.

(5) **A** Scumpfit, and declares, That he was possessed of certain Land for years, the Defendant in consideration he had occupied the Land, and had paid the Rent to the Defendant, viz. Thirty pound per annum all the time he had occupied it; he assumed to save him harmless for the occupation of the Land always, during the term, as well for the years passed, as to come; and alledges, that before the time of the promise, viz. Such a day, &c. his Beasts were taken Damage-fesant, &c. and that the Defendant had not saved him harmless of it; and upon not guilty, it was found for the Plaintiff, and damages assessed. Golding moved in Arrest of Judgment, That here is no consideration to maintain the Action; for the consideration and cause of the promise was a thing done before, viz. The occupation and payment of the Rent; which being past, are no considerations for a thing future, to be done: But it was adjudged for the Plaintiff; for the consideration, that he was in possession, and had paid his Rent, and was to pay his Rent, is sufficient to cause the other to defend his possession for the time past, and to come.

Richardson

Richardson *versus* Pricket.

FAux Imprisonment. The Plaintiff supposed the Trespass and false imprisonment to be 10 Dec. 29 Eliz. the Defendant pleads, That he by vertue of a Warrant of the Sheriff, &c. did arrest and imprison him, 2 & 3 die Decemb. before. Absque hoc, That he was guilty before or after, &c. The Plaintiff said he was guilty of the Trespass, &c. after the third day of December, Prout in Narratione sua specificatur. And upon this they were at issue, and it was found for the Plaintiff. And it was said, that the issue was not well joyned; for it is, That he was guilty, &c. after the third day, &c. but saith not, and before the Action brought. But it was ruled to be well joyned; for when it is said, he was guilty after the third day, &c. Prout, &c. it is to be intended between the third day, and the day of the which he counted. And the Plaintiff had Judgment. (6)

George's Case.

Moor 261.
1 Cr. 417.

Action for these words, Thou art a couzening Knave; thou hast couzened me of Twenty pound at such a place, and such a man of Twenty pound, and there is never a George in England, but he is a couzening Fellow. Upon not guilty it was found for the Plaintiff: And it was ruled, That the Action lieth not, for Wray said they are too general to bear an Action; and a man is to suffer no pain or loss for those words, if they were true. And one Egletons Case was cited to be adjudged, Thou art a couzening Coroner, for thou hast couzened J. S. of his Lands; no Action lieth. And Wray said, That in a Writ of Error between War-ker and Middlemore, which doth depend in the Erchequer Chamber, Action for these words, Thou art a couzener, for thou hadst me to Coventry, and didst couzen me of eighty pound: Judgment was given for the Plaintiff in the Queens Bench; but it was never moved in that Court; for if it had, they would not have given Judgment. Nota, Trin. 30. That Judgment was reversed in the Erchequer-Chamber. (7)

Post. 99. 171.

2 Cr. 427.

2 Cr. 427.

Docton *versus* Priest.

Ejectione firmæ. Upon special Verdict it was found, That two Tenants in Common of a House and Land, made partition within the House, of the House and Land, by Parol without Deed; the question was, if it were a good partition? And the opinion of the Court was, That a partition between Tenants in Common upon the Land, is good without Deed; for it amounts to a Livery in Law; but it is not so between Joyntenants, for they cannot make Livery one to the other: But Wray said, That a partition made by Parol of a thing that may pass without Livery, as a Lease for years, is good. But in this case the partition was in the House, and not on the Land, and it was not found the Land was within view; and so it cannot amount to a Livery in Law: And for that cause it was adjudged for the Defendant, that the partition was not good for the Land, for which only the Action was brought. (8)

Co. Lit. 169. a.
200. b.

Post. 142.

Knavesburgh's Case.

- (9) **H**E was indicted upon the Statute of 8 Hen. 6. which recited the Statute to be, If any be of Land or Tenements Manu forti expulſe & diſſeiſed in the conjunctive, whereas it ought to be in the diſjunctive; and for this miſrecital of the Statute, the Indictment was diſcharged, and a preſident was cited in Michaelmas Term laſt, of the like judgment for the ſame.

Tho. Cookſon & Anna Uxor' *verſus* Jo. Caſtline.

- (10) **T**Reſpaſs for entering upon their Land, Et Herbam ipſorum Tho. & Annæ adtunc & ibidem creſcentem meſſuit & ſuccidit, & in ſœnum compoſuit & viginti carucatas ſceni inde provenient' cæpit & aſportavit. Upon not guilty, pleaded, and found for the Plaintiffs. It was alledged in Arreſt of Judgment, that the Action doth not lie for Baron & Feme of the twenty Loads of Hay taken, &c. for it is a Chattel ſevered from the Inheritance and veſted in the Baron; for which the Feme ſhall not joyn with him in the Action. But the clear opinion of the Court was, That they may well joyn; for as they may joyn in Treſpaſs De clauſo fracto, and cutting their Graſs; ſo they may joyn for the Hay coming of it: And it was ſo adjudged; and the like Judgment was given this Term, between Wilkes and his Wife, againſt Derby. But Wray ſaid, If it were for taking twenty Loads of Hay, but ſay not Inde provenient', it is otherwiſe, for it may be intended of Hay lying upon the Land before, for which they cannot joyn.

Harward *verſus* Furborne.

- (11) **D**EBT brought here for ſixteen ſhillings given for coſts of Suit in an inferior Court, upon a nonſuit by the Statute of 23 H. 8. And after Verdict Godfrey and Houghton moved in Arreſt of Judgment; for ſuch a petit ſum, Action lieth not in this Court againſt the Statute of Glouceſter; that no Action ſhall be brought here for any ſum under forty ſhillings: But the Court held clearly, That forasmuch as the coſts are given by a latter Statute, they are recoverable by an Action of Debt in this Court; and they gave Judgment for the Plaintiff.

Smith *verſus* Haws.

- (12) **C**ovenant. The Caſe upon Demurrer was, William Redman Grandfather, Father and Son; the Grandfather was ſeiſed of Land in Fee, and deviſed it to the Father for life, the Remainder to the Son, and the Heirs males of his body, Remainder to the right Heirs of the Deviſor, and the Heirs males of his body begotten; the Grandfather and Father die; the Son dieth without iſſue-male, having iſſue Anne; the ſaid Anne takes Husband, and the Husband and Anne ſell the Land to J. S. in Fee, and did Covenant, That they were ſeiſed of a ſufficient and lawful Eſtate in Fee-ſimple. And if this was an Eſtate in Tail, or a Fee-ſimple in Anne who was the Heir of the Deviſor, was the queſtion. Godfrey argued it was an Eſtate-tail, for his intent was apparent,

apparent that his right Heir should have an estate tail; and it is here as fully limited as if he had expressly limited and appointed that he should have an estate tail; and his intent being so, the Law will construe an estate tail, his intent not being against Law, and cited *Husleys Case*, 37 H. 8. Bro. and 9 H. 6. 25. by Palton. Coke contra; that it is a Fee-simple, for immediately by the death of the Grandfather, the remainder doth vest in the father, as his right heir, and vesteth in him as Fee-simple, and cannot by matter subsequent be converted into an estate in tail, and so it was adjudged. 1 Cr. 24.

Termino Paschæ 30 Eliz. in Communi Banco.

Cole's Case.

Assumpsit: And declared that whereas the Defendant was indebted to J. S. in twenty pound, in consideration that the Plaintiff at the Defendants request agreed to give his Bond to J. S. for the said Debt, the Defendant did assume to save him harmless, and alledgeth in fact, that he did give his Bond, &c. and he was sued upon it, &c. upon non assumpsit, it was found for the Plaintiff; Shuttleworth moved that the Plaintiff had not well declared, for that it is not alledged that he gave notice that he had made the Bond, and was sued upon it; but it was adjudged for the Plaintiff, for the Defendant at his peril ought to take notice of the Obligation, &c. as in a Bond to stand to Award, he is to take notice of it. Anderson said, if one be obliged to make such assurance as J. S. shall advise, he ought to take notice of the assurance devised at his peril, because a certain person is appointed to do it. But if it be such assurance as my Council shall advise, I ought to give notice of the assurance, for he cannot take notice who is my Council. And for the other point, he ought to save him harmless without request, viz. by payment of the money or, &c. (13)

Termino Paschæ 30 Eliz. in Camera Scaccarii.

Edward Seymor *versus* Sir Jo. Clifton.

Error: The Error assigned was, for that the issue was joyned, that Jo. Clifton hoc petit quod inquiretur per patriam, & Edwardus Seymor similiter, but saith not prædictus; but inasmuch as there was no other Edward named in the Record but the Defendant, and so cannot be intended another person, and the word prædictus is but of form, and not of substance, it is aided by the Statute, and may be amended, and the word prædict' was put in, and the judgment was affirmed. (14)

Stranisham's Case.

Coke said, it was adjudged in Action of Trover and Conversion, the conversion is traversable, for it is the substance of the Action, and the tort supposed in him; and so may well be traversed; for if one finds goods, but doth not convert them, no Action lieth, as the Case was in a Trover and Conversion of Goods, the Defendant saith he took them damage feasant and impounded them, absque hoc that he converted them to his use. And in *Leaks Case* it was adjudged (15)
Co. 10. 56. b.
Yelv. 166.
Post. 377.

1 Cr. 262.
Ante 78.

judged that the place and time of the conversion are to be alledged, for they are material, and for that they were not alledged, the Bill was abated after Verdict.

Coke versus Barrows.

- (3) **E**rror: For that the Plaintiff in Assumpsit, declared that whereas he was indebted to J. S. in forty shillings, the Defendant in consideration he had delivered forty shillings to him, did assume to pay it, and to discharge him against J. S. and alledgeth that he had not discharged him, but suffered him to be sued for the forty shillings by H. C. Executor of J. S. but doth not alledge that J. S. was dead, but the Court held it good enough, for the Plaintiff had directly alledged that he had not discharged him, and the other matter is but circumstance, and the judgment was affirmed.

Termino

Termino Trinitatis,
Tricesimo ELIZABETHÆ
in Banco Reginae.

Inglebath *versus* Johnes, Int. Hill. 30. Rot. 500.

Co. Lit. 282. b.
Moor 429.

Action for words: Thou art a Bankrupt Knave, and a Pocky Knave, and let them bear witness that stand by, and I will prove it. The Defendant pleaded that he spake the words at D. in Essex, and that at such a place, &c. he had made an accord with the Plaintiff for all Trespasses, Actions and Debates in every place (except in London) and had given him satisfaction for them, absque hoc that he spoke these words in London; the Plaintiff replied that he spake the words in London prout, &c. absque hoc that he made such an accord prout, &c. and upon this it was demurred in Law, for it was said the Plaintiff must maintain his Declaration, and is not to traverse that which was but an inducement to the traverse. Glanville, the traverse taken in the replication is good, for the place where the words are spoken is not material; but when the Defendant by his plea hath made the place of speaking material, there the Plaintiff hath election to maintain his Declaration, and that the words were spoken there, and join Issue upon it, or may by general words maintain his Declaration, and traverse that which is falsely alledged to take from him his Action, and he is to be received to which of the pleas he please, and cited 32 Ed. 3. 23. 46 Ed. 3. 30. 10 Ed. 4. 2. and afterwards it was adjudged for the Plaintiff. V. Coke 1 Institutes 282. b.

(1)

Post. 153.

Co. Lit. 282. b.
Post. 418. 667.

Post. 407. 716.
842. 868.

Engurft *versus* Browne.

Action for these words, viz. Thou wert a Suitor to a woman in Southwark, and didst couzen her of her goods, and procured certain false witnesses to be forged. And after Verdict it was alledged by Daniel in Arrest of Judgment, that the words are not actionable; for the first words, Thou didst couzen, &c. have been lately adjudged not actionable. And for the last words there is less doubt; for it appeareth not what their testimony doth concern, nor that the forgery of it is to any purpose, for it may be of some small matter; and the Court commanded Judgment to be stayed, for Wray said they are petit parols to maintain an Action.

(2)

Ante 95.
Ante 93.

Nash *versus* Edmunds, Mich. 29 & 30. Rot. 261.

- (3) **E**jectione firmæ. And declared upon a Lease made to him by five women Daughters and heirs of Jo. Dover. Upon not guilty, the Jury gave a special Verdict. The said Dover was seised in Fee of the Land held in Socage, and that he declared to William North and others, his Will to be that J. C. Lessor of the Defendant should have his Land, and the said William North recited the words to him, and asked him if this was and should be his Will, and he answered, that it was. And they further find that the said North in the life of Dover, and for his own remembrance, and without the appointment of Dover writ the said Will, and afterwards Dover died; and if this were a good Will, being spoken with such direct words, and being writ in his life by the witness for his own remembrance, and without the appointment of Dover, was the question; and all the Justices (who shewed their opinions seriatim) held it to be a void Devise, because the Will was not writ by the commandment of the Devisor, or by his consent, but of the person present, of his own head; but if he had writ it without the Devisors consent, and afterwards had read it to him, and he had agreed to it, this had been as good as if written by his appointment, as *Browties Case*, Dy. 72. And if in the principal Case it should be a good Will, it would be a great mischief; for then if one should say to another when he is in health, I devise such Land to J. S. and he afterwards writeth it in the life of the party, but he never hears of it afterwards nor agreeth to it; if this should be a good Will, it were not reasonable; for perhaps he had afterwards altered his intention: and judgment was given accordingly. Nota, Ro. Snagg who argued in this Case, said it was ruled in Chancery in *Sir Richard Pexalls Case*, when he devised certain Land to his wife for life, and commanded it to be written, and it was written, and a proviso added by the writer, that if she married, that the Devise should be void; and this being read to him, he said the proviso was no part of his Will, but for the residue it should stand, and he died before the Will was altered, and the proviso was adjudged to be void, and the rest of his Will did stand good.

William Collins *versus* Edward Vaughan.

- (4) **I**nformation for the Queen and himself against the Defendant, Vicar of the Church of Engliscombe in Com' Somerset, for that absentavit se, and had not been resident by the space of a whole month together; and after Verdict Walmfly moved in Arrest of Judgment, that the Information was insufficient, for the Statute is, if he absents himself voluntariè, which is not alledged, for if he be absent by compulsion or restraint, it is out of the Statute; and of that opinion was the whole Court, that the word *Voluntariè* is of force, and must be in of necessity.

Morgan's Case.

- (5) **E**rror to reverse an Outlary upon an Attainder of Tho. Morgan his father, whose son and heir he is, who was attainted and hang'd for the murder of one Turberville, Coke assigned the Error in the Endicment,

dictment, for that the said T. M. was Endicted in the County of Somerset, that whereas the said Th. Morgan nuper de D. in Com. Dorset gen. apud W. in comitat' prædict' such a day did strike and killed the said Turberville; and the exception was, the stroke and death was at W. in Com. prædict', and that shall be intended in Com' Dorset which was last mentioned, and then the Endictment in Com' Somerset is meerly void, for Somerset is not named in the body of the Endictment, but in the Margent; and of that opinion was the Court, but they would respite the giving of judgment, until the Attorney-General was acquainted with it. V. 18 Ed. 2. brief 828.

Co. Lit. 22. b.
Post. 333. 606.
184. 656. 658.
739.

Marshal *versus* Hobson.

Error of Judgment after Verdict in the City of York: two Errors assigned. 1. The Plaintiff brought a Formedon by Bill, and declared there according to the custom, and for that the Land was Freehold, which is not recoverable but by Writ in any Court, therefore being by Bill, it was erroneous; and Godfrey said, in any Court where Land is to be recovered, he shall have a Writ Close or any other Writ, and shall declare according to his Case and the nature of the Suit, Fitz. Nat. Br. f. 26 H. 6. Error 28. 14 H. 4. 34. Second Error, the judgment was that the Defendant eat fine die, whereas it ought to be that the Plaintiff shall take nothing by his Bill; and it was held an apparent Error, for such judgment shall not be given but where the Queen is Plaintiff, against whom no judgment shall be given; or where the judgment is final, that the Defendant shall hold it a tous jours.

(6)

Co. Lit. 363. a.

Pell *versus* Pell.

Debt upon an Obligation of an hundred Marks: The condition was, if he pay fifty pound the Bond shall be void; the Defendant pleads tender at the day, and none was there to receive it, and upon this they were at Issue; and afterward the Defendant pleads that puis le darraine continuance, this hundred Marks were attached in his hands in London, at the Suit of, &c. Gawdy Serjeant said the plea was not good; for an Attachment cannot be pending a Suit in this Court; also he pleads, the fifty pound was tendered, and so the hundred Marks were not due, and the Attachment cannot be of the hundred Marks; and this is no such plea as can be pleaded puis le darraine continuance, for this ariseth by the Defendants own act, and may be intended to be by covin; and the Court was in doubt for the first point, and commanded that the presidents be searched, if any such Attachment had been allowed pending a Suit here, or in the Common Bench; but they held that the Attachment of the hundred Marks (if Attachable) was well enough, for it is always to be demanded in that manner, and it is according to the Obligation. And to the third, they held it may be well pleaded puis le darraine continuance, for it goeth in bar at another day; Dalton shewed a president in the Common Bench, Mich. 12 & 13 Eliz 164. Such attachment was made pending the Suit and after the last continuance, but afterwards the parties compounded.

(7)

Post. 157.

Lacy *versus* Smith.

- (8) **A**ction sur trover : and declareth as Administrator to J. S. and that Administration was granted to him by A. B. official to the Bishop of Peterburgh, and sheweth not that he was Ordinary of the place, or that the granting of Administration did belong to him ; and this matter after Verdict was alledged in Arrest of Judgment, but because divers presidents were so, and that such Declarations had been allowed, the Court did give Judgment for the Plaintiff.

Ante 6.
Post. 431.

Stubbs *versus* Rightwile, Trin. 28. Rot. 407.

- (9) **D**ebt against the Defendant as Executor of J. S. he pleads that he had taken Letters of Administration, Judgment of the Writ, &c. the Plaintiff replieth that the Defendant administered de son tort, and after took Letters of Administration, Judgment, &c. and upon this it was demurred. Godfrey for the Defendant argued, that now the name of Executor is lawfully changed before the Action brought, and therefore is to be sued by his new name as Administrator, 9 Ed. 4. 33. 21 H. 6. 5. 18 H. 6. 29. 13 H. 4. Executors 118. Coke contra, for when by his tortious Administration he hath given advantage to be sued as Executor, he cannot by his own act purge this tort and cause the Plaintiff to sue him by another name, but the Plaintiff hath election to sue him one way or other, for he shall take no advantage of his own tort. As if one in Execution Escapes, and is taken again by the Gaoler, he shall not have an audita querela ; and it will be a mischief if the Plaintiff shall be compelled to sue him as Administrator, for it may be that whilst he administered of his own wrong, he wasted the goods ; and if he be only sued as Administrator, he shall only be charged of the goods that came to his hands since Administration, 12 R. 2. Administrators 21. and it was afterwards adjudged that the Writ was good, and that the Defendant respondeat ouster: Nota, if Judgment be given against an Executor upon demurrer, and Execution be awarded, the Sheriff cannot return nulla habet bona testatoris, but is to return a devastavit, as if it had been found against the Executor by Verdict ; for per Curiam he hath charged himself by his own Plea.

Post. 565, 810.

Co. 3. 52. b.
Post. 439, 555.

Post. 406.

Melwich *versus* Luther & Uxorem, Hill. 30. Rot. 344.

- (10) **E**jectione firmæ: And declareth of a Lease made to him by Jo. Melwich for twenty one years of three Messuages and one Cottage in Eastworth, and upon not Guilty pleaded, a special Verdict was given, that the Tenements of which the Ejectment was supposed, and divers other Tenements in Eastworth aforesaid, were time out of mind, &c. until the first day of January 37 H. 8. parcel of the Mannor of Boveridge in the County of Dorset, of which Mannor King H. 8. was seiled in Fee ; and that the Tenements of which, &c. and the other Tenements in Eastworth were parcel of the customary Tenements of the said Mannor, and demised and demisable by Copy of Court-Roll, by the Lord or his Steward, to any person for life or lives, in possession or reversion, at the will of the Lord, according to the custom of the said Mannor ; and at the same time one Alice Mel-

Co. 4. 26. a.

Co. 4. 260.

Melwich widow was a Copyholder of the Tenements of which, &c. for her life; and that upon the said first day of January 37 H.8. the said King by his Letters Patents did grant to Jo. Ogden Esq; the Tenements of which, &c. and the other Tenements in Eastworth; and find further that the said Jo. Ogden at the same time was seised of a Mannor called Harbridge in the County of Southampton; and being so seised of the said Mannor of Harb. and of the Tenements of which, &c. and of the other Tenements in Eastw. at the Court of his Mannor of Har. held 12 Junii 7 Ed. 6. did grant by Copy the Tenements of which, &c. to one Ro. Melwich, and to the said Jo. Melwich, to have for their lives successive after the death of the said Alice, according to the custom, &c. and that this grant was upon the surrender of Henry Dowling and Ri. Dowling of a Copy in reversion of the said Tenements, and they were admitted Tenants in reversion, and find that Alice died, and after Ro. Melwich entred and died, and that the said Jo. Ogden enfeoffed of the said Tenements of which, &c. one Morgan Polden, who thereof enfeoffed William Constantine, and after the said Jo. Melwich entred and made a Lease to the Plaintiff, and the Defendants as servants to the said William Constantine, and by his command ejected him; and si super totam materiam, &c. and the case was argued this Term by Harris for the Plaintiff, and by Ewens for the Defendant; and it was afterward adjudged for the Plaintiff; for the Justices said, although the Tenements are divided from the residue of the Mannor, yet the custom remaineth, and they continue Copyholders paying their services and duties, &c. And he which hath the Freehold of them may keep a Court in any place, and it is not properly a Court Baron, but as a Court of Survey, at which Copyholds may be well granted, and the Lord or his Steward may grant Copies out of Court as well as in Court, 2 Ed. 6. Brooks. And a surrender being taken, and a new Copy granted, is good in whatsoever place it be done; and it was said, if the Copyholders die, yet he which hath the Freehold may grant them by Copy again; and that it was so held in the Lord Chancellor Hattons Case; and if they be Copyholders of Inheritance, they may compel him that hath the Freehold to accept surrenders and make new admittances, &c. Nota, here nothing was spoken of the Lease for years, if it were a forfeiture or not, no custom being found to maintain it. Nota, A Writ of Error was brought of this judgment in the Exchequer Chamber, and the Error assigned in the matter of Law, but no judgment given, for the Parties compounded and agreed with the Plaintiff in the Writ of Error, and he had the Land, as Ewens who was of his Council told me; for he said that all the Justices and Barons in the Exchequer Chamber did hold clearly that it was a void Grant by Copy; for being divided from the Mannor, the custom to demise them is altogether gone and destroyed, so as the estates for life which were in esse at the time of the alienation of the Freehold of them and severance of them, being now determined by surrender, or otherwise, no new Copy can be made; yet the alienation of the Freehold of them doth not destroy the Estates of the Copyholders then in esse, but they shall hold them during their estates paying their Services, but no new estates may be afterward granted by Copy. V. 4 Co. 26. this Case V. Mich. 37, & 38. Placito 6.

Co. 4. 26. a.

Co. 4. 26. b.

Co. 4. 26. b.
Ante 39.Co. 4. 26. b. *Howe & Howard
can't grant Copies
out of Court.*

Post. 443.

Post. 395. 443.
662.

Co. 4. 26. a.

Post. 443.

Cæsar versus Stone.

- (11) **E**rror to reverse an Outlawry: the Error assigned was, that in the Writ of Exigent no place was mentioned where the Sheriff was to have the body; so that the Sheriff cannot know into what Court to bring the body; and for this cause the Judgment was reversed, 33 E. 3. Brief 918. 27 H. 6. 2.

Peterfon's Case.

- (12) **D**ebt upon a Bond: The Defendant pleaded the Statute of Usury in bar, that there was an agreement between the Plaintiff and him, that the Plaintiff should deliver to him Wares of the value of twenty pounds, and that the Defendant should pay for the same within six months thirty four pounds; upon which they were at Issue, and found against the Defendant; Daniel moved in Arrest of Judgment, that it not being alledged that the Obligation was made for the payment of this money, it was no Plea or Issue. Sed non allocatur, for he shall not take advantage of his own mispleading, and judgment was given for the Plaintiff.

Mo. 248.

William Griffith versus Ro. Apprice.

(13)
34, 35 H. 8.
C. 26.

Co. 5. 105. a. b.
Post. 826.

Error of a Judgment in Ejectione firmæ in the County of Denbigh before the Justices there; and the Error was apparent: for the Writ did bear date 16 April 28 Eliz. and the Ejectment was supposed 27 Aprilis 28 Eliz. and so cannot be defended; but Winter said that by the Statute of 35 H. 8. judgments given in personal action in Wales shall be reversed there, and this is a personal action; Egerton Solicitor contra: for this Action doth sound in the realty, and the Statute did not intend that Titles should come in question before the Council of the Marches, and the Statute is in the affirmative, and therefore doth not take away the power at the Common Law; and although he may sue there by the Statute, yet he may sue here if he will, as he might before; and afterwards it was adjudged that this Court had Jurisdiction, and the Judgment was reversed.

Elred versus Wafs.

- (14) **E**rror to reverse an Outlawry in Debt: Coke assigned the Errors. 1. The Defendant in the original was named Elred according to his true name, and in the mean process, viz. the Capias, he was named Eldred, and so is erroneous, for if there be any difference by omission, addition, or interposition of any letter between the original and judicial process, it is erroneous, Tr. 26 Eliz. Outlawry repeated upon a difference, viz. Walwyn & Walweyn. 2 R. 3. 13. Sein-John & Saint-John; so in Fishers Case York for Yerk. 2. Error, which was Error in fact, that the alias capias was returned by one Felton; whereas he was then removed from his office, and Townsend was Sheriff; to which they had pleaded in nullo est erratum, and so the Court shall intend it to be true; and this he said was a dead fault, and for these Errors the Judgment was reversed.

Ante 50. 85.
Post. 105.
Post. 257.

New's Case.

Error upon a Judgment given in Debt upon an Obligation, in the Court of Havering in Essex. The condition of the Obligation was, for the payment of twenty pound to the Plaintiff at his house at S. in Kent; the Defendant pleaded payment at the day, &c. Secundum formam & effectum indorfamenti prædicti. Error assigned was, That the issue was tried at Havering, and not at S. in Kent; but it was said, that this is no Error; for when a thing issuable is alledged, and no place, this shall be tried where the action is brought; and the words Secundum formam, &c. refer only to the time, and not to the place; for the place is not material, payment being made to the Obligee himself: And it doth not appear, but S. in Kent may be within the jurisdiction of Havering; for it is not said in the County of Kent, but at S. in Kent; and there may be such a place called Kent in Havering, and afterward Mich. 30. & 31. the judgment was affirmed. (15)

Leat *versus* Jennings.

Error of a Judgment in an inferior Court, and the Error assigned was, that the Distress was awarded returnable at the next Court, after the serving of the Proces; and every return is to be at a day certain; and it may be the Proces shall not be served within a year, and the Defendant is to have day at every Court, otherwise the Proces is discontinued, 9 Eliz. Dyer 262. And afterwards for this cause the Judgment was reversed. (16)

Dinflow's Case.

He was indicted upon the Statute of 5 Eliz. for Perjury, and the Indictment was, that Tactoper se sacro Evangelio falso deposuit, but it was not directly alledged, that he was sworn, and the Indictment was discharged; for the Justices said, When such heinous Crime is objected against one, it ought to be fully alledged, otherwise it is not good. (17) 5 El. cap. 9.

George Lovegrove *versus* Inocke.

Prohibition. The Suit in the Spiritual Court was against the Plaintiff, by the name of Gregory Lovegrove, as appeareth by the Libel (which in truth) was a wrong name; yet for this variance between the Prohibition and the Libel, the Prohibition was abated. (18) Ante 104.

Meggot *versus* Broughton.

Error upon a Judgment given in this Court this Term; and the Error assigned was, that in an Assumpsit against two, mean between the Verdict and the Judgment, one of them dies, and notwithstanding Judgment was given; and upon this it was demurred, If Error lieth here; for it was said, That this Court cannot reverse their own judgment, except it be for Error in Proces, and
 p and

and not for Error in fact: But it was said on the other part, that in Gourney's Case, where an Infant appeared by Attorney, whereas he was to appear by Guardian, and Recovery was had, and Error brought here, and for this Error in fact, Judgment was reversed. And it was afterwards adjudged, That the Writ of Error was well brought here; for the death, &c. was by the act of God, and a thing that did not lie in their Cognisance: And it was clearly agreed, that the death of one of the parties did abate the Writ, and the Judgment was reversed.

Foster versus Walter.

- (20) **E**jectione firmæ. The Case was, Richard Wager, 6 Edw. 6. did Devise a Messuage to A. his Wife for life, Remainder to his son in tail; and if he dieth without issue, or be unthrift, that it shall remain to the Master and Wardens of the Mystery of Cordwayners, London; whereas they were incorporated by the name of Master, Warden, and Commonalty, &c. The question was, if by reason of this Misnomer of the Incorporation, the Devise was void. And it was argued by Daniel, that it was, and by Cooper contra: But the Justices held the Devise good; for by Intendment the Devisor had not counsel there, nor had Cognisance of their name; and being known usually by that name, there is a sufficient Intendment what Corporation he doth intend shall have it.
- Co. 10. 125. a.

East and Wilson.

- (21) **T**hey were indicted upon the Statute of 8 H. 6. for forcible Entries, and the Statute was recited to be made at Westminster, but shewed not in what County, and the Indictment was discharged.

Termino Michaelis,

Tricesimo & trices' primo ELIZABETHÆ,
in Banco Reginae.

Scovel *versus* Cabell. Cujus principium antea.
Hill. 31. Plac. 13.

Ante 89.

The Case was argued by Coke for the Plaintiff, and Gawdy Serjeant for the Defendant. Coke argued, That by the premises the parties to whom, and the Land demised, being expressed; and in the Habendum the estate being limited, as the office of the Habendum is, the Proviso that cometh afterwards shall not avoid it; for it is repugnant and void, as 21 H. 7. Lease for two years, Proviso, he shall not occupy it for one year, is void, 6 Rich. 2. Q. Juris Clamat. 20. Lease for years, Proviso, he shall not take the profits: And in this case, the Lessor was Tenant in tail, and he maketh this Lease, as by Law he may; and he cannot make it to have to one for life, the Remainder to another for life, &c. And to make Construction that it shall be to one for life, the Remainder to another for life, will destroy the Lease. And afterwards it was adjudged for the Plaintiff, that it is a Joint estate, and the Proviso shall not sever it. (1)

Co. Lit. 44. b.

Moor 267. 8.

Bellicote *versus* Taylboys.

Error of a Judgment in the Court of Barnstable. The Error assigned was, That the Plaintiff counts that he and the Defendant did account together of divers Reckonings, and he was found in Arrearages ten pound two shillings three pence, which he assumed to pay. And upon Non Assumpsit it was found, that he assumed to pay so much as he was found in Arrearages of account, which was seven pound two shillings three pence, and that he assumed to pay so much as was contained in such a Bill, in which he was indebted to him, which did amount to three pounds, so all that he assumed to pay, was ten pound two shillings three pence: And the Plaintiff had Judgment. Error brought, and this Error was assigned, but the Court delivered no opinion; but for another manifest Error in the Record, viz. The Judgment was Capiatur, where it ought to have been in Misericordia; the Judgment was reversed. (2)

Ante 84.

Bricket & alii.

- (3) **T**he Indictment was, that R. B. and the other, &c. Coram J. S. & J. D. duo Justiciariis Dominæ Reginæ, &c. And that the Exception was, That it should be duobus, and as it is, it is false Latin, and without sense; and if it be not false Latin, this cannot be referred to those named before, which are named in the Ablative case. But the Court held it well enough; for the Indictment shall not be overthrown for false Latin, if by any intendment it can be good; And although here is false Latin, yet it may be well enough intended in the meaning. 2. Exception, Bricket and the others are named of Nuneaton in the County of W. and the Indictment being for Riot, that they assembled themselves at Artelborough in the Parish of Nuneaton aforesaid, and saith not in what County Artelborough is; for it was said, that Artelborough may be in the Parish of N. and yet in another County, but the Court held it well enough: For it appeareth not, that Artelborough is a Town, but it may be a place known by such a name in the Parish of Nuneaton, and being named in the Parish of N. it shall be intended to be in the same County.

Post. 117.

Trussel *versus* Aston.

- (4) **D**EBT upon Obligation; the Defendant pleaded the Statute of 23 H. 6. and would avoid the Obligation, that he being in Execution, and the Plaintiff being under-Sheriff, he took this Bond, and let him at large; and it was demurred in Law, because the Defendant did miscite the Statute, in that he did recite, That if any Sheriff aut ejus Officiarii, where it should be alii Officiarii: And the Statute speaketh not only of the Sheriff and his Ministers, but of other Officers. And Coke said, so is the Parliament Roll; and so it was adjudged in one Herris case. And of this opinion was the Court; but they gave day to the parties to compound, and in the mean time should stay Judgment.

Rofs *versus* Morris, Pas. 30 Eliz. Rot. 196.

- (5) **R** Eplevin. The Defendant abows as servant to Jerome Weston Esquire: The case upon Demurrer was, One Gomerly was seised of the Mannor of Nayland, and by Deed 25 Ed. 3. gave it to the Lord Henry Scrope, and to the heirs of his body, who died seised, and so continued by divers descents, until 4 H. 7. and then Thomas Lord Scrope suffered a Common Recovery, which was to the use of him and his heirs; and retakes an estate of the Feoffees to him and his heirs; and having issue Ralph and Jeffery, and three Daughters, dieth. Ralph maketh a Feoffment to the use of himself and his heirs, and 7 Hen. 8. deviseeth it to Jeffery for life, and after Ad usum Rectorum hæredum in perpetuum, secundum antiquas evidencias inde factas, and dieth seised of this use, and of the use in divers other Mannors in Fee. Sir William Danby marrieth with one of the Daughters, and afterward Jeffery dieth without issue: Sir William Danby and his Wife, and the other sisters (being also married) being seised of these uses, make partition, and allot the use of this Mannor to Sir William Danby and his Wife, and the heirs of the

the Wife ; and the other uses of the other Mannors to the other two Daughters : And afterward Sir William Danby and his Wife die, Sir Thomas Danby their heir enters, and infeoffed Welton. Upon this case the points were two. 1. If it was an Estate in Tail, or Fee in the daughters, which were sisters to the Devisor, and issues of the body of Thomas, the Father of the Devisor. 2. If this Partition be void or voidable. Godfrey, Coke, and Cooper, argued for the Plaintiff, That it was an Estate in Fee in Jeffery, and so in the daughters ; for the words of the Will being *Ad usum Rectorum hæredum secundum antiquas evidencias inde præantea fait*, it is uncertain what evidences he intends ; for three evidences were mentioned, viz. The Estate in Tail, 25 Edw. 3. 2. The Recovery. 3. The Deed of Feoffment ; and it appeareth not, which of them he intendeth ; also it appeareth not, whether he intended the heirs of the Lord Scrope, or the heirs of Gomerly ; for by the first evidence, the Remainder is limited to the right heirs of Gomerly ; and for this uncertainty all was void : But admitting it shall be construed an Estate in Tail, according to the evidence of 25 Edw. 3. yet it is only an Estate in Tail in Jeffery, for he is the first person that takes it, and hath it as a purchaser ; and when he dieth without issue, the Estate Tail is spent, and none can have it as heir to him. The second point, They held the Partition utterly void ; for it being of one use in Tail, and another use in Fee, and so not equal ; and being made between Husbands and Wives, is void, Johnson, Atkinson, and Egerton Solicitor, contra. That the Will is certain enough, and the ancient evidence can be construed only of that of 25 Edw. 3. For the other are but new evidences ; and it is helped by the Averment, That the Lord Scrope had no other ancient evidences of this Land ; and therefore the Will shall refer to it, and shall not be expounded to another sense, then as the estate is there limited : And then, though the first effect and essence be in Jeffery, yet he taking it by limitation, he taketh it as heir of the body of the Lord Scrope, and this *per formam doni*, and then the daughters shall have it so likewise ; for they all claim by one gift. 2. They held the Partition good ; for there was *Quid pro quo*, and so only voidable. But all the Justices resolved to give Judgment for the Plaintiff (Lessee of Welton) that this is no Estate tail, but a Fee-simple in the daughters ; for no estate is created by the Will, for the uncertainty of the persons and evidences also, and the intent is to be taken in a Will ; and the Court held, that his intent was, That it should go to his heirs generally, according to the course of the Common Law ; for divers evidences are shewn in the pleading ; And it is hard for a man in extremity to remember them, especially that which was made 25 Edw. 3. But for the second matter, if it be an Estate tail, if it shall inure to the daughters, as 2 Ed. 3. 1. or be extinct upon the death of Jeffery without issue, who was the first Purchaser, according to the opinion in Grifwolds Case, Dyer fol. They said they were of divers opinions, but for the principal matter they gave Judgment for the Plaintiff.

Clearywalk *versus* Constable.

- (6) **T**Respals: For taking of Twenty seven pound of white Wooll at his house in St. Johns Green in Colchester. The Defendant pleaded, That the Town of Colchester is an ancient Borough, and within the said Borough there is, and time out of mind, &c. there hath been a custom, That it shall be lawful to any Burgesses of the said Borough, to seise all goods bought and sold within the said Borough, to any alien, by an alien, to the use of the Queen; and such Burgesses that finds and seiseth them, and alledgeth, that at the time, &c. he was a Burgess there, &c. and that before the time of taking, &c. the Plaintiff being an alien, bought the said Twenty seven pound of Wooll of J. L. another alien; and the Plaintiff being then a Burgess, seised the said Wooll, as things forfeited to the use of the Queen, and to his own use, and demands Judgment *Si actio, &c.* And upon this a Demurrer in Law. White for the Plaintiff, That the Plea was not good; for the prescription was not well alledged, That it should be lawful; and doth not alledge a use in fact, to seise; for there can be no prescription or use, except sometimes it is put in ure, 38 H. 6. 16. b. 34 H. 6. 15. 4 & 5 Phil. & Mar. Dyer 152. Hunt's Case. 2. He prescribeth to seise the goods, &c. but alledgeth not to what use or purpose; as for Forfeiture, Coll, or Custom, or some other intent, 37 H. 6. 7. 21 Hen. 7. 16. 8 Rich. 2. Grants 105. The cause ought always to be shewn of the Seizure. And for this cause principally the Court was clearly of opinion, That the Plea was ill; and if no cause be shewn in four days to the contrary, Judgment shall be entred for the Plaintiff.

Jo. Thirkettle *versus* Reeve and Edward Tye, and Mary his Wife, Trin. 29 Eliz. Rot.

- (7) **D**Ebt upon two Obligations, each of them of twenty pound against Reeve, Executor of Rob. Thirkettle, and Edward Tye and Mary his Wife, Executors of the said Rob. Thirkettle, and declared upon two several Obligations, made 14 July, 23 Eliz. The Defendant Reeve pleads, Nunques Executor ne unques administer come Executor: And upon this they were at issue; the other Defendants, Ed. Tye and Mary his Wife, demand Oyer of the Obligations, and of the conditions: The condition of one was, That whereas Agnes the Mother of the Testator had devised to the Plaintiff forty pound, upon condition to be performed by the Plaintiff, if the said Robert pay it to him after the performance of the condition, and within one year after the death of Agnes; that then, &c. and the condition of the other Obligation was, if he pay ten pound after the performance of the condition, and within two years after the death of Agnes, that then, &c. the Defendants plead, that the said Agnes, 13 July, 23 Eliz. made her Will, and devised the said forty pound to the Plaintiff, upon condition in the said Will, that he shall release to the said R. T. all Actions, &c. except the said forty pound devised to him: And they alledge in fact, that the said R. T. required him to make the said Release, and that he refused to make it, &c. and alledges the death of the said Agnes, 1 Aug. 27 Eliz. (Nota, the Declaration in this action, was Mich. 27 & 28 Eliz. so within

within two years after the death of Agnes) The Plaintiff said, he was not required to make the Release; and upon this they were at issue; and also being at issue, if Reeve were Executor; it was found that Reeve was not Executor, and that the Plaintiff was not required to make a Release. And it was afterwards alledged in Arrest of Judgment, that the Plaintiff had brought his action upon two Obligations, whereas one was not due; for it was brought within two years after the death of Agnes, and damages being given for both intirely, and he had no cause to recover upon one; he can recover no part; But the Court held, that this is but the Allegation of the Defendant; and it appeareth not, if Agnes then died or not, and the Defendant hath not rested upon it, but pleaded another Plea, viz. A request to make a Release, which is a collateral matter: and issue taken upon it, and so had relinquished the other matter: and Judgment was given for the Plaintiff. Ante 68. 9: Nota, That afterwards the Defendant upon this, brought a Writ of Error in the Exchequer-Chamber; and this was assigned for Error: And another Error was assigned, that the Plaintiff had sued one as Executor jointly with the true Executor, which was not Executor, and so had failed in his suit: But all the Justices held neither of them to be Errors. For to the naming one Executor which was not, this is not in abatement of the Bill or Writ, but only that he shall be barred against him: And it will be a great mischief when divers are made Executors, and one refuseth, if the naming of him should abate the Writ. And to the other matter, they held it no Error; for it was only a matter alledged by the Defendants, and it appeareth not, whether it be true or false; and it is waved by the issue. And thereupon they all resolved the Judgment to be affirmed.

Elizabeth Mornington *versus* Try & alios.

Ejectione firmæ. Upon not guilty pleaded, it was found, that the Abbot of St. Peter of Gloucester, 15 Hen. 8. being seised of the Barn and Cythes in question, let them by Deed under the Covent Seals to three for sixty years; afterwards the Abbey was dissolved, and their possessions, Et inter alia, the Barn and Cythes were given by Statute to the Bishop of Gloucester; and afterwards, 15 Eliz. John Wakeman, Bishop of Gloucester, let them to three Cheynies by Indenture, rendring the ancient Rent, for three lives; and the Indenture was found in hæc verba: And in the end of it, the confirmation of the Dean and Chapter was recited, which was of a Lease made by Rich. Wakeman; but the Jury did not in fact find that the Dean and Chapter did confirm it; nor found their Deed in hæc verba as they should have done, but only recited it as a thing annexed to the Indenture; and found expressly the Lease made to the husband of the Plaintiff, by the now Bishop. Tanfield prayed Judgment for the Plaintiff; for the Lease by John Wakeman was meerly void; for there were twelve years to come of the ancient Lease; So it must pass by grant of Reversion, and no Attornment is found; and the Jury do not find a confirmation by the Dean and Chapter, and the confirmation reciteth a Lease by Robert Wakeman, when it was by John Wakeman: And these last faults were held to be incurable. (8) Co. Lit. 3. d. Co. 11. 21. d. Coke moved, that the Verdict should

Post. 150.

should be amended; for the note given to the Clerk of the Assizes was, That they intended to find the confirmation expressly, and of a Lease made by J. W. And for the other point, Cithes pass without Attornment: But the Court held clearly, That after Verdict returned in Court, this cannot be amended by any such suggestion; for then all Verdicts may be prayed to be amended: But if any mis-pulsion was, suggestion ought to be made of it before the Verdict returned; but now it was too late, wherefore Judgment was given for the Plaintiff.

Richard Jackson *versus* Robert Mordant,
Mich. 29 & 30 Eliz. Rot.

(9)

Post. 154.

Post. 181.

Action upon the Case: The Plaintiff declareth, that where Thomas Style and Margaret his Wife were seised to them, and the Heirs of Thomas, of five acres of Meadow lying near a River called Westbury River; and being so seised by Indenture, let them to the Plaintiff for one and twenty years, by force whereof he was possessed: The Defendant such a day, &c. erected a Water-Mill Super & trans the said River; by reason whereof Oblitupavit the Water running in the said River with his Mill: So that the Water from time to time yearly after the erecting of the said Mill, overflowed the Banks of the River in the said five acres of Meadow, and them inundavit; by which they became barren & scirposæ, to his damage One hundred pound: And upon this Declaration it was demurred in Law, and argued this Term. The first Exception was, because he counts that the Baron and Feme were seised to them, and the Heirs of the Baron, and sheweth not how the estate began; for it was said, it being a special estate, and but a particular estate in the Feme, the Commencement of it ought to have been shewn; but the Justices held it well enough, being an Action of the Case by their Lessee: So that it is but a Conveyance to the Action, and the Inheritance is in the Baron. 2. Exception, because he declares of a Lease by Husband and Wife by Indenture, and sheweth not, that a Rent was reserved, and then it cannot be the Lease of the Feme; but the Court held it clearly to be good: For it is the Lease of the Feme, till she disagree, and the Inheritance being in the Baron, it shall be good against him and his Heirs. 3. Exception, That the life of the Baron was not averred; Sed non allocatur, for the reason aforesaid; And the same Term, Judgment was given for the Plaintiff; And I was of counsel with the Plaintiff.

Thomas Broome *versus* Robert Mordant,
Int. Trin. 30 Eliz. Rot. 813.

(10)

Action upon the Case. The Plaintiff declares, That Thomas Slye and Margaret his wife, were seised of a Water-Mill, called Webstury-Mill, viz. The said Thomas in his Demeln, as of Fee, and the said Margaret, Ut de libero Tenemento; and being so seised, they and
all

all those whose estate they had in the said Mill, have had time out of mind, &c. a Water course running in the River of Westbury, to a Mill called Innelly Mill in the County of N. to the said Westbury Mill, and from thence super & trans an Acre of Land of the Defendant, to a Mill called Mixbury Mill in the County of Oxon, and this without any erecting of any Mill, and had time out of mind, &c. the mul- ture of divers Inhabitants there of their Corn, &c. And they be- ing so seised, let the said Mill to the Plaintiff, &c. by Indenture by which he was possessed, until the Defendant erected a new Mill up- on the said Acre of Land, per quod obstupavit aquam prædicta ita quod mo- lendinum prædicta suffocatum fuit, so that the Plaintiff lost the profit of his Mill from the first day of July, &c. until, &c. to his damage, &c. And hereupon it was demurred in Law, and the same Exceptions taken as in the Case before, and ruled as before. And another Ex- ception was taken, for it is said, the Baron was seised in Fee, and the Feme in her Demesne as Free-hold, but saith not of what Es- tate, for her life, or for anothers life. 2. Exception, because the prescription is alledged in the Baron and Feme, and the Feme had only an Estate for life, and so cannot prescribe, sed non allocantur. For to the first, the Plaintiffs needed not shew what Estate they had, it being by way of Conveyance: and to the second, when the Feme is joyntly seised with her Baron which had the Fee, the prescription may be alledged in both: & sic adjudicatur.

Ann Boocher *versus* Ancel Samford, Hillarii,
50 Eliz. Rot. 188.

Ejectione firmæ, upon a special Verdict, the Case was this, William Samford was Lord of the Mannor of Stone-house, within which Mannor there is a place known by the name of Ebley, in which is a House and six Acres of Land, to which Tenement divers other Lands throughtout the whole Mannor were pertaining, and had been used with it by the space of Sixty years, and had always pas- sed by one Grant, and under one Rent (which was now in the hands of one H. B. Coppyholder of it) And the said W. S. being so seised, devised that his Brother Tho. S. after the death of the said H. B. should have the Tenement with the Appurtenances in which H. B. dwelleth in Ebley for Sixty years, rendring 4 l. per annum (the an- cient Rent being 45 s.) but the House and the six Acres was worth 5 l. and if upon all this matter, the other Lands which were used with the House, and are out of Ebley, pass, or not, was the question. Coke argued that all passed, for they were always passed by one Grant, and under one Rent, and they are here granted per nomen tene- ment. And it is to be first considered how those words (wherein he dwelleth in Ebley) shall refer, to the dwelling, or to the Tenement. And as to that he said the words shall be referred, ut verba accipiantur apte & in proprio sensu, then (dwelleth) shall not be referred to Land, but to the Tenement, for a man cannot dwell in Land; and Rela- tion shall always be ut sententia non impediatur, and not to the last An- tecedent. And here he deviseth the Tenement with the Appurte- nances, which is all things belonging to it; and the Lands out of Ebley were belonging to it. And it was adjudged in one Batrees case, where one being sick sent for Scrivener, and gave him instructions, that

(11)

1 Cr. 130.

Moor 222.
1 Cr. 57.

that he devised his House and the Land belonging to it, the Scribe-
ner draws a devise of the House, cum pertinentiis, and it was adjudged
that the Land passed; also the Rent is increased, and therefore his
intent was to give all the Land, and it was to his brother for his
advancement. Atkinson contra, he agreed that by a devise of the
Tenements, all passed; but when he saith, in which H. B. dwelleth
in Ebley, this sheweth his intent that nothing shall pass but what is
in Ebley. A man granteth his Manor in D. nothing passeth but
what is in D. And it was adjudged in the Exchequer, where the
King granted the Commandry of Slevidge in the County of Radnor,
that if no part of it be in Radnor, yet it shall pass; but if part be in
the County of Radnor, and part in another County, nothing shall
pass, but what is in Radnor. But it was adjudged for the Plain-
tiff, that the Lands out of Ebley shall pass; but that the Plaintiff
should recover but two parts, the devise being void for the third
part, the Land being held in Capite.

Crossman *versus* Reade.

(12)
Co. 8. 136. a.
Moor 236.
1 Leon. 230.

1 Cr. 373.
Co. Lit. 264. b.

DEbt. The case upon special Verdict was, A Woman Executrix
marrieth with a Debtor of the Testator, the Husband dieth,
and Debt was brought against the Woman, who pleaded Riens in-
ter manes, and all this was found; and if this was Assets, it was
the question. And it was adjudged that this Debt was not Assets
in her hands, for by the intermarriage the Debt which the Execu-
trix had in autre droit, was not extinct but suspended; and the Action
was revived against the Executors of the Baron; and compared it
to Darcies case in the Commentaries.

Richmond *versus* Webb.

(13)
2 Cr. 86.
Hob. 37. 1
Post. 146. 171.

Action upon the Case, and counts that he was seised of a Messuage
and certain Lands in Blankeworth, to which Land, time out of
mind, &c. he had common appendant in 400 Acres of Land in Lyd-
cotts Millisen, that the Defendant had inclosed it, and so disturbed him
of his Common. The Defendant pleads that he had set up a Vaccary
upon parcel of it necessary, &c. absq; hoc that the Plaintiff had Com-
mon. And upon this issue was joyned and tried for the Plaintiff. And
now Tanfield moved in Arrest of Judgment, that the venire facias and
Trial was de Lydcotts Millisen only, where it ought to be also of Blanke:
where the Land was; 49 Ed. 3. 20. 30 Ass. 42. 10 Ed. 4. 10. and this mis-
trial is out of all the Statutes of Jeofailes; and for this cause it was ad-
judged that the Plaintiff, nihil capiat per billam; and he could not have
a venire facias de novo, for he had a Verdict given, which was certified.

Martin *versus* Alice Whipper.

(14)

DEbt against the Defendant as Executrix of J.S. upon plene admi-
nistravit pleaded, it was found by Verdict, that the Testator at
the time of his death had Goods to the value of one hundred pound,
and was bound to another by Obligation in one hundred pound,
and

and that the Defendant had taken in this Obligation, and made another in her own name with sureties to the Obligor. And upon the motion of Heale, the Court held this was an Administration, and it is in the nature of a payment, and so much of the Testators Debt is by this discharged, and so it was said to be adjudged in Woods Case. Nota, suit ruled accordingly, Pasch. 30. in Communi Banco; Post. 120. which was entred, Mich. 28 & 29 Eliz. Rot. 2625. Inter Stampe & Hutchins.

Pigott versus Russel, Hill. 30 Eliz. Rot. 164.

Pigott sued two Writs of Error, one to reverse a Fine, the other (15) to reverse a Common Recovery, by reason of his Nonage. Post. 129. Tanfield moved that the Writ to reverse the Fine was not well brought. The Case was; English was Tenant for life in right of his Wife, the remainder to the Plaintiff in Fee, and they joyned in a Fine to Russel, so they all ought to joyn in the Writ, and there ought to be summons and severance, and he cannot bring it alone. Coke and Atkinson contra; this Writ is well brought by the Plaintiff alone, for it is brought for an error in fact, viz. his non-age, and of his non-age the other can take no advantage; so the cause of the Action being several and not joyned, they cannot joyn in the Action, 34 H. 6. in the case of attainder, 7 H. 4. 44. and they relied upon the case, 29 Aff. 14. The Court held the Writ was well brought, because it is no error in the Record, but an error in fact; and if two Infants bring a Writ of error, they must assign the errors severally; and therefore if one be within Age, he must bring the Writ alone, vide postea, Hil. 31. pl. 3. Post. 124. Co. 1. 76. b.

*Reynold versus Kingman and Brown, Int.
Hil. 30. Rot. 343.*

Ejectione firmæ. The case was, H. Creeke was seised of certain (16) Lands held by Knights service, let the same to J. Creeke, Habendum to him and one Jo. Downeman, for their lives, rendering Rent. Post. 615. 641. Ante 56. 8. And afterwards devised the Land to Alice his Wife for life, the Remainder over in Fee, which was void for a third part, and died. Post. 323. J. Creeke the Lessee died; Jo. Downeman pretending to be in as Lessee, continueth in possession, and payes the Rent to Alice. Afterwards one Edward Creeke Son and Heir of the Devisor makes a Letter of Attorney to J. S. to enter into all the Land, and to enfeoffe the said Jo. Downeman who maketh a Feoffment accordingly. J. D. dieth seised; the question was, if this descent takes away the entry of Alice. Harris argued that it did not, for when he enters and pays the Rent to the Devisee, he doth it as Tenant at Will, for he had colour to enter. And it was adjudged in this Court in a case between Goos and others, that where J. S. giveth an Authority to J. D. to make Leases of certain Land to certain persons in the name of J. S. and J. D. maketh Leases in his own name, which was void, yet although the Lessees enter and die seised, this taketh not away the entry of J. S. for they enter by colour of title, and in the mean time are as Tenants at Will,

Will; and when the Attorney of B.C. enters to make a Feoffment, the other was in possession for his Lessor, 38 H. 6. and then cannot take livery from him that had no possession. But Wray said he could not be Tenant at Will; for he had no colour to enter his name in the Habendum, being void; but if he were Tenant at Will, by his taking a Feoffment of a stranger his Will is determined; and so his entry cannot reduce the possession to Alice, quacunq;ue via, this is a descent and tolls the entry; and it was adjudged accordingly.

Post. 323.

Knight *versus* Bourne.

(17)
2 Cr. 68r.

Action upon Trover of a Horse, Judgment was, quod recuperet equum vel damna, whereas it should be Damna only, and the Judgment was reversed.

Beveridge *versus* Cony, Pasch. 30 Eliz. 285. vel 485.

Co. 7. 2. a.
Post. 259.

(18) **E**rror of a Judgment in the Common Pleas; the matter was, a Lease was made at Northampton of Land in Cambridgeshire, the Lessee was obliged to perform the Covenants contained in the Indenture of Lease, Debt brought upon the Obligation, and the breach assigned in not paying the Rent, the Defendant rejoyneth that he hath paid it; and upon this they were at issue; and found for the Plaintiff by an Enquest of the County of N. where the Lease was made. And it was said in Arrest of Judgment that it was no good issue, because no place is alledged of payment, and the issue was mis-tryed by a visne of the County of N. where it ought to be of the County of C. where the Land was, for by intendment the payment was there, and so was the opinion of Anderson, but Windham, Periam, and Rodes cont', for although the Bar was ill, because no place of payment was alledged, yet by the verdict it is made good, for a payment in one place is payment in all places, and it was adjudged there for the Plaintiff; and upon the Writ of Error brought, these two matters were assigned for Error. 45 Ed. 3. 5. but afterward the Judgment was affirmed.

Lancaster *versus* Lowther, Trin. 30 Eliz. Rot. 346.

(19)
Ant. 50.

Error to reverse a Judgment in Outlary. 1. Error assigned, that the Original was against Brian Lancaster de Huton Walmsly in the County of Y. the Proclamations were against Brian L. de Hutton, leaving out Walmsly. 2. There be in the Proclamations two Letters of T. and in the Original but one, viz. Huton, and the Judgment was reversed.

Austen & Steene *versus* Courtney.

(20)
Co. 11. 55. a.
Post 458.
Post. 314.

Error to reverse a Fine; levied in Exceter upon a plaint in nature of a Writ of Covenant. 1. Error assigned, that the plaint was quod teneat conventionem de Duobus tenementis in Exceter (and abuted them on every side) which is incertain, for Tenement contains divers things, as Rent, Land, Meadow, &c. as an ejectione firmæ, of a Tenement, and an Indictment that one entred in tenementum with

with force are not good, and this Error was assigned in the plaint; for the Fine relates to the Covenant, and is levied de tenementis prædict. 2. Error, the Fine levied in Exceter is void, for they cannot prescribe to levy Fines, for then the Queen should lose her Fine pro licentia concordandi, 50 Aff. 9. 44 Ed. 3. 29. & in 22 Eliz. it was ruled in a Chester case, that a Fine levied there was void; and the judgment was reversed; but the Justices delivered no opinion whether a Fine levied in Exceter was good or not. Post. 314.

Edwards *versus* Ebsworth.

Information: Upon the Statute 35 H. 8. pro not fencing of Copices. (21)
1. Exception, because it is not alledged that the Defendant had lawful interest in them, as the words of the Statute are. 2. Because, it is shewn that certain Copices were cut, but shews not what Copices they were. 3. Because it is recited that he shall forfeit for every rood 3 s. 4 d. where it should be for every rod of Land; but it was said, the Parliament Roll, is rood of Land, and so was the last impressions; but for the two first exceptions the party was discharged. 35 H. 8. c. 17.

Ter. Michaelis, 30 & 31 Eliz. in Camera Scaccarii.

Pike *versus* Cottington.

Error of a Judgment in the Queens Bench, in Debt upon an Obligation, the Error assigned was, the Defendant in the Writ of Error brought Debt upon an Obligation of a 100 l. the Condition was, that if he pay 50 l. at his House at Lockington in the Parish of Kilmerston, that then, &c. Defendant pleaded payment, and the venire facias issued of the visne of Lock. and this was assigned for Error, for it ought to be de visneto de Kilm. for Lock. shall not be intended to be a Village, but a place known in K. 6 H. 7. 3. 11 H. 7. 22. But all the Justices held it no Error for Lock. shall be intended to be a Village in the Parish of K. for divers Villages may be in one Parish, but if it had been at his House in Lock. in Kilmerston, then Lock. shall not be intended a Village, but a place known in Kilmerston, and the Judgment was affirmed. (1) Ante. 108. Co. 11. 25. b.

Kingdon *versus* Barne.

Error of a Judgment in the Queens Bench, in Trespass for taking of certain Corn, the Defendant justifieth the taking as his proper Goods; and pleads a special justification. The Plaintiff makes title to them by seisure; for that King Philip and Queen Mary by their Letters Patents enrolled in Chancery, dederunt & concesserunt villæ de Launceston liberty of a market, &c. and shews a special cause of seisure, as an Officer there; upon which it was demurred in Law, and Judgment for the Plaintiff. And the Error assigned was, that he pleaded that the King and Queen by Letters Patents, grant, &c. but saith not sub magno sigillo confectas; and this was clearly held an Error; for if the grant was not under the Great Seal, it is not good; and though he saith enrolled in Chancery, it is not good, for any Patent may be enrolled there; and therefore the Judgment was reversed. (2) Ant. 75. Co. 10. 94. b.

Bury *versus* Pope.

- (3) **C**ase for stopping of his light : It was agreed by all the Justices, that if two men be owners of two parcels of Land adjoyning, and one of them doth build an House upon his Land, and makes Windows and Lights looking into the others Lands, and this House and the Lights have continued by the space of thirty or forty years, yet the other may upon his own Land and soyle lawfully erect an House or other thing, against the said Lights and Windows, and the other can have no Action; for it was his folly to build his House so neer to the others Land; and it was adjudged accordingly. Nota, *cujus est solum, ejus est summitas usque ad coelum.* Temp. Ed. 1.

Post. 269.

Billford *versus* Fox and his Wife.

- (4) **D**ebt upon an Obligation against the Defendant and his Wife Executrix of her former Husband; the Baron appeared upon the exigent, and would have put in a superseas for himself alone, without any appearance or superseas for his Wife; and so at the first the Justices thought he might, as 18 Ed. 4. & 14 H. 6. are. But Antropos the Attorney said it was a practise to defeat the Plaintiff of his Debt, and shewed a President of 18 Eliz. that in the like Action brought against Sommers and his Wife, Sommers would have put in a superseas for himself only, but he was not suffered, but shall be compelled to put in an appearance, Attorney, and superseas for his Wife also, and so all the Justices did now hold; otherwise an exigent de novo shall issue out against him.

Hunt *versus* Sone, Hill. 30 Eliz. Rot. 1732.

- (5) **A**n Assumpsit, and declared that in consideration he promised the Defendant that he should have and occupy such Lands from such a day for five years, the Defendant promised to pay him 20 l. for every year, at two feasts, &c. and avers that the Defendant had occupied the Land for one year and a half, and for 30 l. due for that time he brought Action, and after Verdict it was moved in Arrest of Judgment, that this promise and consideration was a thing entire and not severable, and therefore ought to have averred that the Defendant had enjoyed the Lands for five years, otherwise the Action lieth not; but it was adjudged for the Plaintiff, for all the Court held, that if the promise had been that he should enjoy the Land for five years, and in consideration thereof he shall pay him a 100 l. in five years, viz. 20 l. per annum, there the Action lieth not for part till all the Term be expired; but the promise and agreement being that 20 l. shall be paid for every year, it is otherwise; and several Actions lye for every day of payment. And Rhodes Justice said, so it was lately adjudged in Sir Thomas Joscelynes Case, that in consideration one would marry his Daughter, that he will pay to him 300 l. scilicet, Fifty pound

*Qu. of this distinction.*1 Cr. 241.
Co Lit. 292. b.
Post. 776. 807.

pound by the year during six years, there at the end of every year a feveral Aſſion lieth for Fifty pound.

Rookesby's Caſe.

Quare Impedit, The Original Writ wanted this Word (ad): for whereas the Writ ſhould be, quæ ad donationem ſuam ſpectat, the Writ was, quæ donationem ſuam ſpectat, and after divers motions for amending of it, the Writ by award was amended, and (ad) put in, and the principal reaſon was, that the ſix months were paſſed, and if the Writ ſhould abate which was purchaſed within the ſix months, the Plaintiff ſhould be remedileſs to recover his preſentation.

(4)
Poſt. 286. 462.
644.
Ant. 79.
Co. 8. 159. d.
160. d.

Albany *verſus* the Biſhop of St. Afaph. Trin. 27. Eliz. Rot.

Quare Impedit, for the Church of Whittington. The Biſhop pleaded that the Service there was in the Welch Tongue, and that the Pariſhioners underſtood not the Engliſh, and that the Preſentee could not ſpeak Welch, and therefore he reſuſed him; And all the Juſtices held this a good cauſe of reſuſal, for he cannot inſtruct his flock according to his Duty and Charge: but in this caſe the Plaintiff had preſented ſixteen days within the ſix months, and the Biſhop gave no notice of the inability of the Clerk, till three days after the ſix months expired. And the Court held that notice ought to be given to the Patron himſelf, if he be reſident in the County, and if not, a publick intimation ought to be on the Church door, and notice of this matter ought to have been given immediately when he was preſented and examined, or within ſuch convenient ſpeed as might be; but when the Biſhop is to enquire of the behavior of the Clerk, he ſhall have longer time; and for this cauſe Judgment was given for the Plaintiff.

Shepard *verſus* Kearne.

Debt upon an Obligation. The Condition was that if one pay to the Plaintiff within one Month after the death of the Lady Learne 30 l. or Twenty Nine, at the Election of the Obligee, that then, &c. and the Defendant pleads that the Plaintiff had made no Election; the Plaintiff demurred, and it was adjudged that the barr was good, and Judgment againſt the Plaintiff.

(6)
Moor 241.
1 Leon. 69.

The Queen againſt the Biſhop of Lincoln, and Ligh the Incumbent.

Quare Impedit, The Caſe was, After Lapse incurred to the Queen, the Biſhop being Patron doth preſent, and afterwards the Suſſeſſor of the Biſhop certiſieth againſt this Incumbent,

(7)
Owen 5. 89.
Gould. 78. 83.
86.
Moor 259.

Ante 44.
Co. 7. 28. a.
Post. 790. 811.

bent, that he had refused to pay the Tenths, and then the Bishop collateth the Defendant; who was inducted; the Queen brings Quare impedit. And it was adjudged that the Queen hath not lost her presentation, but if the Incumbent had died it were otherwise; for here the Church became void by the Incumbents own Act; so if he had resigned or been deprived; and it would be inconvenient if the Queen should lose her presentment by the Incumbents own Act.

Michael *versus* Scockwith.

(8) **D**Ebt upon an Obligation, the Issue was non est factum. The Jury found that the Defendant did seal and deliver it as his Deed, but that after the day of the Issue joyned, the Seal was pulled off from the Obligation; and the Plaintiff had Judgment, for it was the Defendants Deed at the time when the Issue was joyned, and the Trial shall relate to it, although the Deed was cancelled afterwards. v. 36 H. 8.

Co. 5. 119. b.

May & Bannister *versus* Street.

(9)
Moor. 257.

Ejectione firmæ. It was found by Verdict, that the Prior of Merton was seised of a House in Southwark, held of the Archbishop of Canterbury, as of his Borough in Southwark, and 30 H. 8. Surrenders it to the King, H. 8. who granted the said Messuage and divers other Lands in London, Middlesex, and Essex, to J. S. and his Heirs, to hold of him in libero Burgagio by fealty for all services and demands, and not in Capite. Queen Mary grants the Mannor and Borough of Southwark to the Mayor and Commonalty of London, and the Tenant of the said Messuage died without Heir; and the question was, whether the now Queen or the Patentees of the Borough should have the Elcheate, And it was adjudged for the Queen; for the first Patentee of the Messuage held it of the Queen in Socage in Capite, as of a Seigniorie in gross, and the Words in libero burgagio are meerly void, for the Land out of the Borough cannot be holden in libero burgagio, and there shall not be several Tenures, for one Tenure was reserved by the King for all, and therefore of necessity it shall be a Tenure in Socage of the King.

Lit. Sect. 162. 3.

Stampe *versus* Hutchins Intr. Mich.

28 & 29. Rot. 2625.

(10)
1 Leon. 111.
Moor 260.
Ante 115.

DEbt against the Defendant as Administratrix; she pleaded plene administravit. The Jury found that the Intestate was indebted to divers by Obligations, and that after his death the Defendant had taken in the Obligations, and had obliged her self to pay the greater part of the sums contained in the Obligations, at certain days to come, and for the residue had promised to the parties that in consideration of delivery in of the said Obligations, that she would pay, &c. And by the Opinion of Anderlon, Windham, and Periam, it was held clearly a good Administration, so that the property of the goods of the Intestate to that value were altered and changed in the Defendant.

Hunt

Hunt and his Wife *versus* Gilburne.

Dower: And demanded the third part of the Lands of Augustine her former husband, of Lands in Kent; the Defendant pleaded that the custom there is, that the Wives shall have the moiety of the Lands of their husbands for their Dower, and shall hold them so long as they live chaste and unmarried, Et non secundum cursum communis legis, and that the Feme demanded since the death of her former husband had taken the demandant Hunt to husband, and so demanded judgment, if she shall have Dower; and the opinion of the Court was, that the prescription in the bar was good being in the negative, and so it was adjudged. And Periam said, if he had not pleaded in the negative, yet the demandant shall not have Dower, for the custom that Wives shall have the moiety is the Common Law in Kent, and no other Law runs there.

(11)
Gould. 108.
1 Leon. 133.
Moor 260.

Post. 825.
Moor 260.

Hughson *versus* Ann Web, Pasch. 30: Rot. 420.

Debt against the Defendant as Administratrix upon a contract of the intestate; the Defendant pleads fully Administred, and found against her; and it was moved in Arrest of Judgment, that Debt upon a contract lieth not against an Administrator; And it was resolved by all the Justices, that the Plaintiff shall not have judgment; for although the Defendant by her plea admitted that the Action lay against her, yet when the matter at the beginning is not sufficient to charge her, the Court ex officio ought to abate the Writ without exception of the party, 15 Ed. 4. 25. and the Defendants plea takes not away the Authority of the Court, but they may abate the Writ at any time after.

(12)
Post. 426. 454.

Everard *versus* Greene.

Trespas: The Writ supposed the trespass to be done apud Henisale, and the Declaration supposed the trespass to be apud Bayskett in Henisale, and after Verdict this variance was alledged in Arrest of judgment. Snagg for the Plaintiff, Gawdy for the Defendant. And the Court held that for this variance judgment should be staid; and the difference is, where there is no original, it is aided by the Statute of 18 Eliz. for Jeofails; but where there is an original, and this varies from the Declaration; it is otherwise, and a precedent in the Queens Bench was shewn to be adjudged accordingly.

(13)

Stevens *versus* Lawton and his Wife, Mich. 29 & 30.
Eliz. rot. 2578.

Ejectione firmæ: Upon special Verdict the Case was, Sampson Bell let Land to W. his son, and P. his Wife, & eorum primogenitiæ proli successive; they had then no issue, but afterwards they had issue; the question was, if after the death of W. and P. the issue shall take by way of remainder or otherwise. And the Court held, he shall take nothing, for he was not in esse at the time of the grant, and by the grant he is to take jointly; and so it was adjudged.

(14)
Ant. 10. 58.
Co. 6. 17. a.
Post. 334.

R

Chamber-

Chamberlain versus Stanton, Mich. 30 & 31. Rot. 656.

- (15) **D**Ebt upon an obligation: the Defendant pleaded non est factum; the Jury find that the Defendant caused the obligation to be written and signed and sealed it; and then laid it upon a table, and the Plaintiff came and took it; the question, if this was the Defendants Deed; and the opinion of all the Justices was, that it was not, without other circumstances found by the Jury.

Co. Lt. 36. a.
Ant. 7.

Johnson versus Gabriel and Bellamy, Trin. 29. Rot. 334.

- (16) **E**jectione Firmæ: The case upon special Verdict was, Grant was seised in Fee of the Land, and devised it to his Wife for life; and when John G. the son of his brother, came to his age of twenty five years, then he shall have it in Fee. Jo. before his age of twenty five years levieth a Fine to A. B. and after his said age of twenty five died, and it was adjudged that his heir shall be barred by this Fine levied by him, and so it shall be if the Land had been given to him in Tail, and there shall be no Averment, that partes ad finem nihil habuere, &c. and this being found by Verdict, shall bar as well as if it had been pleaded, as an Estoppel.

Co. 10. 50. a.
1 Cr. 435.
Post. 142.
Co. 10. 50. a.
Post. 610. 11.
Post. 362.

Termino Hillarii,
Tricesimo primo ELIZABETHÆ,
in Banco Regiæ.

Mott *versus* Hales, Int. Mic. 30 & 31 Eliz.

DEbt upon Lease for years: The case was, a Parson maketh a Lease to the Plaintiff for twenty one years after the Statute of 13 Eliz. of Lands usually let, rendering the ancient Rent, the Patron and Ordinary confirm the Lease, the Lessee lets part of the term to the Defendant, the Parson dieth, the Successor enters, and lets it to the Defendant, against whom the first Lessee brought Debt upon the former Lease, who pleads the Statute of 13 Eliz. that makes all Leases void where the Parson is non resident or absent for eighty days, &c. and that the successor hath entred, &c. upon this Plea the Plaintiff demurred; and it was argued by Coke and Godfrey that the Statute extends not, but to the Parsons that make the Leases and are non-resident or absent, &c. and extends not to Leases of Parsons which afterwards die; for such persons cannot be said to be absent which are not in esse, especially the Statute giving liberty to let Land usually let, which shall be vain, being confirmed by the Patron and Ordinary, if they continue no longer than the Parsons life; but it was adjudged that this Lease is void by the death of the Incumbent, for the Justices said that the Statute doth provide against dilapidations, and for maintainance of Hospitality, and therefore provideth not only that Leases shall be void for non-residency, &c. but by death or resignation, for otherwise dilapidations shall be in the time of the successor, and he cannot maintain Hospitality, and so it was adjudged.

(1) *This Case doth divide 106*
Moor 270. Law. 11 Vol. 245.
R. 754.
13 El. cap. 20.

Post. 490.

Barkly and Gibbs *versus* Kempstow, Int. Trin.
30. Eliz. Rot. 64.

A Sumptit: Plaintiffs declare, that Civitas Worcester fuit antiqua civitas and that all Pleas determinable there were used to be by suit before the Bailiffs, Chamberlain, and Aldermen there determined, and the Bailiffs, &c. had use to have their servientem ad clavam, to make Arrests; and that there they had a Prison, and that the Bailiffs time out of mind were Keepers of the Prison, and of all the Prisoners there, and that whereas the Defendant had a

(2)

R. 2

house

Hob. 14.

Ante 53.

Ante 53.
Post. 625.

house adjoyning to the Prison, in which the Bailiffs had use to commit their Prisoners to be safely kept; and whereas one M. had affirmed a plaint of 18 l. against Worley in the same Court before the Bailiffs, &c. which was a Plea there determinable by Custom, per quod they mandaverunt quoddam warrantum to the said Serjeant to Arrest him, by force whereof he Arrested him and brought him to the next Court, and the Plaintiffs being Bailiffs committed him to Prison; and the Defendant having the said house adjoyning to the Prison, in consideration that the Plaintiffs committed the Prisoner to him to keep, by which he might make his commodity by uttering his meat and drink, and might have as great benefit as he used to have, promised to keep him safely, and save the Plaintiffs harmless of all escapes; whereupon they committed the Prisoner to his house to keep, &c. he such a day had suffered him to escape, by which they were damnified; upon non assumpsit pleaded, it was found for the Plaintiffs, and divers matters alledged in Arrest of Judgment. 1. Because it is alledged that mandaverunt warrantum, &c. but shew not that it was in writing under Seal, as it ought to be. Sed not allocatur, for it shall be so intended. 2. It was not alledged how they were damnified, viz. that they were sued for this escape, or otherwise molested. Sed non allocatur, for immediately upon the escape they were damnified and in danger to be sued, and might sue the Defendant presently and not tarry till they were sued. 3. It was held upon good advisement, that this was a good consideration to make an Assumpsit, viz. the uttering of his meat, &c.

Pigot *versus* Russel, vide Antea Mich. 31 casus 15.

(3)

Co. 1. 76. b.
Post. 129. 290.
Ante 115.

IT was moved by Tanfeild that the Writs of Errors were not good, for the Writ of Error upon the recovery made only mention of one Voucher, when it was a double Voucher, so the Justices had no Warrant to examine it. 2. The Writ of Error upon the Fine was ill, for the Writ makes mention of an hundred and five Acres, and the Fine certified is an hundred and fifty Acres, and for this variance it is not good. Atkinson & Coke contra. 1. The Writ of Error upon the Recovery was well enough, for so are all the precedents to make mention of one Voucher being betwixt the Demandant and Tenant; but if it had been between the first and second Vouchee, then both ought to be mentioned. And as to the Fine, it agreeth with the Record, which is with the Custos Brevium, but Wray said the principal part of the Fine is with the Chirographer, and it ought to agree with it, else is not good; and here it was held that if Lessee for life, and he in the reversion joyn in a Fine to a Stranger, and the reversioner reverseth the Fine for nonage, yet he shall not enter for forfeiture, because he joyned in the Fine and consented to it; and afterward the Fine was reversed quoad the infant only.

Patridges Case.

Quo Warranto : A Demurrer to the bar : it was held by all the Justices in speaking to it, that a man may prescribe to hold a Leet oftner and at other times than are mentioned in the Statute Magna Charta cap. 11. for it is in the affirmative ; and Popham said that want of a Pillory or Tumbrel is cause of forfeiture of a Leet, ⁽⁴⁾ 13 Ed. 1 Leet. 12. Cook contra. And Popham said that a general Pardon being with divers exceptions, he that will take advantage of it must plead it, and that he is not a person excepted, otherwise of a general pardon except I. S. for there the Court may take consuance that he is not I. S. 8 Ed. 4. 7. And the Court held that it is not sufficient in a Quo warranto of liberties to derive an interest to a stranger in them from the Queen without making title to himself, for the Writ is Quo Warranto, he himself useth them. ^{2 Inst. 72. Post. 245.}

Cage *versus* Payton & Everet, Intr. Trin. 30 Eliz. rot. 349.

TRESPASS quare clausum bosci sui vocat' Frith fregit & forty Loads of the Wood did take and carry away. The Defendant pleaded that the place where, &c. was parcel of the Mannor of great Hornebey, which Mannor the Earl of Oxford let to Heywood for years Exceptis boscis, arboribus mahermiis, grossis arboribus, & subboscis, but did covenant and agree that the Lessee and his Assignees might take reasonable Fireboot and Hedgeboot super præmissa prædicta during the term; and the Earl afterwards conveyed the reversion to the Plaintiff, and they as servants of the Lessee justifie for reasonable Fireboot, &c. the question was, if in the place where, &c. being parcel of the Wood which is excepted out of the Lease, if by reason of these words Super præmissa prædict. they might take Trees, or if it shall be only referred to the Land demised. Godfry and Egerton for the Plaintiff, that the Fireboot is to be taken only upon the Land let, for that which is excepted is not let; and præmissa shall be taken for prædimis- ⁽⁵⁾ fa. Snagg contra. Wray said that the agreement he shall take Fireboot, &c. super præmissa shall only extend to the Land let; but if he had averred that there was not sufficient upon the Land let, that might peradventure alter the case; and so was the opinion of the other Justices, and judgment given for the Plaintiff. ^{Post. 782.}

Ireland *versus* Higgins, Int. Trin. 30 Eliz. rot. 403.

ASSUMPTIT : The Plaintiff declareth, that whereas he was possess of a Grey-hound, which came to the Defendants hands by Trover, that he promised to deliver it upon request, and the Defendant did demur upon the Declaration; Lee argued, the Action did not lie, for being out of the Plaintiffs possession, he had no property in it, being fera naturæ, 14 Eliz. Dy. 306. 12 H. 8. and by a grant of omnia bona & catalla; a Dog passeth not. Tanfeild contra : he agreed that if it were fera naturæ there was no consideration of the promise, but a Dog is a thing that is tame by industry of man, and the Law regardeth it as any other beast, and is of as good use; and there be four kind of Dogs which the Law regards, viz. a Mastiff, a Hound which comprehends a Grey-hound, a Spaniel and ⁽⁶⁾ ^{Co. 7. 17. b. Hob. 283.}

and Cumbler, and he had seen a president in 13 H. 7. rot. 35. where in trespass of assault and battery, the Defendant justified that I.S. was possessed of a Dog ut de bonis propriis, and delivered it to him to keep, and that the Plaintiff would have taken it from him, in which he resisted him, and in defence and custody of his Dog he beat him, and the hurt which he had was de son tort demesne, &c. and to this the Plaintiff was put to answer, and said de son tort, &c. which probeth a property in the Dog when he justifieth the beating of one in defence of it 2 Ed. 2. Avoury. A Replevin lieth of a Ferret, which is of a more base nature, and 23 Eliz. I.S. brought trespass for taking of a Bloodhound, and found for him, and he recovered 10 l. damages. And the Plaintiff need not in this case aver the Dog was tame, for the Law intends it, as of a horse; and it was adjudged for the Plaintiff.

Stone *versus* Wythipol, Executor P. Wythipoll, Int.
Tr. 30 Eliz. rot. 777. vel 771.

(7.)

2 Cr. 351.

Post. 700.

Post. 700.

A Sumpfit: and declares that where the Testator was indebted to him for certain pieces of Velvet, and for 5 l. of money lent, & pro diversis aliis mercimoniis, bonis & catallis, and promised to pay him at such a day, and died before the day, and the Plaintiff having an intent to sue the Defendants he required him to stay his suit till such a day, and he would pay him or give him security, whereupon he staid, &c. The Defendant shewed that at the time of the delivery of the Goods to the Testator, he was within age, and thereupon it was demurred. Egerton for the Plaintiff, that the consideration here is good, and consists of divers parts, the Debt precedent, the Testators promise though within age, and the Defendants promise; and the promise of the infant is not void, but for his non-age he may help himself by plea; but if Debt had been brought against him, and he pleads nihil debet, it shall be found against him; and if at his full age he had promised payment, it had been good, and in foro conscientiae the promise of the infant had been good; and 9 Eliz. the Case was, the Lord Gray was indebted to divers, and after his death the Lord Gray his son, who was not his Executor nor chargeable with the Debts, when the creditors complained and demanded their debts of him, told them that if his Father was indebted to them he would pay them; and upon this it was held an Action lay, and the promise of the Executor is upon good consideration; for the Plaintiff surceased his suit, and the Executor was freed of trouble, and this matter will maintain Suit in Chancery. Coke contra, that it is no consideration, for every consideration that doth charge the Defendant in an Assumpfit, must be to the benefit of the Defendant, or charge of the Plaintiff, and no case can be put out of this rule; and this contract by the infant was void, and staying of suit is no benefit to the Defendant, nor any charge to the Plaintiff more then was before; and this is no consideration to sue in Chancery, for no suit there against an express rule of Common Law, and denied the Case of the Lord Gray, and the Defendant being not chargeable to pay the money, the staying of suit was no benefit to him; and afterwards the Court was clear of opinion the Action did not lie, for the contract of the infant was meerly void, and in Debt against him he might plead nihil debet. Egerton said it was adjudged in this Court between Edmunds

and

and Burton, that where an infant was bound in an obligation, and at his full age he promised payment: an Action was maintainable against his Executor upon this promise, to which the Court agreed; for the Bond which was the ground of it was not void, but voidable, and he could not plead *non est factum*, or *nihil debet*, to a Bond; and if at his full age he had accepted a defensans of the Bond, this had made it good; and in the case cited the promise was by the infant himself, which in conscience he ought to pay; but the Defendant is in a remote degree, and it was adjudged against the Plaintiff.

Wheeler versus Thorogood.

Ejectione firmæ: It was held clearly by the Court, that if I. S. (8)
maketh a Lease to B. to commence two years after, that after Ante 15.
the two years are expired, B. before any entry may grant his term, Co. 5. 124. b.
although the Lessor doth continue in possession.

Termino Hillarii 31 Eliz. in Communi Banco.

Moody versus Lewen, Int. Mich. 29 & 30 Eliz. rot. 2529.

Replevin: Upon a special Verdict it was found that Trin. 14 Eliz. a
Fine was levied between Lovelace and Rutland Plaintiffs, and
Fooke and seven others Deforceants of the Mannor of D. &c. by
which Fooke and the others did acknowledge the Mannor, &c. to the
Plaintiffs come ceo, &c. and they granted it to them, &c. rendering
Rent with a nomine poenæ, and clause of Distress to Fooke in Fee,
who granted it to Horden, which conveyed it to the Abowant; the
Plaintiff traversed the grant to Horden modo & forma, &c. and it was
found that Fooke in his grant did recite that the Fine was levied
inter Fooke and seven others Plaintiffs, and L. and R. Deforceants
of the Mannor, and that the said L. and R. granted by it the Rent, &c.
to F. in Fee, and he granted it to Horden; and if this Rent by reason
of this misrecital was well granted, they prayed the discretion, &c.
And it was argued by Shuttleworth for the Plaintiff, and by Walmisly
for the Defendant; and it was adjudged a good grant, for there
is sufficient certainty of the thing granted, and of the intention
of the parties to grant it, and nothing is mistaken but the Deforce-
ants and Plaintiffs in the Fine, which is not material; and it
was adjudged for the Defendant, that he should have return.

Hooper versus Gomerfal and his Wife, Int. Trin. 30.
rot. 2403.

Debt against the Defendant G. and his wife Executrix of Henry
Woodlade of London Taylor: the Defendants plead a recovery (2)
against them by I. S. by the names of I. Gomerfal and Elizab. his Wife
Executrix of H. W. of London, Barber-Chyrurgeon, and that ultra the
sum recovered they had nothing, &c. and upon this it was demurred, Post. 267.
and adjudged no good plea, because they took no averment that
H. W. Taylor, and H. W. Barber-Chyrurgeon were the same person.

Gosling

Gosling *versus* Warburton and Crispe, Intrat. Mich.
29 & 30 Eliz. rot. 334.

(3)

Ejectione firmæ. The Case was, Frencham devised his Land to M. his Wife till P. his daughter came to the age of nineteen years, and afterwards to P. entail, remainder over in Fee, and devised further that P. should pay after her age of nineteen years to his Wife twelve pound per annum in recompence of her dower, and if she failed of payment that M. should have the Land for her life, Mar. before P. came to the age of nineteen years, brought a Writ of dower and recovered a third part, and after P. came to her age of nineteen years for non-payment of the twelve pound M. entred, and the question was if her entry were lawful. Shuttleworth argued that it was, and that she had not waived the benefit to have the Lands by the devise, by bringing her Writ of dower, for then she had no title to it, but her title accrued by the not payment of the twelve pound; Walmsley contra. And afterwards it was adjudged, that she having recovered a third part in dower, she shall not have the rent by the Will; and it is against the intention of the Will, she shall have both, and the acceptance of one is a waiver of the other. And Mich. 31 & 32 Eliz. Error was brought, and the judgment was affirmed. The Record of which is P. 31 Eliz. rot. 247.

Co. 4. 4. b.

Termino Hillarii 31 Eliz. in Scaccario.

Lowe *versus* Lowe.

(1)
3 Leon. 110.
Moor 268.

Ejectione firmæ. Upon special Verdict the case was, I. S. had issue, three sons, and devised his Lands to his second son for thirty years to perform his Will and pay his debts, and made him his Executor, and if he dieth within the thirty years, that then his third son shall have such term as shall be arre of the thirty years, and dieth: the eldest son dieth without issue, and the inheritance descends to the second son, he dieth within the thirty years, having issue; the question was between the Uncle and the Nephew, if the third son shall have the Land during the residue of the thirty years. And it was argued by Pigott for the Plaintiff, and Beaumont for the defendant, and adjudged for the Uncle Plaintiff; for although the term was extinct in the second son, yet this is a new devise to the third son, for the words are, that he shall have such a term, &c.

Termino

Termino Paschæ,

Tricesimo primo ELIZABETHÆ,
in Banco Reginae.

Charnocke and his Wife *versus* Worsley,
Intrat. Trin. 30 Eliz. Rot. 833.

ERror. The Case was : Baron and Feme levied a Fine, the Feme being within age, the Baron and Feme brought a Writ of Error, and she was adjudged within age; and if the Judgment shall be, that the Fine shall be reversed generally or quoad the Feme only, was the question; And of the Plaintiffs part, two presidents were shewn, Trin. 2 H.4. Rot.49. & Pas. 6 H.8. Rot.26. That the Fine shall be reversed generally; and for the Defendant a president was shewn in 7 Eliz. That it shall be reversed quoad the Feme only: But there the Case was, That the Baron and Feme levied a Fine, the Feme being within age, and the Baron died, and she took a second husband; and they brought a Writ of Error, and the Fine was reversed quoad the Feme only, and her heirs. And now it was argued by Egerton and Golding of Grays-Inn, That the Fine shall be only reversed quoad the Feme and her heirs, and shall stand good against the Baron; for it may be that the Land was the inheritance of the Baron, which he might lawfully convey; and that the Feme was joynted only to bar her Dower, or that they were Joyntenants before marriage; so he might well give his part: And if it were the inheritance of the Wife, yet he might dispose of it, during his life; and it shall not be reduced to him against his own act. Coke and Atkinson contra: It shall be intended the inheritance of the Wife, if the contrary be not shewn, as in Pigotts Case, Ante. Wray, When Baron and Feme joyn in a Fine, it shall be intended the inheritance of the Wife, and not that they are Joyntenants or Tenants in common: And if the Fine shall be reversed only as to the Inheritance, where shall the Freehold be, and to whom shall the Conisee be attendant? Gawdy, This matter being dubious, the Court shall intend it to be rather the Inheritance of the Wife, then otherwise: And the Fine being the foundation of the Conveyance, it being reversed all shall be restored; as the case in Littleton, Plac: the Baron discontinues the Land of the Feme, and takes an estate to him and his Wife; the Wife is remitted, and so is the Husband, though he cannot say so: For he cannot be remitted, but the Husband must be also remitted, for they are one person; and this Fine shall be reversed in all: For it is

(1)
1 Rol. 748.
Co.2.77. b.
Ante 115.
Ante 124.
Ante 115. 124.
2 Cr. 482.
Lit. Sect. 666. 73

S

Error

Post. 216.

1 Rol. 748.

Co. 2. 77. b.

Co. 2. 57. b.

Error in Law of the Court; and the Baron by the Fine giveth nothing divided from the Feme: And all that passeth from the Wife shall be reversed in all, for the Conveyance is in Law erroneous. As if a man confess an action which is erroneous, yet against his own act he shall avoid it by Error: And if it shall be reversed quoad the Feme only, then it shall be a Fine levied by the husband only; and so it will be a discontinuance at the Common Law against the Wife, which is not reason: And by the Reversal of the Fine, a particular interest cannot be given to the Conisee. And if this Fine shall stand to bind the Baron, then the Baron cannot joyn in the Writ of Error; for a man cannot bring an action to reverse that which binds him, but all the Books are, they shall joyn in a Writ of Error. Wray, The Baron giveth no more then the Wife giveth with him; and this was Error in Court, to receive the Fine; and if the Fine shall be reversed, but Cessabit executio, during the life of the Baron, then the Wife shall not be restored to her Inheritance living the Baron, which is not reason; and here is no mischief to any: For if the Conisee had made a Frogment, Scire facias shall issue against him, in which he may shew and plead, That it was the Inheritance of the Baron, and the Conisee might have pleaded it; and if he doth not, the Court will not help him. And it was afterwards adjudged, That the Fine shall be reversed in toto. And Wray said, he had conferred with divers other Justices, and they were of the same opinion.

Roger Windham *versus* Ed. Clere.

(2)

Action upon the case, and declares, That the Defendant was a Justice of Peace in the County of N. And whereas the Plaintiff was a loyal Subject, &c. The Defendant maliciously intending to deprive him of his good name and fame, did direct his Warrant, and shews it in certainty, &c. to divers Constables to attach him; alledging he was accused of the stealing of the Horse of A. B. by reason whereof he was arrested, till he put in bond to appear, &c. ubi revera he was never accused, nor did steal the Horse, and the Defendant did know him to be guiltless; by reason whereof he was greatly discredited: Upon Non Culp' pleaded, it was found for the Plaintiff; and it was held by Clench and Gawdy, the action was maintainable: If a man be accused to a Justice of Peace for an offence, for which he causeth him to be arrested by his Warrant; Although the accusation be false, yet he is excusable; but if the party be never accused, but the Justice of his malice and own head cause him to be arrested, it is otherwise: And they commanded Judgment to be given for the Plaintiff, 14 Hen. 8.

Havithbury *versus* Harvy and his Wife.

(3)
5 El. cap. 9.

DEbt upon the Statute of 5 Eliz. 9. and demands ten pound, for that he served a Proces upon the Feme as a Witness, and tendered to her sufficient charges, &c. and she appeared not, &c. And upon issue joyned, it was found for the Plaintiff. And it was alledged in Arrest of Judgment, that he doth declare, that the not appearance was to his damages, and sheweth not what damages:

damages : Also that a Feme Covert is not within the Statute, and the charges ought to be tendered to the Baron ; for the charge lieth upon him. *Lewis*, The Action is not brought for the damages which he had by her not appearance, but for the ten pound given by the Statute. Secondly, A Feme Covert is within the Statute ; for she may be the sole witness. Thirdly, She is the person punishable for not coming, and the tender therefore is to be to her ; and the Plaintiff had Judgment.

Hoe versus Marshal, Int. Hill. 30 Eliz. Rot. 788.

DEbt upon an Obligation: The Condition was, That if Osbert Fuller shall not appear at the next Court in Thetford to answer to the Plaintiff, &c. If then the said Osbert before the first day of October, found surety to answer ; that then, &c. the Defendant pleads, that the said O. did appear at the next Court ; the Plaintiff replieth, That he did not appear Et de hoc ponit se super patriam. And upon this, issue was joyned and found for the Plaintiff. And it was alledged in Arrest of Judgment, That this was mis-ried ; for it shall be tried by the Record, and not per Patriam, for every Appearance is upon Record. But the Court held the trial good ; for it appeareth not that he appeared, and that his appearance was upon Record ; but his Plea is, that he appeared at such a day in the Court, which may be, and his appearance not entred ; and yet by it his Bond is saved, and he himself doth not conclude, Prout apparet de recordo. And Wray said, That appearance at such a day may be tried per Pais : But Appearances generally shall be tried by the Record. And Gawdy said, If it be mis-ried, it is aided by the Statute, 32 H.8. And it being the next Term moved again, and a Rule given if the cause be not shewn the next day, that Judgment be for the Plaintiff.

(4)
Post. 579.

Piers versus Hoe.

TRespafs. The Case was upon special Verdict : A woman that was Tenant for life as a Joynturess takes a second husband, and they by Deed convey the Land to Clerke and his Heirs, Habendum to him and his Heirs, to the use of him and his Heirs for the life of his wife only : And the question was, If this were a Forfeiture. And it was argued by Popham for the Plaintiff, and Coke for the Defendant ; and Gawdy held it no Forfeiture, and that the words (for the life of the Wife) shall refer to both : For in construction of Deed, where the words are doubtful, reasonable construction shall be made ; and when words are in a Deed to express the parties intent, they shall not be taken as void : And here the words (for the life of the Wife) are put in to exclude the Forfeiture, and to save the Estate : And of this opinion were Wray and Shute upon the first motion, but Clench contra. But at another day it being moved again, Gawdy held his former opinion ; but Wray and the other Justices held it a Forfeiture ; for Wray said, by the Deed at first a Fee-simple did pass, and that to the use of the Feoffee, then the estate and the use are several things,

(5)
1 Rol. 834.

Post. 407.

and cannot be coupled to the words (for the life of the Wife.) And Wray said, he had demanded the opinion of the Justices of his house, and they held it clearly a Forfeiture in the words, and that the words (for life, &c.) shall refer only to the use; and it was so adjudged.

Ordeway versus Parret and Halsey.

(6)

Scire facias brought against the Defendants who were bail upon a Bill of Debt brought against Bennet, who pleads, That the principal had payed the money in which he was condemned to the Plaintiff, according to the condition of the Recognisance; and per Curiam it was ruled no Plea without pleading payment of Record: For it was said, that the condition is, That the Defendant shall satisfy the debt, otherwise the Sureties would do it: And this is to be understood of the most sufficient satisfaction, which is of Record; and therefore they disallowed the Plea, and would not suffer it to be entered, or to be demurred upon; and did command Gerard, who pleaded the Plea, to plead another Plea; otherwise a Nihil dicit shall be entered. V. Postea, Paschæ, 33 Eliz.

Post. 233.

Watkins versus Ashwicke.

(7)

1 Leon. 34.
Ow. 137.
Moor 222.
Co. Lit 206.b.
Co. 9. 106. a.

Nota by Coke, that it was adjudged, Trin. 27 Eliz. between the said parties, that where one tendered money upon a Mortgage for an Infant, who was not Guardian, nor was to have any interest in the Land, that it was adjudged a void tender.

De Bavoy versus Hassal.

(8)

Assumpsit. The Plaintiff declared, that in consideration the Defendant had retained him to go from London to Paris in France, upon his occasions, he assumed to give him so much as would content him; and alledged that he went thither, and was content to take five and twenty pound for his labour; and at such a place he requested the Defendant to pay it, which he refused. Coke moved in Arrest of Judgment, that he shewed no time or place, when he gave notice of his contentment; and therefore was not good; for it hath been adjudged, that where one doth promise to give another twenty pound upon request, and because no place was alledged of the request, the Judgment after Verdict was staid. Gawdy Justice, the ground of this action is the Assumpsit, but this cannot be certain without the parties Declaration: So the notice is to make the certainty of the duty, but not to enforce or impeach the promise; and in the case alledged, the Assumpsit is nothing without request. But here being only a Conveyance, the certainty of the time and place is not necessary; but this general form will serve, for it is but inducement; for the Contentation is not the cause of the Action; as the case in 39 Hen. 6. in debt against a Successor of a Parson for an Annuity granted by his Predecessor, Pro consilio impenso & impendendo, and declares, that he gave counsel as he ought (otherwise the action lay not) but shewed no place where, yet good. Wray accords: For the place where

Ante 74.

where he was content, is not material, nor issuable; for none can try it but himself: Also it is remedied after Verdict; and it was adjudged for the Plaintiff.

Fynymore versus Sanky. Int. Mich. 30 & 31 Eliz.

Rot. 174.

DEbt for Seven pound thirteen shillings and four pence; upon ⁽⁹⁾ Nihil debet, the Jury found that the Defendant did owe Six ^{Post. 292.} pound thirteen shillings four pence, but spoke not of the other twenty shillings. And this was assigned for Error, that the Verdict was ill, and not remedied by the Statute of 32 Hen. 8. And for this cause it was reversed.

Arundel versus Short and his Wife, Mich. 30. & 31.

Rot. 434.

Error, Upon a Judgment given in Trespass by Baron and Feme of their Close broken, and Corn carried away. Error assigned, that Feme ought not to joyn, for she can have no property in the Corn, 48 Ed. 3. 18. 9 Ed. 4. 52. In personal actions they cannot joyn. Godfrey and Coke contra: It is in the election of the Baron to joyn his wife in personal actions; and it may be intended that they were Joyntenants of the Corn before Coverture, or that the Feme had it as Executrix: And if the Writ by any Intendment may be good, it shall not abate. Gawdy, The Books agree, that for personal things they cannot joyn; but for personal things in action, it is in the election of the Husband to joyn his wife, or not. And Trin. 31. the Judgment was reversed. V. 21 Hen. 6. 30. 14 Eliz. Dyer 305. 7 Hen. 7. 2. ⁽¹⁰⁾ Ante 96. 2 Vol. 195.

Musket versus Cole.

Assumpsit. And declareth, that in consideration the Plaintiff had paid to the Defendant Forty pound for the debt of J. Musket his son; the Defendant assumed to deliver to him all the Bills and Obligations in which the said J. Musket was bound to him; and alledgeth, in fact, a request, and denial to deliver, &c. And upon Non Assumpsit, it was found for the Plaintiff. And it was moved in Arrest of Judgment, that the Plaintiff had not averred, that the Defendant had any Bills or Obligations of the said J. Musket in his hands; and if he had none, the Plaintiff was not dammified, 37 Hen. 6. 29. 19 Eliz. Dyer 356. & 297. But Godfrey for the Plaintiff said, That when it is alledged, that he required the Defendant to deliver them; in this it is implied, that he had some Bills, &c. and the Plaintiff need not shew them specially. Gawdy Justice said, the Plaintiff is not to recover the Bills, &c. but only damages, and so need not alledge what the Deeds were; as the cases in 47 Ed. 3. 3. and 46 Ed. 3. 4. The difference taken where he is to recover damages, and where the Land; And here it may be given in evidence what Bills, &c. he had; and the Plaintiff had Judgment. ⁽¹¹⁾

Knight

Knight *versus* Jermin, Antea Mich. 29. & 30. Case 25.

(12)

F.N.B. 114. D.

2 Cr. 131.

It was now moved again by Coke, and he said, this Malicious intention and endeavour before the Bill exhibited, is to be punished, although the Indictment was lawful to be preferred by any one for the Queen; and the words here, and in a conspiracy, are all one; and as a Writ of Conspiracy lieth against two, so here against one; and it is here alledged to be done maliciously: And here he caused the Indictment to be written before he came into the Court, which is not the office of witness: And where malice is, his Oath doth not excuse him; but if he had done it by the command of the Court, it had been otherwise, 21 Edw. 3. 17. 7 Ass. 12. 20 Hen. 6. 5. Gawdy Justice, If the Defendant did it upon good presumptions, he ought to plead them; as that he found him in the House, &c. or the like cause of suspicion; but no such thing is pleaded, otherwise every one shall be in danger of his life, by such malicious practices. Wray agreed.

Termino

Termino Trinitatis,
Tricesimo primo ELIZABETHÆ,
in Banco Reginæ.

Brooke *versus* Doughty, Int. Hill. 31 Eliz. Rot. 798.

Action for words : For calling him A perjured person, and that he was forsworn in the Court of Requests, And that he shall stand upon the stage. The Defendant pleads not guilty ; and it was found, that he spoke none of the words, but that he was forsworn in the Court of Requests ; and the question was, if these words were actionable. Coke moved, That for saying a man is forsworn, no action lieth. And in Trin. 28 Eliz. between Herne and Haxe, for saying, he was forsworn in the Court of Whitechurch, no action lieth. And in this Term in the Common Pleas, between Samms and Cowbolt, which is entred, Trin. 28 Eliz. Rot. 636. for saying, he had proved him forsworn in the Queens Bench, no action lay. But the Justices (Wray being absent) held the action lay : And for the Case of Whitechurch, Gawdy said, The reason was, because it is a bafe Court ; of which, this Court shall not take Cognisance : But the Court of Requests is a Court, of which this Court shall take Cognisance. And in Mich. 31 & 32 Eliz. the Case was moved again ; and by consent of Wray, Judgment was given for the Plaintiff, but the damages were abridged. Nota, Daniel shewed a precedent, which was Trin. 23 Eliz. Rot. 882. between Foster and Thorne, That for these words, Thou wert falsly forsworn in the Star-Chamber, an action did lie.

(1)
Post. 394.

Post. 573. 788.

Post. 609.

2 Cr. 190.
Post. 297. 492.
905.

Toft *versus* Tomkins, Int. Trin. 30 Eliz. Rot. 528.

The Case upon special Verdict was, There was Grand-father, Father, and Son ; the Grand-father Tenant for life, the Remainder to the Father in tail ; the Grand-father maketh a Feoffment to the use of himself for life, Remainder to the Father in Fee ; then the Grand-father and Father Infeoff the Defendant : The question was, If this were a discontinuance ? Coke for the Plaintiff, and Godfrey for the Defendant. Gawdy and Shute held it clearly a discontinuance ; for when the Father in Remainder enters to make a feoffment, he is remitted by reason of the forfeiture committed before ; and by this had gained the possession, and it is only his Feoffment, and so a Discontinuance ; for both cannot have possession. Clench, contra : for the intent of his Entry was to joyn with the other ; and his intent appears, that his and the Grandfathers estate shall pass together ; And this explaineth it,

(2)

Co. Lk. 49. b.

it, that he will not enter for forfeiture, and so is no Discontinuance, Et adjournat' absente Wray.

Boyton *versus* Andrews and Simpson, Int. Hill. 30 Eliz. Rot. 156.

- (3) **D**Ebt upon an Obligation. The condition was to make an assurance to the Obligee of certain Land before the tenth of March, 17 Eliz. And if it fortune that the Obligee refuse to accept the assurance, and shall make request to have One hundred pound in satisfaction of it : Then if upon such request within five months after, he pay the One hundred pound, that then, &c. and at the day he refused the assurance ; and afterward, 27 Eliz. he maketh request to have the One hundred pound. And if this request were sufficient for the time, was the question upon Demurrer : And upon motion without argument, the opinion of the Justices was, that a request at any time, during his life, was good, and he is not restrained to make it, at, or before the day the assurance was to be made : And Judgment was for the Plaintiff.

Coteford *versus* Pease.

- (4) **P**rohibition. The Plaintiff sueth the Defendant for Tithes in Specie of certain Pastures in N. where he was Parson : The Defendant to have a Prohibition, surmisseth, That he was an Inhabitant in S. and that time out of mind every Inhabitant there that had Pastures in N. had paid Tithes for them to the Vicar of S. and that the Vicar of S. had paid to the Parson of N. two pence for every acre ; and the Court held the Prohibition did lie, and that the Plaintiff shall declare, and the Defendant may demur to it if he will, for it is as if he had prescribed to pay two pence for every acre.

Botham & Cooper *versus* the Lady Gresham.

- (5) **P**rohibition. That she sued them in Court Christian for Tithe Hay, and surmised, that time out of mind they had paid to the Vicar there four pence for the Tithe-Hay of every acre. Coke moved, this was not good, for here modus decimandi shall not come in question ; but he ought to plead it in the Spiritual Court, that it appertains to the Vicar, and not to the Parson : And if the Vicar sue for Tithes, there modus decimandi shall come in question ; and a Consultation was granted. V. Casum præcedent.

Ante 71.

Post. 306.

1 Ro. Rep. 126.

Gomerfal *versus* Bishop, Hill. 31 Eliz. Rot. 751.

- (6) **P**rohibition. The Plaintiff surmised that he sued him for Tithe of Hay, whereas there was an agreement between them, that for the sum of seven shillings per annum he promised him, that he should have the Tithes of this Land for his life : And in his Declaration he said, that for this sum the Defendant let him his Tithes for life ; and for this variance the Court held all to be ill, for the Surmise is as the Writ ; and if there be variance between the Surmise and Declaration, all is ill : But Godfrey said, it had been ruled between Pendleton and Hunt, That an agreement between

Post. 188.

tween the Parson, and the Parishoners, was a good cause to grant a Prohibition, for the Spiritual Court cannot try it; and they will not allow the Plea.

Stedman's Case.

Stedman was indicted upon the Statute of 5 Eliz. for Perjury, (7) and the Indictment was, That he was examined upon certain Articles in the Star-Chamber, and that Falso & voluntariè depofuit; Post. 148. and shews not in what matter he swore falſly, nor in what action; Post. 148. and the Oath was in the Star-Chamber in Middleſex, and the Indictment in Stafford, and he was diſcharged.

Richard Thomas Case.

He was indicted upon the Statute of 5 Eliz. for Perjury, and (8) recited the Statute, That if any he sworn, &c. in any Court of Record, whereas the Statute doth mention them ſpecially, &c. Alſo that Apud Caſtrum Lincolne falſo depofuit, and ſhews not in what County the Caſtle was, &c. And it wanted the concluſion, Et ſic falſo & voluntariè perjurium commiſit, &c. And he was diſcharged.

Lenthal's Case.

Lenthal was indicted of the murder of Coke, and the words were, (9) Inquiſitio capta apud Hereford, &c. but ſhewed not in what County Hereford was, which ſhould be of neceſſity; for the Coroner or Juſtice of the Peace cannot take an Inquiſition out of their Jurisdiction, and ſhewed not the place where the ſtroke was given: And for theſe cauſes, the Indictment was held to be void.

Goffen's Case.

Goffen was indicted of the murder of Marſum, and the Indictment (10) was, that percuffit in brachia ſua dextra. Coke moved, That this was falſe Latin, and without ſenſe, or certainty where the ſtroke was, and ſhewed not where the party died of the ſtroke; for it was, and ſo of it Eo inſtante die obiit: And the opinion of the Court was, that it was vicious. Co. 5. 121. a. Post. 231.

Kirkby *verſus* Coles, Hill. 31 Eliz.

Aſumpſit. And declared, that whereas a certain communication was between him and Cooper, for the Haſſing of certain Hoggs for the Plaintiff; in conſideration, that the Plaintiff gave to Cooper three ſhillings for every Hog well maſted; the Defendant aſſumed, That they ſhould be well fattened, and re-delivered to him: To which promiſe, he giving credit, did deliver to Cooper One hundred and fifty Hoggs to be maſted; and for that fifty of the Hoggs were not re-delivered to the Plaintiff, he brought his Action. And after Verdict, Tredway did alledge in Arreſt of Judgment, That there was no conſideration to charge the Defendant; for he had no benefit; but Godfrey alledged for the Plaintiff, That the promiſe was the cauſe of the Contract, and being made at the time of the Communication it ſhall charge him; otherwiſe per- (11) haps

Ante 42.

haps, if it were made at another time. And it was adjudged between Smith and Edmunds, where two Merchants were indebted one to the other, and they agreed to deliver all their Bills and Bonds into the hands of the Defendant, he did assume, that he would not deliver them, till all actions were determined between them; and notwithstanding he had delivered to one of them, and the other party brought his action; and it was adjudged maintainable, yet he had no benefit by keeping of them: Yet that was not material, for the action was grounded upon the promise and disceit, so here. And of that opinion were Wray and Clench, because the promise was at the time of the Communication. Gawdy Justice, was of the contrary opinion.

Warcop versus Morfe.

(21)

Ante 94.

A Sumpfit. And declares, that in consideration he had bought of the Defendant three parcels of Land, upon the tenth of December; he afterwards, viz. 19. December assumed to make him a sufficient assurance thereof before such a day: after Verdict, Godfrey moved, that the consideration was executed, but it was adjudged for the Plaintiff; for the assurance was the substance of the sale and matter.

Stretton versus Tayler.

(13)

Co. 11. 65. b.

Co. 11. 65. b.

Post. 583.

3 Inst. 194.

Information upon the Statute of Usury, Tam pro seipso quam pro Regina; the Queens Attorney entred a Non vult prosequi: And this was now pleaded in bar against the Informer for all; and it being moved in Court, Wray held it should be no bar. But Popham Attorney alledged, that it cannot be found in any Record, that the party had proceeded, when the Attorney had entred a Non vult prosequi: For they do it not without great consideration, when the Information had long depended, and nothing done in it, and it is entred for the ease of the Subject, that he should not be grieved without cause; and it is not against reason, that in personal suits, the act of the one Plaintiff should prejudice the other. And here the Queen is the principal and first named; and if it were pro Domina Regina tantum, it is clear, she might discharge it; and the Replication shall be in the Attorneys name only: And therefore after Plea peaded, the Queen is only party in a manner: And it was adjudged within these eight years, That if the Informer be nonsuited, the Queen cannot proceed; and by the same reason, where the Queen will not proceed, it bars the party; and the Records of all times warrant it. But at another day it being moved again, Wray said, they all held that the Entry was no bar to the party; and that upon conference, Anderson and Manwood were of the same opinion, that the party is not barred by the Queens not proceeding, for in that the Law giveth the party the moyety, the Queen cannot discharge it. And Wray and Gawdy denied, that the nonsuit of the party did bar the Queen. And it was afterwards ruled, that the party is not barred by this Entry, 11 Co. 65. b.

Perry *versus* Soam, Mich. 30 & 31 Eliz. Rot. 482.

Prohibition against the Defendant, Parson of the Church of Sher-
ing in Essex; for that he had libelled in the Spiritual-Court for
Tithes of green Cares, eaten before they be ripe: And for Tithes
of Herbage of dry Cattel, and for Tithes of Sheep bought or sold,
and for Churchings and Burials; and surmised as to the green
Cares, that in the said Parish they had not sufficient Meadow or
Pasture for their Draught-cattel and Milch-kine: And in conside-
ration thereof, they had used time out of mind, &c. to pay the
tenth Shock of their ripe Cares; but for the green Cares which
were eaten before they were ripe, in consideration they gave them
to their Cattel, they were discharged of Tithes for the same. And
as to the Herbage for dry Cattel, he surmised, That every Parish-
oner there which had Milch-kine and Calves, under the number of
seven, shall pay for every Calf he rears one half penny, for every
one they kill one penny, for every one they sell the tenth penny; and
if he have seven or above, to give one in satisfaction of Tithes of
them, and all dry Cattel: And as to the Tithes of Sheep bought
or sold, he surmised, That they paid for the Lamb one half penny,
and for the Wooll and Fleece of the Sheep one penny, and for all
Sheep bought or sold between the Lady-day and Lammas, to pay four
pence; and to the residue of the year, saith nothing, nor to the
Churchings and Burials; and for that it was clearly held ill.
And to the first, Coke said it is no good surmise, for he may as well
prescribe to be discharged of Pay given to his Cattel, and it is a
prescription in Non decimando; and he doth not prescribe for all
Cares, but for those given to his Cattel, and hath not averred,
they were given to his Cattel; so pursueth not his prescription,
as 10 Ed. 4. 2. is that he ought. To the second Surmise, it is not
good; for he alledgeth not, that he had Calves; for if he hath no
Calves, but dry Cattel, he pays nothing, and it is uncertain whe-
ther he shall have Calves, or not; so it is an uncertain thing for a
certain duty. And last Term it was ruled in the Lady Greshams case,
Where one prescribed to pay yearly by the hands of two persons
inhabiting in such houses, four pence to the Vicar in satisfaction of
all Tithes, it was adjudged ill; for the houses may decay, or none
live in them; so nothing shall be paid: As to the first, the Court
held it a good Surmise; for Wray said, the matter is the want of
Meadow and Pasture; and if he had said, for want of Meadow and
Pasture, they had use to eat their Meadows with their Cattel; and
for so much as they did eat, to pay no Tithes, it had been good: But
for the second, the not averring he had Calves, this cannot be good,
and the other are not to be defended: And therefore for all, except
the first, consultation was granted, and for that they would advise.

(14)

1 Cr. 393.

2 Cr. 47.8.

English *versus* Pellitory, Tayler and Smith, Int. Mich.
30 & 31 Eliz. Rot. 521.

Trespals for Assault, Battery, and Wounding: Two of them
pleaded, that they were Lessees of certain Lands; and there
were certain Posts upon the Land, and the Plaintiff would have
taken

(15)

taken them away, and they gently took them from him, &c. The third pleaded, that he came and found them contending for the Posts, and he parted them, *Moliter* laying his hand upon the Plaintiff. The Plaintiff replieth, *De injuriis suis propriis absque tali causa*, and found for him. Harris moved, that this was no issue; for the Plaintiff ought to have made several Replications, and *absque tali causa* can be no issue to all: But the Court said, though it be no good form of pleading, yet by reasonable construction these words *absque tali causa*, being *nomen æquivocum*, shall be referred to every cause. And so the Pleading shall be maintained, and Judgment was given for the Plaintiff.

Termino Trinitatis, 31 Eliz. in Communi Banco.

Sir Tho. Cecil *versus* Harris, Int. Trin. 29 Eliz. Rot. 823.

- (1) **D**Ebt against the Defendant as Executor for the arrearages of Rent in time of the Testator; he pleaded Levy per Distress & sic non detinet, and upon issue joyned, it was found by Verdict, that a stranger which was the Assignee of the Term, by the Executor, had paid the Rent to the Plaintiff, which had accepted it; but no Distress was taken for it: And if the Plaintiff should have Judgment upon this Plea, was the question. Anderson, Periam, and Windham, held clearly, that Judgment shall be against the Plaintiff; for the substance of the Plea is found with the Defendant; for it is found the Rent is paid: So non detinet the Rent, and the Substance is upon the non detinet, and not upon the levying by Distress. Walmsly held strongly the contrary, that the substance of the Plea is upon the levying by Distress; and if it be found it was not levied, the residue is not material, for this is the matter traversable; and upon this is the issue, and so is 4 H. 6. and 33 H. 6. But the other Justices clearly against him; and Anderson denied the Book of 4 H. 6. and said other Books are against it.

Ante 41.
Post. 167. 209.
634.

Sutton's Case.

- (2) **E**jectione firmæ, and declares of a Lease for years made to him the Plaintiff, by the Defendant himself: And upon not guilty pleaded, the Jury found a special Verdict, that the Defendant had nothing in the Land when he made the Lease to the Plaintiff; and that afterwards he entred upon the Plaintiff, and the Jury finding the whole matter at large, the question was, if his Entry was lawful. Anderson and Periam held clearly, that the Plaintiff shall recover; for this is a good Lease, and interest between the parties; so that the Lessee may enter, and the other cannot put him out; and when he hath right and interest, he may have his action: And this may as well be found by the Jury, though but a matter of Estoppel, as any other matter. And Anderson said it hath been adjudged, if A. levy a fine to B. of his own Land for years, and B. is ousted, A. shall have an Assize; and they said, the Jury in any case are bound to find an Estoppel: and in Pleadals Case, because they would not find an Estoppel, they were attainted. But Walmsly held the contrary; for being a matter of Estoppel, and the Jury being sworn to find *Veritatem facti*, they shall not find an Estoppel: And the Jury having found the matter at large, and

Ante 37.
1 Cr. 110.
Co. 2. 4. b. 4.
53. a.
Post. 309.

and the truth appearing to us, that the Plaintiff had not right nor cause of action, but by Estoppel, we must judge according to the truth of the matter: And Windham seemed to agree with him, that it shall be adjudged according to the truth of the matter: And thereupon Periam said, they would know the opinion of other Justices, but said privily there was no great question in it.

Marler *versus* Wright and Green, Int. 30 & 31 Eliz.

Rot. 803.

Ejectione firmæ. The case was, Edmund Bishop of London made a Lease 6 Eliz. for twenty one years of Land, part of his Bishoprick, rendering the ancient Rent, and afterward was translated to York; and 17 Eliz. Edwin then Bishop of London granted the Land to three for their lives, rendering the ancient Rent; the Lessee Attorneth, the Dean and Chapter confirm the Lease. Edwin was translated to York, and John now Bishop of London made a Lease to the Plaintiff. The question, if the Lease for three lives being confirmed by the Dean and Chapter was void to bind the Successor by the Statute of 1 Eliz. the Lease for years being then in esse. And it was adjudged, that the Lease for three lives did not bind the Successor; and the principal reason was, That by the words of the Statute, upon Leases made by Bishops, the ancient Rent must be reserved, and yearly payable; and in this case, the Rent reserved upon the grant for three lives in Reversion, although it be due; yet the Successor had no remedy for it, during the Lease for years, by Distress or by Action of Debt, being reserved upon a Lease for life; nor by Assize, for he had no Seisin: And so it is not due or payable, according to the intent of the Statute, and the Plaintiff had Judgment.

(3)
1 And. 193.
Moor 253.

Co. Lit. 45. a
4. a. 2.

Smalwood and two others, against the Bishop of Coventry, &c. and Marsh.

Quare impedit, brought by the Plaintiffs as Executors of William Sale, for not suffering them to present to the Arch-Deaconry of Derby, which became void in the time of the Testator, and belonged to him; and after his death, to the Plaintiffs to present; and the writ and count supposed a disturbance to the Testator in his life, *In nunc retardationem executionis testamenti prædicti*. And it was demurred upon it. 1. Because the Arch-Deaconry is yet void; and so they may have an Action for the disturbance to themselves. 2. There is no such Writ in the Register. 3. Here is a double disturbance to the Testator, and to themselves. 4. The disturbance to the Testator is alledged to be in *Retardationem executionis testamenti*, which cannot be; for in the time of the Testator there was no Testament. 25 E 3. 40. 4. This is not an action given by the equity of the Statute of 4 Ed. 3. c. 7. 5. An Arch-Deaconry is such a spiritual promotion, for which an action lieth not; for it is a spiritual office and function, and hath no certain place to be inducted in; as 24 Ed. 3. 42. where this question is glanced at there. V. 50 Ed. 3. 26. 39 Ed. 3. 21. 18 Ed. 3. 9. And it was resolved, that the Writ shall abate. Anderson said they were all resolved, that as the Writ is brought, it shall abate, and yet they agreed that a special Writ lieth in this case for the Executors. And the principal reason of their Judgment was, because the Writ was *In nunc retardationem*, which cannot be of a disturbance in the life of the Testator. Vide This case revived, Mich. 33 Eliz. in Communi Banco.

(4)
Post. 207.

Post. 207.

Bond

Bond *versus* Richardson, Int. Mich. 30 & 31 Eliz.

Rot. 610.

(5)
 1 And. 198.
 Ow. 45.
 1 Leon. 311.
 Moor 267.

DEbt upon an Obligation; the Condition was for the payment of a lesser sum at a certain day and place; the Defendant pleaded payment at the day and place according to the Condition: Upon which, they were at issue, and it was found, That he paid it before the day, and at another place, and the Plaintiff accepted it; and for whom this Verdict was found, was the question. Anderson, it is no question, but it is found for the Defendant; and afterwards in Mich. 31 & 32 Eliz. it was moved again; and then Anderson said, They were all resolved to give Judgment against the Plaintiff; for payment before the day, is payment at the day: And thereupon it was adjudged, that the Plaintiff shall be barred. Vide 5 Eliz. Dyer 222. contra.

1 Cr. 284.

Mills *versus* Snowball.

(6)
 Co. Lit. 48. a.
 Ante 95.

ENtry sur Disseisin; The parties being at issue, and the Jury at the Bar: One of the Jurors was challenged by the Demandant, and also by the Tenant, and thereupon he was withdrawn: And afterwards, because there were not Jurors sufficient, it was prayed, That he might be sworn; and by the assent of both parties he was sworn by Order of Court. And upon evidence it was held, That if a Feoffment be made of divers Lands, and of a house in which the Feoffor doth dwell, and delivers the Feoffment in the house, and speaks nothing of the Land; yet it is good of all: For they having an intent to give and take Livery, this is a good Feoffment; for they assembled there for that purpose. And it was held, That where one deviseth Land to his wife for life, Remainder to his son and heirs; And if he dieth before his age of twenty one years, that then it shall remain to J. S. in Fee, and dieth; the son levieth a Fine, and dieth before twenty one years. J. S. shall have the Land after the death of the wife; for it is a plain Limitation.

Ante 122.
 Post. 359.

Anonymus.

(7)
 Lit. Sect. 198.
 Post. 683.

DEbt by an Executor, the Defendant pleads, that the Plaintiff was an Alien nee at Gaunt, under the obedience of Philip, King of Spain, enemy of the Queen: And it was held a good Plea, though the Action was brought as Executor; and though no wars was proclaimed between this Kingdom and Spain, by reason of open acts that he did as an enemy.

Green's Case.

(8)
 1 Cr. 38. v. 336.
 2 Cr. 224.

Action upon the Statute of Winchester; for that one Brook his servant was robbed, and alledges, that the Plaintiff himself came before a Justice of Peace, and was sworn according to the Statute of 27 Eliz. And after Verdict, it was alledged in Arrest of Judgment, that the Servant was to be sworn, and not the Master, and so was the opinion of the Court: For the servant might know the persons when the servant was robbed, and the Master was not in company: And the intent of the Statute is, that he that had notice, shall be sworn. And thereupon the Judgment was said.

Beale

Bease versus Draiton.

DEbt upon an Obligation: The condition was, that if J. S. makes an Obligation to the Plaintiff before Michaelmas, that then, &c. the Defendant pleaded, that J. S. made the Obligation, and sealed and delivered it to another as his Deed, to the use of the Plaintiff. And it was adjudged, that it was no performance of the condition; for the meaning was, that it should be a good Deed to the Plaintiff, and perhaps the other will not deliver it to the Plaintiff. (9)

Ante 54.
1 Cr. 19. 20. 77.
2 Cr. 570.

Hare and three others versus Celey, Int. Hill. 30 Eliz.

TRESPASS for breaking their Close called Church-field, and metes and bounds it: The Jury find a special Verdict, that the place where was sixteen acres lying in a field called Church-field, and mered it by other meres and bounds that were mentioned in the new Assignment, of which Hare was seised in Fee, and eas exposuit to the other three to sow at halves, &c. That he should find one half of the Seed, and the other three the other half, and should manure the Land; and that Hare should have one moiety of the Grain there growing when it was reaped, and the others the other moiety: And after the Land was sown, A. entred by the command of the Defendant, and spoiled a great part of the Corn: Upon which entry and spoiling, the Action was brought. 1. Matter, If Church-field being found to be a great field, in which divers men had interest, if the sixteen acres in it may be called Church-field; and as to this the Court spake little. 2. Matter, If this exposing the Land to half, be not a Lease of the Land; so as the Action was to be brought in the name of Hare and the three. 3. Admitting it was a Lease, if Hare be not Tenant in Common with them of the Corn, for the moiety of that which was sown, was his; and the Court held it no Lease of the Land, but otherwise if it be for two or three crops: And therefore, as to the breaking of the Close, Hare only was to bring the action; and as to the spoiling the Corn, they ought to joyn, being Tenants in Common: But in that they joyned in the action for breaking the Close, whereas he ought to have brought it alone; it was adjudged the Writ should abate. (10)

Post. 170.

Co. Lit. 198. a.
Post. 530. 554.
729.

Higgins versus Mill's Case in Cancellaria.

THIS Case was referred to Anderson and Walmsly out of the Chancery, this Term. Higgins being possessed of a Term, deviseth his Term to Elizabeth his Wife, and to Edward his Son, for their lives; and after to Humphrey his Son, and the heirs males of his body, and died. Elizabeth and Edward entred by force of the Devise, and died. Humphrey sold his interest of his Term, and had issue John, and died. John sued for the Term; and they certified their opinions under their hands, that John had no right to the Lease. Anderson did not shew his reason, but Walmsly shewed his reason to be, for that John cannot claim it as heir-male, for that is not good to convey the interest of a Term to him. V. Leonard Loves Case, 10 Co. ad finem. Co. 10. 87. b. (11)

Termis

Termino Michaelis;

Tricesimo primo & trices. 2^o. ELIZABETHÆ,

in Banco Regina.

Garrets versus Fulwood.

(1)
1 Cr. 197.

IT was held by the Court, that the Statute of 5 Eliz. cap. 23. is to be intended not only of Excommunication for criminal causes; but in any other Suits there for Legacies, Probate of Wills, Cithes, or other cause there.

Matthew versus Hassal, Int. Mich. 30 & 31 Eliz. Rot. 49.

(2)

Ante 75.

ERROR of a Judgment in Ejectione firmæ of a house in London, where Judgment was upon confession of the Defendant. First Error assigned was, That a Writ of Inquiry of Damages was awarded, and no day given to any of the parties to be there at the time of the return; for the Entry ought to be, Ideo dies datus est partibus prædictis, or at least to the Plaintiff; so that he might then pray his Judgment, Sed non allocatur: For the Defendant is not to have day, and the Plaintiff is to attend at his peril; and so is the course in the Common Pleas, but it is otherwise in the Queens Bench. The second Error, the Judgment was, That Recuperet possessionem termini prædicti, where it should be Quod recuperet terminum, and so are all the Books: But the Court held it all one; for as in a Real action, he is to recover Seisin; so in a Personal, he is to recover possession, and the Writ is Habere facias possessionem, and the Judgment was affirmed.

Long versus Woodliffe.

(3)

2 Cr. 435.

DEbt upon an Obligation, which bore date in May, 30 Eliz. and it was for payment of a lesser sum in December, 31 Eliz. The Defendant pleads payment in December, 30 Eliz. according to the condition, whereas it should be December, 31 Eliz. Issue was joyned Quod non solvit; and at the Nisi prius, the Defendant did confess the Action, Scit' quod non potest dedicere actionem quin non solvet. Harris Serjeant, moved in Arrest of Judgment, that this being no issue the confession that he had not paid, is not material; and so Judgment cannot be given for the Plaintiff: But the Court held, that he having confessed the Action, the words Quin non solvet, are not material, but surplusage; and it shall be adjudged upon his confession, and the Plaintiff had Judgment.

Hill

Hill *versus* Tempest, & Rainsford *versus* Mallet,
Int. Trin. 31 Eliz. Rot. 811.

Error of a Judgment in the Common Pleas in Trespas of Battery, and this was after Verdict. The first Error, that the Entry was, That the Defendant appeared per Higgins Attornatum suum, leaving out his Christian name. 2. Error, that after the issue and distringas awarded, the Action being brought against Hill and J. S. J. S. died before the last continuance; and judgment was given only against Hill: but to this last Error it was held, that the Writ should not abate, but it shall stand against the Survivor, and the issue well tried, although that but one of them living, 4 H. 7. 7. 2 Eliz. Post. 574.
Dyer 175. to the first Error vide postea in this term. Post. 153.

Hadman and Green *versus* Ringwood.

The Plaintiffs as Churchwardens of Hotherston in Norfolk, brought Trespas for taking of a Bell out of the Church in the time of their predecessors, and in truth it was in the time of Ed. 6. in the Rebellion of Kent there; upon not guilty pleaded, it was found against the Defendant, and 50 l. damages given; Godfrey moved, that this Action doth not lie by the Successor of the Church-Wardens, for they are not incorporate by that name, but the Predecessor by reason of his possession ought to bring the Action, & moritur cum persona 19 H. 6. 6. Coke contra, and relied upon Fitz. N. B. 91. & 8 Ed. 4. 6. for otherwise no remedy for the wrong, for the Predecessor Church-Warden cannot have Action, his time being past; and so prima facie the Justices did conceive, for the Successor shall have account against the Predecessor. Vide postea, Pas. 32. placito 11. (5) Post. 179.

Damport *versus* Thatcher.

Error of a judgment in the Common Pleas in an Action of debt, and upon the judgment in the Scire fac' that issued upon it. And the Error assigned, and upon which the Plaintiff relied, was, that the judgment is entred, visis præmissis videtur curiæ, that the Plaintiff shall recover his Debt; and so much for damages and costs de novo adjudicatis, which was erroneous, for it is but a videtur curiæ, or the opinion of the Court, and no judgment by the Court, and then the judgment subsequent upon the Scire fac' is erroneous. But the Court held that the first judgment was not erroneous, but that no judgment was given, and then the Judgment in the Scire facias is erroneous, and therefore they reversed that; but as to the first, there being no judgment, they could not judge upon it; and the party had no remedy upon it, for it cannot be remanded to the common place, to have judgment there given, but he must commence his suit de novo. V. postea, 33 Eliz. Hill. placito 10. (6) Post. 215. 2 Cr. 386.

Lucy *versus* Fisher, P. 31 Eliz. Rot. 311.

- (7) **R** Eplevin: For taking of his Gelding in a Close of five Acres of Land in Sporle; the Defendant made conusans as Bailiff of Ph. Audley Esq; in the place where, &c. for that one George Lether was thereof seised in Fee, and held them of the said P. A. as of his Mannor of Easthall in the same County by fealty and rent of eighteen pence, and other services, and for the said rent arrear made conusans as Bailiff of the said Philip, as in those Lands held of him; the Plaintiff traversed the tenure of the Mannor, and being at issue it was found for the Plaintiff. Tanfield moved in Arrest of judgment, that it was mis-tried, for the issue being if the Land in Sporle were held of the Mannor of Easthall in the same County, the trial ought to be by a Jury of both Mills; and here the venire facias was awarded de vicineto Sporle only, and so it was adjudged between Richmond and Webb, Antea 114. 2. Exception, that he alledged that G. Lether held the Land, and afterwards avows as upon the Statute, which is not good; for when he meddles with the name of the Parson, so as he takes conusans of him, he ought to avow on him by the Common Law, and not upon the Land by the Statute, but for that the Court held it well enough; but as to the first, it was a mis-trial, for the venire properly ought to be of the Mannor, and of the place where the Land lieth; but they gave day over to advise.

Ante 114.

Crickmere *versus* Paterfon, Int. Tr. 30 Eliz. Rot. 568.

- (8) **T** Respals: Upon special Verdict the Case was, Docking seised of Lands, and having issue two daughters, devised the Land to the eldest and her heirs that she pay to her youngest sister yearly thirty pound, the question was if this was a condition; and all the Justices held it was, for so is the intent of the Devisor, and otherwise the youngest sister had no remedy for the Rent; and Wray and Gawdy held, that if the words were paying thirty pound to her sister, this clearly is a condition, and so ea intentione, or ad affectum, and his intent appearing, the Law shall so adjudge it, and that the youngest daughter might enter upon a moiety, for which the action was brought, and it was adjudged accordingly. V. Coke's Littleton 236. b.

1 Rol. 410. 1.
Co. Lit. 236. b.

Post. 205.

Post. 378.

Warde *versus* Blunt.

- (9) **A**ction upon the Case sur trover, and supposed that he was possessed of divers loads of Corn and Hay at H. in the County of M. and that they came to the hands of the Defendant by trover, and he converted them to his own use; the Defendant pleaded that before the trover he was seised of certain Land in Burton in the County of Stafford in Fee, and the Corn and Hay was growing upon that Land, and he cut them as his proper goods, and was of them possessed till he lost them, and they came to the hands of the Plaintiff by trover, and he lost them again, and they came to the hands of the Defendant, and he converted as it was lawful for him to do. And upon this the Plaintiff demurred in Law, for the Plea amounts but to the general issue, and this cause was

Post. 434-435.
485.
1 Cr. 157.
Yelv. 174.

was shewn for Demurrer. Egerton moved, that the plea amounts to the general Issue, for it is no more then that they were his proper goods, and then he ought to plead non culp. and if it be a plea, he ought to travers, without that they were the goods of the Plaintiff, for the Plaintiff declareth that they were his proper goods, and he ought to answer it, 25 Ed. 3. 9. 22 Ed. 3. 18. 30 Aff. 22. 11 H. 4. 78. Atkinson contra, although this plea amounts but to a general Issue, yet he should not have demurred, but ought to have moved the Court, (9 H. 6. 11. 19 H. 6. 21.) that he should plead another plea, or a nihil dicit he entred; for demurrer being joyned upon it, this is confessed, and then it is to be adjudged for the Defendant; but the Court held, that inasmuch as this is the special cause shewn upon the demurrer, it is good, and then shall be adjudged for the Plaintiff, and afterwards the Plaintiff had judgment.

Simms versus Westcott.

Assumpsit. The Plaintiff declares that in consideration that he at the request of the Defendant should marry Elizabeth the daughter of the Defendant, he assumed to pay him thirteen pound six shillings eight pence after marriage when required, and should have all the hennep growing upon such Land, and would give him a Bed, and divers other things there expressed; and alledges in fact that he had married the said Elizabeth, and the Defendant had not paid the thirteen pound six shillings and eight pence, nor any of the other things; the Defendant pleads a special plea, and traverseth he did not assume modo & forma. The Jury found he assumed to pay thirteen pound six shillings and eight pence, but did not assume any of the other things. And I moved that the Verdict was found for the Defendant, for when the Plaintiff declares of an Assumpsit to do divers things, and the Jury find he assumed to do only one of them, the Plaintiff hath failed in the Assumpsit; for he ought to shew the truth of his case, and not to vary from it. And so was the opinion of Wray, Shute and Clench, Gawdy contra, and cited 32 H. 8. Br. verdict 90. But Wray said that Book was no Law, and the contrary had been adjudged in this Court; and afterwards Gawdy being absent, it was adjudged for the Defendant, but the Court allowed him no Costs, for Wray said that was in their discretion.

(10)

Post. 292.

Ante 79. 80.

Lembro & Hamper.

They were indicted for perjury upon the Statute of 5 Eliz. 9. Tanfeild took exception to the Endictment, in that it was, falso & corruptive deposuere, but not voluntarie; and although at the end of the Endictment it is, & sic voluntarium commiserunt perjurium, yet this doth not help it, and for this cause they were discharged; and Gawdy said, although the Verdict pass against that which the Witness deposeth, so as no action lieth against him, yet he may be Endicted for it.

(11)

Post. 201.

2 Cr. 508.

Rithers Case.

(12)
3 Inst. 166.
Yelv. 120.
Ante 137.

HE was endicted of perjury, for perjury committed in his answer in the Star-Chamber, and upon his examination to Interrogatories there; and because these matters are not within the Statute, for he was not examined as a Witness between the parties; nor in perpetuam rei memoriam, he was discharged.

Lanes Case.

(13)
Ante 137.

HE was endicted of perjury, for that upon an issue in such matter between parties he did falsely depose such a thing, &c. but sheweth not how the issue was, nor how the deposition trencht to the point of the issue, and he was discharged.

Burtons Case.

(14)
1 Cr. 340.

HE was endicted as a Common Barretor contra formam Statuti, Coke took exception, that there is no Statute that makes this an offence, but it was at Common Law, and the Statute of 34 Ed. 3. doth not make this an offence, but appoints a punishment; but it was held good, for so are many presidents.

Sir Rowland Haywards Case.

(15)

HE was endicted for stopping of a Highway ad nocumentum diversorum ligeorum Dominae Reginae, and because it was not, all the Queens liege people, he was discharged.

The Lord Dacres Case.

(16)

HE was endicted for encroaching upon the Highway, and exception taken, because it was not expressed of what place he was; Sed non allocatur, for process of Outlary lieth not against him, but distress; and so it was ruled in the Lord Pagetts Case.

Bullen *versus* Grant.

(17)
Ante 90.

Post. 442.
Co. 4. 23. a.

Post. 484.

Trespals: The Case upon evidence was, Hugh Bullen father of the Plaintiff being a Copyholder in Fee, surrenders the Land to the use of his last Will, and deviseeth it to his Wife for life, remainder to G. his son in tail, remainder to T. his son in tail; the Lord admits M. and afterwards admits G. the Wife dieth, G. dieth without issue, T. is admitted and surrenders to the use of the Defendant, and dieth without issue; the Plaintiff before admittance, being heir at Law to H. B. enters, and upon an Ouster brings trespass. 1. It was held per curiam, that the heir may enter without admittance, for Wray said, when the surrender is to the use of his last Will, this at first is the whole Fee; but when he deviseeth the Land for life or in tail, and doth not meddle with the reversion, by this the reversion never passed out of him to the Lord, but descends to his heir, and he shall have it without any admittance. 2. It was held that a surrender of Tenants in tail is no discontinuance, except the custom be so; and although it was moved, that there can be

be no estate tail of a Copyhold, except it be shewn that the Lands had been given so, and always enjoyed, and that afterwards it had been enjoyed by them in the remainder and reversion, and that their alienations did not use to bind, &c. for otherwise it shall be intended a Fee; yet the Court held the contrary, that it shall be intended an estate tail, except the contrary be shewn, and that it is an estate tail, and so always used. Post. 307. 372.
Co. Lit. 60. b.

Hedd *versus* Chalener.

The case was, a Feme Copyholder takes Husband, which let the Land for more years than the custom doth warrant; the question was, if this be a forfeiture to bind the Wife, as a condition in law. Wray, if the Husband denieth to pay the rent, or to do suit at Court, these are present forfeitures, which shall bind the wife, for they are things that the Lord must of necessity have; but a Lease is no great prejudice to the Lord, and it is good to advise of it; but Shurley and Tanfeild said it hath been adjudged, that Waste is a forfeiture which shall bind the Wife. (18)
Post. 305.
1 Cr. 7.
Co. 4. 27. a.

Mustard *versus* Hopper.

A Sumpsit: The Plaintiff declares that in consideration the Defendant should enjoy such goods, &c. he would pay the party 25 l. the Jury upon non assumpsit find, that he promised to pay, if he enjoyed such goods, &c. and it was adjudged for the Defendant, because the Plaintiff declared of an absolute promise, and the Jury find a conditional promise. (19)
Ante 79.

Bradburne *versus* Eliz. Bradburne.

A Sumpsit, the Court held where there be divers considerations alledged by the Plaintiff, and some are frivolous and void, yet if any of them be good, the Plaintiff shall recover: and it was so adjudged. (20)
2 Cr. 110. 127.
Post. 759. 848.

Royle *versus* Bagshaw.

A Sumpsit, And declares that in consideration that he at the request of the Defendant would deliver as many quarters of Hault to J. S. to his use, as he would receive and have, before such a day, the Defendant promised to pay tales denariorum summas, &c. before the first day of August. And alledges in fact, that he delivered so many quarters of Hault, viz. each of such value, &c. and upon non assumpsit, for part and payment pleaded for the residue, it was found against the Defendant. Lewis moved in arrest of Judgment. 1. It is not alledged to whom the money should be paid, sed non allocatur; for it shall be intended to the Plaintiff. 2. The promise is incertain, for he doth not promise any sum, but tales denariorum summas, but saith not what, &c. sed non allocatur, for Wray said, when the Plaintiff afterwards shews the value of every quarter, it shall be intended he shall pay according to that rate, and such general assumpsit is good. 3. There are two issues, one payment, other non assumpsit, and the Jury find for both, quod assumpsit, where they should find for one, he did not pay, and for the (21)
1 Cr. 77.
1 Cr. 77.
2 Cr. 263.

Ante 112. the other that he did assume, but because upon the Dorse of the poſtea it appeared that the Jury found both iſſues againſt the Defendant, and it is but the miſpriſion of the Clerk of Aſſizes, the Record was rebailed to him to amend it, which he did, and the Plaintiff had judgment.

Sir Anthony Sturleyn *verſus* Albany, Hill. 31. Rot. 668.

(22)
Ante 67. **A**ſumpſit: The Plaintiff declares that the Earl of Arundel granted to him a Rent of forty pound out of the Mannor of Whittington, and after conveys the Mannor to the Defendant and his heirs, and that he 24. Mart. 20 Eliz. promiſed to the Plaintiff, that if he would ſhew him a Deed by which it ſhould appear that he was to pay the Rent; that he would pay to him all the Arrearages of it, and all that ſhould be Arrear after, and alledges that he 27 April 27 Eliz. ſhewed a Deed to the Defendant, by which it appeareth that he ought to have the Rent; and for eighty pound Arrear for two years laſt paſt, he brought his Action; the Defendant pleads that after the promiſe, viz. 2. July 22 Eliz. the Plaintiff entred into the Mannor, and let it to J. S. for years; the Plaintiff replieth, that 1. Decemb. 27 Eliz. the Defendant re-entred, and for the Arrearages after he brought the Action, and upon the re-entry the iſſue was joyned, and found againſt the Defendant. Glanville Serjeant took divers exceptions to the Declaration. 1. Becauſe by the entry into the Mannor, the promiſe which was before, and the Action upon it is ſuſpended, and being once ſuſpended, it is gone for ever. Wray, the Action is brought for the two laſt years which were after the re-entry, for which he had no cauſe of Action before; and therefore cannot be ſuſpended omnino. Gawdy, it is not material when the Arrearages were due, for the cauſe of Action (the promiſe) was then in eſſe, which is ſuſpended if the cauſe be ſo; but here the Aſumpſit is collateral, and is not ſuſpended by the entry into the Mannor, for it is not iſſuing out of the Land; but if the Plaintiff had releaſed all Actions before the Deed was ſhewn, and then the Deed is ſhewn, yet the Plaintiff ſhould be barred, for the promiſe was before the releaſe. 2. Except. Becauſe the Deed was not ſhewn in convenient time, for it was five years after, and ſo divers Arrearages due. Sed non allocatur, for it is the better for the Defendant, the longer the time is before the ſhewing of the Deed; but if the promiſe had been, that upon ſhewing the Deed, to pay all that ſhould be due at Mich. there the Deed muſt be ſhewed before Mich. 3. Exception, the promiſe is, if he ſhew a Deed by which it appeareth he ought to pay the Rent, he will pay it, and the Plaintiff ſheweth that he did ſhew a Deed, by which it appeareth he ought to have the Rent, and ſo meets not with the conſideration; and of that opinion was Gawdy, but the other Juſtices *è contra*; for it is in the Declaration, which by the Statute is not to be overthrown for default of form, and ſo is well enough.

Co. Lit. 291. b.
1 Cr. 373.

Dobbin's Case, Trin. 31 Eliz. Rot. 562.

A Sumpfit: The Plaintiff counts, that whereas he claimed to have a title to certain Land in D. the Defendant in consideration that the Plaintiff assumed to assign his right, title, and interest to the Defendant; he assumed to pay him forty pound, &c. and after Verdict it was alledged in Arrest of Judgment, that this was an unlawful consideration, and against the Statute of 32 H.8.9. for it appeareth not that the Plaintiff was in possession by the space of a year before, so that he could assign to the Defendant, nor that the Defendant was in possession, that he might release to him, sed non allocatur; for it stands indifferent whether he was in possession or not, and a Declaration shall not be avoided, but for great cause; and the Plaintiff had Judgment. (23)

White's Case.

Prohibition. The Plaintiff suggests that by the Statute of 21 H.8.6. no Portuary shall be paid but in such places where it ought to be paid before the making of the Statute, yet he was drawn into the Spiritual Court against the said Statute, and prohibition was granted; and Love said, so it was adjudged in 16 Eliz. 1 Cr. 238. (24)

Smith *versus* M. Collins and three others.

Ejectione firmæ: After issue joyned, the Record of the Nisi prius was at the suit of S. against M. Sharpe and three others, and found for the Plaintiff; and this matter was alledged in Arrest of Judgment, and that there was no trial between the Plaintiff and Defendant, and adjudged quod Plaintiff nihil capiat per billam. (25)

Scarlet's Case.

Trespas. Verdict for the Plaintiff. Bartlett alledged in Arrest of Judgment, that the venire facias was, & habeas ibi hoc breve, and said not nomina juratorum, so that the Sheriff had no Warrant to impanell a Jury, also it was libratas pro libras. Sed non allocatur; being within the Statute of Jeofails, and it was adjudged for the Plaintiff. (26)

Wiggely *versus* Bradshaw, Hill. 31. Rot. 406.

Error, Bradshaw had Judgment to recover by confession in Debt, but had no judgment to recover damages, and for this cause the Judgment was reversed. (27)

Molton's Case.

COke demanded the opinion of the Court in this case, Molton being Tenant in Tail, had issue two Sons, R. and I. and dieth. R. levieth two fines of the Land, and dieth without issue, I. brings two Writs of Error upon these fines; the Defendant to the first fine, pleads the second fine not reversed; and to the second he pleads the first not reversed; the question what is to be done. Curia, you may reply, that the said fine pleaded in bar is also erroneous, and so aid your self. 7 H. 4. 39. (28)

Before

Befome *versus* Crooke, Trin. 31 Eliz. Rot. 763.

- (29) **E**rror of a Judgment given in Southampton, in Debt upon an Obligation. 1. Error, for that at a Court held 9. Novemb. the Defendant brought his Writ of Priviledge, and the Mayor being absent, the Bailiffs allowed it, and gave day till the next Court, when the Mayor being present did disallow it; and for default of answer, nihil dicit was entered, which Coke said was a plain Error; for after the Writ delivered they could not proceed, 6 H. 7. 6. and if it be said the Bailiffs are not Judges, then they cannot hold a Court, and then the day given by them is null, and so is a Discontinuance. 2. Error, Oyer being demanded of the Obligation and Condition; this is rehearsed in hæc verba, but are not entered; so it appeareth not the Plaintiff had title, and for these Causes the Judgment was reversed.

Palmer *versus* Thorpe.

- (30) **T**he Case was: A. let the Manor of D. to B. for thirty years, and the next day lets it to another for forty years, to commence at Mich. next after the date; the Tenant doth Attorn; the question was, if it be good grant of the reversion, being to commence at a day to come. Gawdy, a reversion for years cannot commence at a day to come, for then the Grantor shall have a lesser estate in himself. Wray, the reversion being for years is a chattel which may well expect; and if I have a rent in Fee, may grant it for years to commence at Mich. for an estate doth not pass, but an interest. Coke, it hath been adjudged, if a man grants his term from M. it is good, for it is as a Lease from Michaelmas.
- Co. 8. 74. b.
Co. 1. 155. a.
Post. 287.

Cadee *versus* Oliver.

- (31) **E**jectione firmæ: It was found by special Verdict, that the Lord Muntjoy being seised in right of his Wife, was bound in a Statute of two thousand pounds 6 Eliz. to L. D. and after let the Land to H. for twenty one years, and after let the Land to J. C. for ninety nine years, to commence immediately, and 12 Eliz. the Land was extended upon the Statute at fifty three pounds per annum; the Lord Muntjoy and his Wife grant the Land to Perry in Fee, and during the extent J. C. grants the term to his Son, the Lord Muntjoy died, the Son enters upon the comisee of the Statute, &c. Two questions. 1. If the grant of the term by J. C. during the extent be good. 2. If the Lessee may enter upon the comisee of the Statute without a Scire facias. Cooper argued pro Plaintiff, Harris pro Defendant; and Harris said it had been resolved by the opinion of the two chief Justices, that the grant of the term was void, for the extent might continue longer time or shorter, and so might continue longer than the ninety nine years, &c. adjurnatur.
- 1 Cr. 598.
2 Rol. 48.

Hill, Rainsford, & Tempest *versus* Mallet, Trin.
31 Eliz. Rot. 811. vide Antea.

Error of a Judgment in Com. Banco, in Trespass and Battery: (32)
Error, that the Entry is that the Defendant appeared per Hig- 1 Rol. 289.
gins, Attornatum suum. Coke, this is meerly the default of the Clerk, Ante 145.
which is helpt by the Statute of 32 H.8. and if it had been per Attur-
natum suum it had been good, but this was denied; and the Court
held it is no appearance, for want of the Christian name of the At- Ante 59. 73.
torney, for there may be divers Attorneys named Higgins; and if 1 Rol. 289.
one appeareth for another, as Attorney, without Warrant, Action
upon the Case lieth, which cannot be here. 1 Mar. Dy. 93. But
Wray said, if there were any warrant of Attorney, and his name
appeareth there, it may be amended, but as it is, the Judgment
is erroneous. Ferrers moved that there was a warrant of Attorney
in the Common Place, in which his name appeared; and prayed 2 Cr. 6.
the Court to award a Writ ex officio to certifie it, as 9 Ed.4.3. 11 H.
4.92. Wray, in the Case between the Lord Norris and Braybrooke, it Ante 84.
was much debated; and there after in nullo est erratum pleaded, it 2 Cr. 6.
was granted, for this Plea goeth to a thing contained in the body Post. 177.
of the Record, and the Writ was granted.

Lee *versus* Curveton. Trin. 31 Eliz. Rot. 902.

Error in Debt upon Bond; the Defendant pleaded non est (33)
factum, and it was found against him. And the Plaintiff did
count per factum suum Obligatorium, but saith not curiæ hic prolatum; and
this was assigned for Error. Coke, this is but matter of form, Post. 217.
which makes not an Error after Verdict; and the Clerk of him- Co. 10. 94. b.
self might have put it in, without any instruction of the party.
2. Error, That the Judgment should have been, quod capiatur, and
the Judgment is, that de fine nihil, quia pardonatur, whereas in truth
the Plea was pleaded after the general pardon, Coke, perhaps he
was specially pardoned; but it was held, that shall not be intended;
and for this last Error the Judgment was reversed.

Billingham *versus* Mynors. Trin. 31 Eliz. Rot. 95.

Action for words, viz. Thou art a Traytor, spoken at Welfden in Suffex: (34)
the Defendant pleads that he spake these words at S. in Hamp-
shire, viz. such things Traytors do, absque hoc, that he spake the words
at W. in S. and upon this it was demurred, and being argued by
Luckner, it was held clearly by the Court, that the Justification was
ill, and the traverse upon it, for the Action is general and transi- Co. Lit. 282. b.
tory; and the Defendant doth not justify the words in the Decla- Ante 99.
ration, and the Plaintiff had Judgment.

Honywood *versus* Husbands.

Action upon the Case, for disturbing him of his Common ap- (35)
pendent to his Land; and declared that A. was seised of the
Land for life, remainder to B. in Tails, remainder to the right
Heirs of B. and that time out of mind, &c. they had common in
this Land, for themselves, Farmors and Tenants; and that the
£ said

said A. and B. let the Land to him for years, whereupon he put in his Cattel and was disturbed, &c. and after Judgment given against the Defendant upon nihil dicit, and a Writ awarded to enquire of damages, and returned; Pepper moved divers exceptions to the Declaration, (the Judgment being the same Term) 1. Because he sheweth not how the particular estate begun, 20 Ed. 4. The Case of a Corody. 2. The prescription cannot be by the particular Tenant; and here he joyns the particular Tenant, and the remainder. 3. He counts that the particular Tenant and he in the remainder did demise, whereas it is but the confirmation of him in remainder. 4. He doth not aver the life of the Tenants for life. Topham contra, And he moved, that inasmuch as the Judgment was given before, and a Writ of enquiry of damages, no exception can be taken to the Declaration; upon which Judgment was given: but the Court held contrary; for no absolute Judgment was given, for upon the Writ of Enquiry of damages returned, a new Judgment is to be given, which is the perfect Judgment, before which any thing may be shewn to stay Judgment, and against the Declaration; and so it was ruled. And as to the first exception, Topham said, it was not material, for it is but a conveyance to the Action; and he is a stranger to the Estate, 1 H. 5. 4. Second, the prescription is good, for the particular Estate, and the remainder is but one Estate. Third, it is the Lease of both, 27 H. 8. 11. Fourth, the life of the Tenant for life needs not to be averred, for it is the Lease of one that had the Inheritance. Gawdy held the Count good. Wray, the third and fourth exceptions are not material, but for the first, the Count is not good, for the Plaintiff must sufficiently entitle and enable himself to the action, which he pretends to be, because of his Interest in the Land; and then he must shew a sufficient Right and Interest in his Lessors; and to the Second, he ought to make a distinct Title to the Common, and not confound them as he hath, & adjournatur.

Tytherley *versus* Welsh, Pasch. 31 Eliz. Rot. 310.

- (36) **E**rror, The Case was, the Defendant had recovered against the Testator of the Plaintiff in Debt, and after Judgment, and before Execution the Testator dieth. And the Attorney of the Plaintiff in the Action of Debt sueth a Scire facias against him that is now Plaintiff, to have Execution without any new Warrant, and recovers. And this was assigned for Error. Godfrey moved it was not Error, for the Attorney was not discharged by the Judgment, but may well sue execution within the year. 33 H. 6. 49. 34 H. 6. 51. Gawdy Justice, that is true that the Attorney may pray Execution, but this here is a new Action against the Executor; and it is against another person, then against whom his Warrant was; and after for this cause the Judgment was reversed.

Person *versus* Hickled, Trin. 31 Eliz. Rot. 66.

Error of a Judgment given in the Common Bench, Mich. 30 & 31 Eliz. Rot. 3021. in an Assumpfit, where the Plaintiff counts that in consideration he by his servant had delivered to the Defendant two Bills of Debt of Three hundred French Crowns, amounting to Eighty pound to be received at Roan in Normandy to his own use, he such a day, &c. assumed to pay him sixty one pound; upon non Assumpfit, it was found for the Plaintiff, and he had Judgment; and Error was assigned, for there is no consideration to charge him, for if it appeareth not how he should recover them, if he be denied payment, nor that they were Bills made to the Plaintiff, nor what benefit he may have upon them; and these matters were alledged in the Common Bench, in arrest of Judgment, as it was alledged by Godfrey, and confest by Fermer Sergeant, and yet they gave Judgment for the Plaintiff, that it was a good consideration, and well alledged, and so the Court held here, but adjournatur. V. Postea, Hill. 32. placito 8. (37) Post. 170.

Yates *versus* Virdman. V. Antea Mich. 29 & 30 Eliz. placito 10.

Error, After the Errors were examined the Plaintiff discontinued his Writ; and because there was a manifest Error in part of the Record which remained in the Common Bench, he obtained a Writ out of the Chancery to the Lord Anderson, to remove the residue of the Record; which Writ is in the Register 216. and this part of the Record being removed and sent into the Queens Bench, he brings a new Writ of Error, coram vobis residet, and would assign Error upon the new part of the Record removed. Coke moved that this Writ is not warranted by any course, for this is to alledge diminution after in nullo est erratum pleaded, and then should be infinite, which the Law will not suffer, and this course is not a Writ of Error to proceed upon the first Record, for then it should not vary from it, for all shall be entered upon the first Roll, but here it shall be upon a several Roll, which is not by any means warranted. Tanfield, we have sued a special Writ to remove the residue of the Record and another Writ to the Court to proceed upon the whole Record which is now in Court, which is a special Writ upon our case; and all that is removed is but one Record, and all being removed, we cannot have any other Writ; and so is not infinite. And at another day being moved again, Coke said, the Writ which is now brought, is but a Writ of diminution which ought to issue out of this Court, for this is the Writ of diminution in Fitz. Herbert 25. and the Plaintiff after a Scire facias ad audiendum errores, shall not have a Writ of diminution, for he is to see that the Record be full before he sueth his Scire facias upon it, and the Defendant after in nullo est erratum pleaded, shall not alledge diminution as the books are; and then it shall be a great mischief if the Defendant shall have no means to alledge diminution, that yet the Plaintiff by his own act shall have it by discontinuing his Writ of Error, and a Writ of diminution (38) Post. 281. 1 Cr. 575. Ante 84. Post. 281.]

nation ought to be awarded out of the Court where the Record is, and not out of Chancery. Tanfield, a Writ of diminution doth alledge a certain parcel of the Record which is not certified; but here no part in certain is alledged, but generally residuum recordi; and therefore it is not a Writ of diminution; but admitting it be not well removed, yet is it not material, for being here it is to be examined by the Court as if an endowment be erroneously removed, yet being in Court, it shall be proceeded upon, 7 Ed. 4. 22. 9 Ed. 4. 32. The Court ex officio in some cases ought to award a Writ of diminution, where the party is estopped. And all the Justices held that this is but a Writ of diminution, for it is the same Writ that is in Fitz. and diminution cannot now be alledged, as 22 Ed. 4. and other books are, and this being awarded out of Chancery cannot be a warrant to this Court; and so this Court cannot proceed upon it, nor is it to regard it being brought hither without warrant, viz. by a Writ which is void, and so cannot examine Errors upon it; but when such Writ is to be awarded, and there is Error in it, and the Record is by it removed, it is otherwise, as 9 H. 6. 4. but because the party had not appeared, they commanded he should appear; and then plead or demur to it, and they would make a rule in it. V. Postea Trin. 34. B. R. placito 2.

Sweeper *versus* Randal, Trin. 30 Eliz. Rot. 770.

(39)

TRESPASS for taking his Corn: upon not guilty pleaded, the Jury found that J. Gilbert let the Land to the Plaintiff at will, and afterward he agreed with J.G. ad sursum reddendum the Land and his Interest in it to him, and that he entered and let it to the Defendants who took the Corn; the question, if this was a surrender (I agree to surrender my Land) if it imports an Act to be done in futuro or in the present time. Gawdy, this can be no surrender but a relinquishing of his Estate, if these words be any thing; for Tenant at Will cannot surrender no more then he can grant, but he conceived it was an Act to be done in futuro. Wray, if I agree to let my Land, this is no Lease, no more shall this be a relinquishing of his Estate. Shute agreed with them. Clench, it seemeth the intent of the party was to relinquish the Estate at the time of the speaking, for otherwise the words were void, for he may leave it at any time. Gawdy, if his intent was so, the Jury should have found it expressly, but they had not done so; and the Plaintiff had Judgment.

Co. Lit. 55.

Post. 486.

Davies *versus* Thomas.

(40)

DEbt upon a Bond, the condition was to secure him harmless against J. S. in an Action for fifty three pounds, for which he was Bail for him; the Defendant pleads he had paid to J.S. twenty pound in satisfaction of the fifty three pound, and so he kept him harmless; but for that the Plaintiff might be damnified before the payment, to which he doth not answer, the plea was held ill, and the Plaintiff had Judgment. V. 38 H. 6. 13.

Babington

Babington versus Babington.

DEbt. The Defendant pleads a foreign Attachment in London, (41)
 which was after appearance and pending the Action, and af-
 ter advisement, it was ruled to be no good plea; but no cause was
 shewn, and the Defendant had a day to plead peremptory, or a
 nihil dicit to be entred. Wray said, this will be a president for the
 time to come. 1 Rol. 552.
Ante 101.
Post. 593. 691.
713.

Landydale versus Cheyney, Hill. 31 Eliz. Rot. 638.

COvenant. The case was; Tenant for life made a Lease for years, (42)
 the Lessee by Indenture, grants, bargains, and sells all his
 estate, to have and to hold in tam amplis modo & forma, as he ought to
 hold it; Lessee for life dieth, he in the reversion enters, and the
 Bargainee brought a Writ of Covenant against the Bargainor.
 Godfrey argued that the action did not lie, for here is no garranty
 in Deed or in Law, but only a grant or assignment of his Interest
 which doth not imply any Warranty; and if there be any War-
 ranty, yet the Action lieth not, for the Covenant doth determine Post. 613.
Moor 74.
 with the Estate; and so is 32 H. 6. 32. 9 Eliz. Dyer 257. so if Tenant
 in Tail makes a Lease for years, and dieth without Issue, the Co-
 venant doth determine with the Estate. And of that opinion was
 the Court; and Wray said it was a strong case. And because none
 came of the Plaintiffs part, it was adjudged for the Defendant.

Etnam versus Tottam.

DEbt upon a single Obligation of thirty pound; the Defendant (43)
 pleaded payment of Three pound pendente Billa, and demands
 Judgment of the Bill; but because he pleaded it without any spe- Co. 5. 43. d.
Post. 455.
 cialty, the Plaintiff had Judgment.

Benington versus Benington.

TRespass for entring into his House and Land: the Defendant (44)
 pleaded it was the Freehold of Joan Benington, and he entred
 as her Servant, and by her Commandment, and the Issue was, if
 it were her Freehold or not. And the Jury found it was the Free- Post. 170.
 hold of the Plaintiff for two parts, and the Franktenement of the
 said Joan for the third part: and the question was, if the Plaintiff
 should have Judgment upon this Verdict. And the Court held
 clearly he could not; for although the issue is found against the
 Defendant, viz. That all was not the Freehold of J. B. Yet it ap- Ante 140.
 pearing a Tenancy in Common, so that the Plaintiff cannot main-
 tain this Action, Judgment shall be given against him, and it was
 adjudged for the Defendant.]

The Lord Stafford against Thynne.

(45) **E**rror upon a Judgment in an assise, and assigned one Error in fait, viz. that the Land lay in D. in the County of Monmouth, and not in the County of Salop, where the Assise was taken: and upon this issue was joyned, and at the Nisi prius the Lord Stafford was non suite, and this was now returned. And Coventry prayed they might have Execution in the assise, and that Judgment might be affirmed; for he being non-suit for one Error, this is a non-suit in the whole Writ of Error. Wray, if there be Error in the Record, we cannot affirm it, but it shall remain as it is, and we will advise.

Procter *versus* Tayler.

(46) **E**rror to reverse an outlary which was sued against him for costs; the first Error that ten shillings was awarded to the Defendant upon non-suit pro damnis suis, whereas it should be pro misis & custagiis suis, and this was held to be Error. 2. Error, That the Sheriff did not return the day when one of the Counties was held, as he ought; for it ought to appear to the Court when every County was held, that it may appear there were so many days between every County Court, as is appointed by the Statute; and for these causes the judgment was reversed.

Silbury *versus* Bird, Hill. 31 Eliz. Rot. 120.

(47) **E**rror upon a Judgment given in Colchester. 1. Error that the Writ of Droit close was directed, Ballivis villæ de Colchester, whereas it should be Ballivis suis; for they are the Queens Baylies; and it is not sensible that it should be directed, Ballivis villæ. Coke, all the forms of the Writs are so, and it is therefore good. 2. Error; the Action is brought against an Infant, who appears by his Guardian, and no Warrant appeareth for it; for the Entry in such case is, quod talis admissus est per curiam. 3 H. 6. 17. Fitz. N. Br. 27. i. 16 H. 7. 5. Coke, this is Error in fait, and in the Common Bench the Entry is per custodem admissum, &c. And a special Entry is kept of it in a Roll, and so perhaps is kept in Colchester. Wray, this is no Error in fait, but in the Record. Gawdy, the Guardian ought always to be admitted per curiam. 2 Mar. Dy. 104.

Appleton *versus* Burr. Pasch. 31 Eliz. Rot. 248.

(48) **E**rror upon a Judgment in an Action upon the Case, in C. Banco: the Plaintiff counts that he had sued T. B. and had a process to arrest him, directed to the Defendant, being Sheriff of Essex; and thereupon he sent his warrant to the Bayliffs of the Franchise of S. to take him; who arrested him, and delivered him to his Deputy; and he suffered him to go at large, and had not his body at the day of the return, in amissionis debiti sui periculum. Foster assigned divers Errors. 1. He doth not alledge he delivered to

to him within the County, and then the Sheriff had not cause to detain him. 2. He doth not alledge he let him at large without Sureties, for he ought to take sureties of him, if offered. 3. He alledges he had not his body at the day, and perhaps he appeared of himself, and then the Plaintiff hath no prejudice. 4. For that he saith, in amissionis debiti periculum, which is not material, if he loseth it not indeed. Godfrey argued cont', but the Court gave no opinion, sed adjournatur.

Hawes *versus* Coney. Int. Trin. 28 Eliz. Rot. 1010.

T Respals for breaking his Close in Thurkell: upon not Guilty pleaded, the Jury found a special Verdict. J. Smith had Issue, Tho. Smith, and R. Smith, and that Tho. Smith was seised of a House, and Seven Acres of Land in Thurkell for life, reversion in Fee, to R. his Brother, and that the said R. was seised in possession of Forty Acres of Land in possession in Norton in the same County, and that R. made his Will, and by it devised all his Free and Copyhold Land to his Executors for performance of his Will, and the Will of J. S. his father, in which were divers Legacies given, To have and to hold to them and every of them, and that they should take the profits of it for Ten years, to the use of his Will, and that afterward his Executors or one of them should sell the Land, and distribute the money in performance of the said Will, and dieth. Tho. the Brother being Tenant for life dieth within half a year after him. The Executors enter into the Land in N. but not in T. and occupied them for Ten years, and after enter into the Land in T. and sell all the Land in T. and N. whereupon the Heir of Robert the Devilor enters into the Land in T. and the question was if his entry were lawful. Cooper argued for the Defendant, that by the words and intention of the Will, they had no Authority to sell the Land in reversion, for the words that they shall take the profits for Ten years, shew his intent only for the Land in possession, of which profit may be taken. Coke contra, the profits shall be intended such profits as he may take of a reversion; and is like the case, 34 H. 6. 6. a devise was of all his Tenements in manibus suis existentibus, the reversion shall pass; and cited the case, 39 Ed. 3. 27. for the exposition of words in the Kings grant; Gawdy, the Reversion is not devised, for no profit of it; but all the other Justices contra: for the intent of the devise was to perform the two Wills, and to pay Debts, &c. and perhaps the Land in possession was not sufficient; And Wray said, the word (all) perswaded him much, that his intent was so; and the words to have and to hold, and the words to take the profits, are of one sense, for he cannot hold but by taking the profits; and here are two Wills to be performed, and therefore the devise shall be taken in the most liberal manner, for the performance of them. But if it had been found that the Land in possession was sufficient to perform them, this might peradventure have altered the Case.

(49)

Dove versus Williot.

(49)

TRESPASS. Upon special Verdict the Case was this: Tenant for life, the Remainder in Fee of a Copyhold, he in the Remainder maketh a Lease by parol; Tenant for life and he in the Remainder joyn in a Surrender to the use of him in the Remainder in Fee; the question was, if this were a good Lease, and should take effect in the life of the Tenant for life. And it was held by Gawdy, Clench, and Wray, that it should, for the Lease is good against him in the Remainder, and by the Surrender of the Tenant for life to the use of him in the Remainder, his Estate is drowned in the Fee, and as it were extinct, and cannot hinder the Lease to have operation; and is all one as if he were dead, and being all in one hand, cannot have any privilege severed from the Inheritance; as if he in the Remainder grants a Rent-charge; and after the Tenant for life doth surrender, the Rent shall commence presently. But Gawdy said, if a Lease be made for two years, and after the Lessor let the Land by Parol to another for four years, this is but a Lease for two years, although the first Lessee Surrenders, for he had no power to contract for the two first years at the beginning; but otherwise it is when the Estate is determinable upon an incertainty. Plo. Comment. Smith and Stapletons case.

Co. Lit. 338.b.

Knowles versus Palmer.(50)
1 Rol. 905.

THE Case was moved by Atkinson, that in Debt after Judgment, the party prayed an Execution by Elegit, which being granted the Sheriff doth return, that he hath divided the Land by Dath, &c. but he could not make Execution, for the Land was extended upon a former Statute, and thereupon the Plaintiff prays a Capias ad satisfaciendum, and had it; and thereupon Atkinson prayed a Superfedeas, because a Capias is not to be awarded after an Elegit, especially if the Sheriff return he hath Lands, but if the return were Nihil, it were more doubtful, for when the Plaintiff hath elected the highest execution, and the Defendant hath Land which may be delivered, he cannot resort to a lower execution. Gawdy Justice, he may have Execution by Capias, for this is the highest execution which can be, for it concerneth the body, and the difference is, that after a Capias he cannot have an Elegit, nor other Execution, but after an Elegit, if he be not satisfied, he may have a Capias, and so is the better opinion of the Books. 17 Ed. 4. 4. 21 H. 7. 19. 31 Ed. Process 52; 5 Ed. 4. Br. Execution 93. and the Statute which giveth the Elegit doth not restrain the Execution at the Common Law. And the other Justices seemed to agree with him, but they would advise. Afterwards Knowles being taken by Capias, he prayed remedy upon it, but all the Justices held it well awarded, and they could not help him; although his case in equity, as it was opened, deserved favour.

2 Cr. 338.
Post. 310.

Weekes versus Holmes & Uxorem.

DEbt against them for certain Barrells of Beer sold to the Feme, (51)
 Dum sola fuit, they both waged their Law; and this Term
 both Baron and Feme did swear, according to the form of the Oath. Co. Lit. 172. b.
 Quod Nota, The Baron did swear for the Debt of the Feme.

Parkins versus Hinde, Trin. 30. Rot. 418.

Prohibition for suing for Tithes of Land in Babington, the case was, (52)
 The Parson of Babington, 29 H. 8. did Lease all his Glebe Land 2 Rol. 57.
 to Mills for Ninety nine years, rendring thirteen shillings four
 pence Rent, for all exactions and demands. And now his Succes-
 sor sued for Tithes of the Land, being the Glebe Land, and upon
 it the Plaintiff sued a Prohibition. Godfrey moved, that the Pro-
 hibition lieth, because the Land was let rendring Rent, and it is
 for all exactions and demands; and by that he bars himself and
 Successors of all Tithes. But all the Justices contra; for Wray said, Moor 47.
 the Parson shall have Tithes against his Lessee, and the words Co. 11. 13.
 here shall be no discharge; for these Tithes arise, and accrue after,
 and are not things issuing out of the Land, but collateral and due
 Jure divino; and therefore cannot be discharged but by special words:
 But if the words had been, as well for Tithes growing and arising
 upon the Land, as for other demands, then peradventure it had
 been a good discharge. But as the case is, it cannot be intended
 by any words, that he reserved the Rent for Tithes: And so
 Gawdy Justice did conceive, especially as the case here is, the Lease
 being of twenty four acres of Land, and only thirteen shillings
 four pence reserved; and afterwards, the same day, they granted a
 Consultation, but they said, that the words shall discharge the Lessee
 of all Rents and Services, but not of suit at Court, or such things
 as are not then in demand, 11 Co. 13.

Mannings versus Townsend, Trin. 31 Eliz. Rot. 136.

DEbt upon an Obligation, dated 1 May, 27 Eliz. The Defendant (53)
 pleaded, that he was bound in this Obligation Simul cum Rich. 2 Rol. 412.
 Gotts, to whom the Plaintiff had released all Actions and Demands, 2 Cr. 372.
 the said first of May. The Plaintiff by Replication shewed, That
 after the Obligation sealed by Gotts, he released to him; and after-
 ward, viz. The same day the Defendant sealed the Bond, Absque hoc
 quod tenetur simul cum Gotts. And upon this it was demurred in Law:
 And it was clearly held, that this Release doth not discharge the
 Defendant; but they held the Traverse to be ill, because Gotts was
 bound with the Defendant; but because the Defendant had not
 taken advantage of it, to shew it upon the Demurrer, and had con-
 fessed the matter in fact alledged by the Plaintiff, it was adjudged,
 that the Plaintiff shall recover, if nothing be shewn to the contrary
 within two days.

Bugberd *versus* Dominam Reginam, Hill. 31. rot. 4. or 48.

- (54) **E**rror of a Judgment in a Quare impedit for the Queen, for the Church of Rettington in Essex; Error assigned, that the Judgment, that the Queen shall present, and recover for the value of the Church for half a year; Fenner Serjeant, the Queen is not by the Common Law to recover damages, nor any other person, and the Statute of West. 2. c. 5. giveth no damages, but where the party is hindred of Presentment, which the Queen is not in this case, when she presenteth by her Prerogative; as in this case, where she presenteth by reason of Lapse. 14 Ed. 3. Quare impedit 54. 3 H. 6. Damages 17. And he had searched divers Presidents, viz. Pasc. 7 H. 5. Rot. 442. and 2 H. 6. Rot. 404. 9 H. 6. Rot. 316. where no damages are given; and the case of 7 Eliz. Dyer 236. is but a Curia advisare vult. And the Statute cannot be intended to give damages, but only to the true Patron, and not to the Queen, which claims only by Prerogative. Gawdy, The Queen shall not recover double damages, for the Queen cannot lose her Presentment; but single damages is only for the Tort in the Presentment; and this the Queen shall have, as any other person; and the case of 13 Ed. 3. Quare impedit 181. was near the time of the making the Statute; and they best intended the meaning of the Parliament. And although presidents now are otherwise, it may be that the King did not regard damages, or were never demanded. Wray contra: It is hard, that when one part of the Statute will not serve for the Queen, and she is out of it, that it shall be construed she shall have benefit of another part of the Statute. And although the case of 13 Ed. 1. is so, yet divers Books since that, in the time of Edw. 3. & Hen. 6. and since are, That the King shall not have damages, and the Books and Presidents being so till 7 Eliz. It is fit to adjudge the case according to them. Clench agreed. And afterwards, Trin. 32 Eliz. Wray said he had conferred with Anderson, Manwood, Periam, and Walmsly, and all (except Periam) agreed, That no damages were to be given; and afterwards for that cause the Judgment was reversed. V. 6. Co. Boswel's case, fol. 51. Post. 180.

2 Inst. 362.

Termino Michaelis, 31 & 32 Eliz. in Communi Banco.

Annesly *versus* Johnson.

- (1) **R**eplevin after a second Deliberance, Return was awarded to Johnson; and Averia elongata being returned, a Withernam was awarded of the Cattel of the Plaintiff, and afterwards the Plaintiff cometh and satisfieth the Defendant his damages, and prayeth a Writ of Restitution of his Cattel. Fleetwood, Cattel taken in Withernam, are not replevisable; for how then shall the party be satisfied for the meat of the Cattel. Curia, they are not replevisable without doubt; but upon satisfaction he shall have a Writ of Restitution of the Cattel, and so is the course, which all the Clerks did agree; And as to the food, he hath the occupation of the Cattel, and it is reason he should find them meat for it; And the Writ was granted. V. 16 H. 6. Return de Avers 2.

Gostwick's

Gostwicks Case.

A Lease was made to two for years, upon condition, that they (2)
 nor either of them, shall alien any part of the Land; without Ante 35.
 assent of the Lessor, they make Partition, and one alieneth his
 part. This is a Forfeiture of the whole.

The Lord releaseth and grants his Seignior to the Husband, (3)
 who is seised of the Tenancy in right of his Wife, to him and his Co. Lit. 299.a.
 heirs; the Husband dieth, and his heir distrains for the Rent up-
 on the Lands. Anderson and the Court held, that it shall inure as a
 grant, which is most beneficial to the Grantee; and it is agreeing
 with the intent of the Deed, that the Husband and his heirs shall
 have it.

Quare impedit. The Queen having the Advowson of the Vicarage (4)
 of D. grants the Vicarage to J. S. The question was if the Advow-
 son passeth: Fenner argued it should pass. Puckering contra. And all
 the Justices held it shall not pass: for by the Queens grant no-
 thing shall pass, but what she intends to pass; and the Vicarage
 is another thing then the Advowson, and every thing must pass by
 its proper name: And it shall not pass in the Case of a common
 person.

Nota. By Anderson and Walmsly, Administration committed may (5)
 be revoked, notwithstanding the Statute of 21 H. 8. And so it hath
 been often used. Windham and Periam doubted.

Rookwood's Case.

Rookwood having issue three sons, had an intent to charge his (6) 1 Vent. 218
 Land with four pound per annum to each of his two youngest
 sons for their lives; but the eldest son desired him not to charge
 the Land, and promised to pay to them duly the four pound per
 annum; to which, the two younger sons being present, agreed, and
 he promised to them to pay it: And for not payment after the
 death of the Father, they brought an Assumpsit; and the whole
 Court held clearly, that it was well brought, and that it was a
 good consideration; for otherwise his Land had been charged with
 the Rents.

Hambleton *versus* Hambleton.

A Devise was to three, and that the Survivor shall be each (7)
 others heir; it was adjudged, that they were all Joyntenants:
 And so is the meaning of the Will.

Crisps Case, Trin. 31 Eliz. Rot. 1636.

Quare Impedit, and declares of a grant of the next Avoidance; the (8)
 Defendant demanded Oyer of the Deed, and the Plain-
 tiff

tiff sheweth a Letter written to his Father by the Patron, in which he writ he had given him the next Avoidance: And upon this it was demurred, and ruled clearly without argument against the Plaintiff; for it was a meer mockery, and the grant cannot be without Deed.

Gillam's Case.

- (9) **E**jectione firmæ. As Executor for ejecting him out of his Ferme & bona sua ibidem cepit, &c. And after Verdict, found for the Plaintiff; it was alledged, that Bona sua, &c. shall be intended his own goods, and not the Testators, Curia contra.

Ante 6.

Pemberton *versus* Cony.

(10)
Ante 43.

J. S. makes an Infant of the age of four years his Executor, and doth by his Will appoint that J. D. during the nonage of the Infant, shall have the disposition of his goods. Debt shall be brought against J. D. during the Infancy; for he is Executor during that time.

Termino Michaelis, 31 & 32 Eliz. in Scaccario.

George Ognel *versus* Paston.

(1)
Godb. 403.
2 Leon. 84.
Moor 274.
Co. 8. 142. a.

DEBT. The Case was, Francis Woodhouse was bound in a Recognisance in Chancery to Ognell, which being forfeited, Ognell sueth two Scire facias against him, and both were returned nihil; and thereupon had Judgment to recover his debt, and thereupon he sueth out a Levam facias, which was returned nihil; and thereupon he sueth a Cap. ad satisfaciendum directed to the Defendant, Sheriff of Norfolk; the said Woodhouse being then in prison for suspicion of Felony, and the Defendant doth arrest him upon it, and after Woodhouse was arraigned and found guilty; and afterwards being discharged of the Felony, the Defendant suffers him to go at large. Ognell brought debt upon the escape; the Defendant pleads the conviction of Felony, and all the matter, &c. And upon this the Plaintiff demurs. 1. Question, if a Capias ad satisfaciendum lieth upon a Recognisance in Chancery, a Scire facias being returned upon it. 2. Question, Admitting a Capias was not grantable, if it be void, or only erroneous; so as the party must avoid it by Audita querela, or error. 3. Question, If Woodhouse being in prison for Felony, if the Execution was well served upon him. And this term it was argued by the Barons: and as to the third point, they all resolved, and the Council of the other party did not much inforce the contrary. That Execution was well served upon him; for although his body was at the Queens pleasure, yet he shall not take advantage of his own Tort; (no more shall the Sheriff) but he shall answer the Action or Execution of a common person. And as to the first point, all the Barons were of opinion, that the Process was well awarded and maintainable by the Law; for it being a Debt of Record, it is not reason, but his body should be liable to Execution upon it, as to a common Obligation; and this Capias is not by the Statute of West. 2. cap. 45. or 25 Ed. 3. but by the course of the Common Law, and the course of the Chancery, and Presidents

Post. 214.

1 Cr. 390.
Post. 576.
Co. 8. 142. a.
1 Rol. 897.

2 Cr. 3.

Presidents are usual there after Scire facias; and their courses are to be maintained as of other Courts. 2. Question, admitting the Capias lay not, yet it is not void, but erroneous: And this the Sheriff shall not dispute, nor take advantage of it; for it was a good Warrant to the Sheriff to take him, and false imprisonment lieth not against him, 9 Edw. 4. 13. 21 Edw. 4. 23. 36 H. 6. 32. And it shall always be a good Execution, until the party avoid it by Error; and by all their assent, the Plaintiff had Judgment.

2 Cr. 3.
Co. 8. 142. a.
Yelv. 42.
Post. 188. 271.
576. 707. 767.
893.

Termino

Termino Hillarii,
Tricesimo secundo ELIZABETHÆ,
in Banco Reginae.

Venard *versus* Wotton.

(1) **A**ction for these words, viz. You have falsly forged your Fathers hand, and thereby falsly have procured your Fathers Tenants to pay their Rents to you, due to your Sister. After Verdict for the Plaintiff, Fuller moved, That the words are not actionable, for it is not shewn what thing he forged; for which he is by any Law punishable: And here it may be he counterfeited his Fathers hand to a Letter, for which he is not punishable 28 Eliz. Inter Brook & Doughty. You have forged my Lord of Leicesters hand to such a Letter, adjudged not actionable: And so was the opinion of the Court, and Judgment for the Defendant.

Yelv. 146.

Taylor *versus* Vale, Mich. 31 & 32 Eliz.
Rot. 68.

(2) **R**eplevin. The Case was upon Demurrer. Vale having a Rent-charge in Fee by Indenture, which was enrolled within six months, giveth and granteth it to Hall in Fee, and there was no Attornment. (Nota, in truth the case was, that he for a certain sum of money, giveth, granteth, and selleth the Rent, &c. But it was pleaded only, that he by Indenture Dedit & concessit) And it was ruled without any Argument, that the Rent without Attornment passeth not, being only by way of grant, and not of bargain and sale, although the Deed was enrolled. But Wray said, That if by Indenture, in consideration of a certain sum of money Dedit & concessit, and the Deed is inrolled, this shall pass the Rent without Attornment, though there be no words of Bargain and Sale: And the Plaintiff had Judgment.

Co. 8. 93. b.
2^d ed. 97.
1 Voul. 70.

Willis *versus* Jermin, Hill. 31 Eliz. Rot. 674.

EJectione firmæ. It was found by Verdict, that the Dean and Chapter of Exeter let the Land to Harvy for years, rendering Rent payable at their Chapter-house in Exon, and for default of payment, the Lease to be void. Harvy assigned his Estate to the Defendant, the Rent was arrear, and not paid, being demanded at their Chapter-house. The Dean and Chapter, by the name of the Dean and Chapter of St. Mary de Exon (whereas they were incorporated by the name of St. Mary in Exon) make an Indenture of Lease for twenty one years to the Plaintiff of the Land, and in their Chapter-house put their Seal to it, and make a Letter of Attorney to J. S. to enter and make delivery of this Deed upon the Land, which he did accordingly; and if this be a good Lease, they pray the opinion of the Court. Harris Serjeant, prayed Judgment for the Defendant. First, the Lease of the Land is void by Misnomer of the Corporation, Sed non allocatur; for it is no material variance, and so it hath been ruled. The second cause, that the Lease was not good, because the Dean and Chapter let it in their Chapter-house, by setting their Seal to it; which being a perfecting the Deed of the Corporation, there can be no other delivery: Then the first Lessee continuing in possession, and they out of possession, the Lease was void, and the Delivery after by the Attorney, it having a former Delivery, is void; Sed non allocatur: For there is no other means for a Corporation, to make a Lease, but this. And Gawdy said it is plain, That it is not the Lease or Deed of the Corporation until Delivery, as of another person. Thirdly, The first Lease ceaseth not till Entry, and so cannot make a new Lease. Wray, the first Lease doth clearly cease without Entry. Gawdy doubted. Fourthly, the Lease is not good, for the Attorney hath not executed his Warrant according to his Authority; for it was, that he should enter and claim it to the use of the Corporation, and then deliver the Lease; and the Jury found that he delivered it upon the Land, but found not that he had entred and claimed, &c. Sed non allocatur: For in a special Verdict, the circumstances of every thing need not so strictly be found, as it is to be pleaded; and it being found, that by virtue of the Warrant he delivered it upon the Land, it shall be intended he pursued it duly. Fifthly, It is found that they demanded the Rent at the Chapter-house, where the demand should be upon the Land. Sed non allocatur, for the demand at the place where it is payable, is sufficient, and the Plaintiff had Judgment.

(3)

1 Rol. 830.

2 Rol. 23. 42.

428.

Co. 11. 20. 2.

2 Rol. 42.

1 Rol. 830.

2 Rol. 23.

Co. 3. 64. 5.

Post. 221.

Post. 181. 188.

Co. Lit. 48. b.

Co. 9. 51. b.

Post. 669.

Co. Lit. 202. a.

Post. 415.

Smith *versus* Hillier and Clerke, Trin. 31 Rot. 880.

FAux imprisonment in Middlesex. The Defendant pleads that Lynne is an ancient Village, and that in it Usitatum est a tempore quo, &c. to chuse a Major every year, and that the Major for all the time, &c. was Custos Gaolæ there; and sheweth, that a Plaint was entred in the Court there against the Plaintiff; for which he was committed by the Major to the Gaol there, absque hoc, that they are guilty of the imprisonment in Middlesex: Upon which

(4)

which the Plaintiff demurs. Tanfield for the Plaintiff, the Bar is not good; first, Because the Prescription is, that for all the said time, &c. The Majors had been Keepers of the Gaol, which was no good pleading of the Custom; for he ought to say, *Usitatum est*, &c. Secondly, The Major cannot commit one to himself; for there ought to be one to commit, and another to receive, and not to be both one person. Thirdly, He doth not prescribe to have a Gaol there, nor sheweth not there was a Gaol there; and it may be, that he may make his Gaol where he pleaseth, and then the Plea should be, *Comissus custodiæ Majoris*, and not to the Gaol; or the Prescription should be, That the Major, &c. was *Custos* of all Prisoners, and not *Custos Gaolæ*. Fourthly, He traverseth *absque hoc*, that he was guilty in Middlesex, which is not good; for he cannot traverse the place, but generally, for the Defendant cannot streighten the Plaintiff to a place. Fifthly, The Defendant justifying between the 28 day of September, and the 14 of October, at which day he was removed by Habeas corpus, and shew, that the 29 day of September Hellier was chosen Major, but do not answer to the time of the day of 29 September, before which he was chosen Major; for it may be, he imprisoned him the same day before he was chosen Major, which is not answered. Coke for the Defendant; the Bar is good, notwithstanding the Exceptions. To the first, it is once alledged, that *Usitatum est* to chuse a Major, &c. then *Usitatum est* shall be referred to every part of the Prescription, and need not reiterate it to every part. Secondly, The course of all Corporations is, that the Major which is the Judge, is Gaoler also: So the Sheriffs of London, they have a Court in the Guildhall, and are Officers and Gaolers to it. Thirdly, He need not prescribe in the Gaol; for it is incident to a Court to have a Gaol, as a Court of Pypowders to a Fair; also a Gaol is not in a place certain, but goeth with the person of the Gaoler. To the fourth, the Traverse is good. For if he Traverse generally, the justification in a place certain shall be waived, which is material as this case is, and shall not be enforced to it, where it is local; and in Cover's case, it was adjudged in False Imprisonment, he justifies as Constables in Suffex, *absque hoc*, that he is guilty in Middlesex, and awarded good. So in Lovels case in Trespass, for taking his horse in Cambridge, he justifies for Damage-feasant in Essex, *absque hoc*, that he was guilty in Cambridge, and it was good by award. To the fifth, upon which it was much relied, he answered, That it shall be intended a Justification for the whole day, for there shall be no division of a day: And if he imprisoned him before he was Major, the Plaintiff must shew it; for *prima facie*, it shall be intended to go to the whole day, 15 Edw. 4. 23. 9 Edw. 4. And of the same opinion was the Court in omnibus, and it was adjudged for the Defendants.

Ante 76.

Co. Lit. 282. b.
Post. 375.Co. Lit. 282. b.
Post. 174.

Co. 1. 106. b.

Kimerly *versus* Cooper, Trin. 31 Eliz. Rot. 768.(5)
i Rol. 563.

Action for words. The Plaintiff declares, that whereas by the Custom of London, the Major, Recorder, and Aldermen of London being Justices of the Peace, had used to take the Depositions and Examinations of any person produced before them in *Perpetuam rei memoriam*, and to keep the said Depositions upon Record

cord in the Court of the Guildhall, to be given in evidence to a Jury for the better knowledge of the truth between any persons; and that whereas he was examined and sworn before Sir George Bond, Mayor of London, being then and there a Justice of Peace, as a witness on the behalf of Ed. Sta. and made such Oath, &c. The Defendant said, that he had falsely sworn in the said Oath, Innuendon the Oath there taken in form aforesaid, &c. to his damages, &c. The Defendant pleaded, That the Plaintiff was not sworn before the said G. B. modo & forma prout, &c. And upon this it was demurred in Law. 1. The Traverse cannot be taken; for the alledging of the Oath is but conveyance to the Action, and so is not traversable: And if he never took such Oath, yet it is a great slander. 2. This Plea amounts to a General Issue, and so is not good. Harris of Lincolns-Inn, contra: That the Declaration is not good; for the force of it is, that the Mayor had used to take the Oath, &c. And if he had not Authority, it is no more than if the Plaintiff had taken a voluntary Oath; in which for saying he is forsworn, is not actionable. And the custom to warrant him to take the Oath, is not well alledged; for he ought to alledge, that the City is an ancient City; for otherwise he cannot prescribe in it, 21 Ed. 4. 54. 12 Edw. 4. 8. 22 H. 6. Prescription 47. And the Traverse is good, for it is not the conveyance, but the principal substance of the Action, and without it the Action is not maintainable, and so is traversable, 34 H. 6. 22. 13 Edw. 4. 4. 26 H. 8. B. Action sur Case 103. 14 H. 4. 30. Gawdy, Where the conveyance to the Action is that which doth entitle the Plaintiff to the Action, it may well be traversed, if the Defendant cannot wage his Law, otherwise where he may wage his Law; 8 H. 6. 5. 22 Edw. 4. 29. 7 Edw. 3. 54. 31 H. 6. 10. 26 H. 8. Br. Traverse, 5 H. 7. 3. But principally for the first fault, that he alledgeth not, that it is an ancient City, the Declaration is not good. And of the same opinion were the other Justices, that it is a thing traversable, for the Action is grounded upon it; and it was then adjudged for the Defendant, without further argument. Post. 201.

Alexander *versus* Dyer, Trin. 31 Rot. 901.

DEbt for Rent reserved upon a Lease for years, and declares, That where he let the Land to the Defendant for twenty one years from the Feast of St. Michael next ensuing, rendering Rent, and that the Defendant had entred the 29 day of September, and had occupied for one year, &c. the Defendant pleaded Nihil debet; and after Verdict against him, it was alledged in Arrest of Judgment, that it appeareth in the Declaration, that he had entred upon Michaelmas day, which is a day before his title began, and so is a Disseisin, and no Rent due. Gawdy, it is clear he is a Disseisor by his entry, and the accruing of his term shall not alter his estate, 7 Edw. 6. Dyer 89. Pet debt lieth for privity of Contract, 24 H. 8. Dyer. Co. 3. 23. b. Rushdens Case, And so was the opinion of the other Justices, and the Plaintiff had Judgment. (6)
1 Rol. 605.
2 Rol. 420.
Post. 906.

Dod *versus* Coke.

(7)
2 Rol. 703.
Ant. 157.

Ant. 143.

Trespas for breaking his Close, called Sheeps-course in High-field, upon not guilty, the Jury found, that the place containeth divers acres; the Plaintiff is seised of one acre in it, in which the Defendant had entred; and that the Defendant is seised of a great part of the said place; and the Earl of Suffex of another great part of it: And upon motion, the Court held the Action well brought; for although the Plaintiff counts of the breaking of his Close, called Sheeps-course in High-field; yet he may assign his Trespas in which place he pleaseth: So the Verdict is found for the Plaintiff, and it was adjudged for him.

Penfon *versus* Hickbed, V. Antea Mich.
31 & 32 Eliz. Placito 37.

(8)
Ant. 155.

Ant. 155.

The Case was now moved again, and two Causes were assigned, why the consideration was not good: First, it is not alledged for what the money, contained in the Bills was due, nor to whom; and it may be they were Bills made to the Defendant himself, and due to him, and so no consideration. 2ly, This buying of Bills of Debt, is maintenance, and so no consideration: For the first, the Justices held the consideration is not well alledged for the causes aforesaid: But for the second, they held it is not maintenance, for it is usual amongst Merchants to make exchange of money for Bills of Debt, Et c. contra. And Gawdy said, it is not maintenance to assign a Debt with a Letter of Attorney to sue for it, except it be assigned to be recovered, and the party to have part of it; and the Judgment was reversed.

The Lord Stafford against Thynne.

(9)
1 Rol. 220.
Ant. 158.

Post. 503.

Co. 6. 54. a.

Error of a Judgment in an Assise. 1. Error, That the Demandant counts of a Disseisin de Tenemento, but saith not De Libero Tenemento; yet it was held good, for so much is implied. 2. The Judgment is Ideo capiatur, and Capias pro Fine lieth not against a Baron of Parliament. 11 H. 4. 15. 27 H. 8. 22. 29 Ed. 3. 39. 14 E. Dyer 315. But it was held by the Court to be good; for it is upon a Disseisin found, upon which a Fine is given by the Statute; in which, no person being exempt, it shall bind a Nobleman as any other; and where a Fine is due, a Capias pro Fine is to be awarded; and for a contempt a Capias lieth against a Nobleman, and this Fine is for the contempt to the Law, so is 1 Hen. 5. And the Judgment was affirmed.

Lane *versus* Milward, Trin. 31 Eliz. Rot. 490.

(10)
Post. 543.
Co. 8. 159. a.
Ant. 79.
Post. 609.

Error upon a Judgment in Reading upon an Assumpsit. 1. Error, that the Venire fac' was 24 Jurator' where it should be 12 Jurat. And this at first was held Error, but after divers ancient Presidents were shewn where such Ven' fac' were awarded, it was allowed to be good; for they would not Reverse so many Presidents. 2. The Action was against W. M. and the Judgment was against predict' Th. M. but the Court held it was but a Division of the Clerk,

Clerk, and might be amended in Affirmance of the Judgment.
And the Judgment was affirmed.

Proude versus Hawes.

Action for words, That the Plaintiff was a Common Barreter; after Verdict, it was alledged in Arrest of Judgment by Egerton Solicitor, That the words were not actionable; and so it seemed to the Court, and the Judgment was staid. (11)
1 Cr. 192.

Ryles Case.

Action for these words, That he is a couzening Knave; for that he hath sold him a Chain of Copper, for a Chain of Gold; and that he is a couzening Knave upon Record. Atkinson moved, that the words are actionable, and vouched Bedfords case, for saying, Thou art a couzening Knave, for thou soldest a Saphire, for a Diadem; and the Action was maintainable. But Wray and Gawdy conceived the words are not actionable, except it had been alledged, that he is a Goldsmith, and got his living by buying and selling of Chains and such wares, then peradventure the Action would lie, but not here. (12)
Ant. 95.

Johnson versus Tucke, Int. Mich. 31 & 32 Eliz. Rot.

Assumpsit. Which was supposed to be in the Parish of St. Mary le Bow in London. The Defendant pleads to part Non Assumpsit, and to the other part a Release in the Parish of St. Magnes London, and issues were joyned upon both, and one Ven' fac' awarded to try both issues: And this was De viceneto de Bow, and found for the Plaintiff. Egerton Solicitor moved in Arrest of Judgment, That it was a mis-trial, for the Venire ought to be of both places; for it was agreed, That the Plaintiff might have, if he pleased, several Ven' fac'; and might have at his election but one Ven' fac', and he relied upon 27 Hen. 6. 6. But it was moved, that it was a good Trial for the issue which was at Bow, and a discontinuance for the other, 11 Hen. 7. 5. But the opinion of the Court was, that in as much as the Venire fac' was awarded for trial of both issues, This is a mis-trial in all, and cannot be good for one; but in 11 Hen. 7. 5. the question did arise; for that it did not appear, that the Ven. fac. was awarded to try both the Issues, and Judgment was staid; and they said he might take a Venire fac. de novo if he would. (13)
Ant. 114.

Ward versus Thorne.

Action for words, for calling him A Rebellious and Traiterous Knave; after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Action did not lie; for rebellious may be upon a Proclamation of Rebellion out of Chancery, or other Courts; and when Traiterous and Rebellious are coupled together, they are of the same sence. Curia: For the words Rebellious Knave, Action lieth not; but Traiterous being joyned with it, Action lieth; and the Plaintiff had Judgment. (14)

Trofs versus Michell.

(13)

Post. 184.

Error of a Judgment in Exceter against the Plaintiff upon a Foreign Attachment; where a Suit being by Michel again Hore, the said H. was returned nihil; and it was surmised, that the said T. had certain money in his hands due to Hore; whereupon according to the custom there, this money was attached in the hand of Trofs. T. came and pleaded Nihil debet to H. And upon this Michel doth demur, and adjudged for him, because he ought to have pleaded, That he oweth nothing to H. nor had any money in his hands due to H. And upon this T. brought a Writ of Error: First Error, because it is a good plea, and the Plaintiff was to be barred, and not to recover; and so is the common pleading in London: For if it be no debt, it is not attachable. But it was answered, that it is no plea; for he may have money in his hands which is attachable, and yet no debt; as if he hath money to keep, or if he find the money of H. or otherwise: And therefore he ought to answer to every intent, and not to one intent only. But Gawdy said it is good to a common intent, and so is the Custom of London. Secondly, Because Michel had Judgment to recover costs against T. which are not recoverable upon a Foreign Attachment. Thirdly, Because no Judgment was given, that T. shall be discharged against H. And the Judgment was reversed, principally for the first Error.

Shelbery versus Buffard.(15)
Ante 158.

Post. 472:

Post. 198.

Error of a Judgment upon a Recovery against Bird in Colchester, in a Writ of Right, in which the Plaintiff was vouched, and came in and voucheth the common Vouchee, and loseth by default, &c. First Error, that the Writ of Right was directed Ballivis villæ suæ de Col' where it should be Ballivis suis, &c. for they are the Queens Bailiffs. Second Error, the Declaration was made before the appearance of the Defendant by Attorney, or in person. Thirdly, the Vouchee appearing by Guardian, the Entry was, he appeared by Guardian, but saith not, Ad hoc per curiam admissum. Fourthly, The Judgment was general against the Vouchee, and not for the Land only within the Jurisdiction. Fifthly, The demand is De medietate duor' Meluagior', and the Judgment is, Quod recuperet Tenement. prædict. where it should be Medietatem Tenement. prædict. Sixthly, Because no Judgment was given for the Vouchee against the second Vouchee. Coke: The Judgment is well given, and there is no Error but the last; and he said, the Record was otherwise, That Judgment was given against the second Vouchee. But he moved, that the Writ of Error was not well brought, for it varieth from the principal Record; for in that the Plaintiff is named Shelbury: And here the Writ is brought by the name of Shelbery: so (e) for (u); and in Trin. 25. Eliz. a Recovery was against one by the name of Bird, and he brought a Writ of Error by the name of Burd: And for this variance the Writ did abate, 12 Aff. 2. 26 Aff. 31. Another variance, That the Record was of Lands in Colchester, and the Writ of Error supposeth the Land in Colchester; and the Writ being merely founded upon the Record; for these variances he prayed it might abate: But notwithstanding these Exceptions, the Judgment was reversed.

Termino

Termino Hillarii, 32 Eliz. in Communi Banco.

Porry *versus* Allen, Trin. 30 Eliz. Rot. 611.

DEbt upon a Lease for years. It was found by special Verdict, That one Ball being Lessee of these Lands for forty years, let them to Gibson for thirty years; and he let them to Porry the Plaintiff for nineteen years, rendering 10 l. Rent; and afterwards Articles of Agreement were made between Ball and Gibson, That Porry should have and hold these Lands and other Lands for three years, rendering a greater Rent: To which Articles P. doth agree at another time and place, and occupieth the Land accordingly; and after let these Lands to the Defendant for seventeen years, rendering Rent: The three years expired, afterwards Gibson grants his term to Cornwallis, who enters in 29 Eliz. And for Rent behind after his Entry, the Action was brought; and it was argued by Hammon of the one part, and Harris of the other. 1. Question, If this was a Surrender by this Agreement? 2. If a Surrender may be as this case is, by one Termor to another, out of which his term is derived, because one term cannot drown in another. But all the Justices held clearly, That this cannot be a Surrender; for the words and the acts between strangers, can make no Surrender: And this Agreement that P. shall hold the Land, is a void Agreement for a stranger to take benefit by it. And Anderson held clearly, that an Agreement or Covenant made between J. S. and J. N. that J. D. shall have such Land for years; this being made between strangers cannot amount to a Lease: So if J. S. Covenants with J. D. that his Executors shall have such Land for twenty one years, this cannot amount to a Lease; for they are in this degree as strangers, and for this point principally, they all held it can be no Surrender. And for the other point, they also held, that this can be no Surrender; for when Lessee for twenty years maketh a Lease for ten years, the second Lessee cannot surrender to the first Lessee; for ten years cannot be drowned in twenty: And it was adjudged for the Plaintiff. V. Post. Trin. 35 Eliz. Plac. primo B. R. fol. 302.

(1)

Co. 1: 155. d.
Post. 486.

Post. 302. 3.

Brooksbies Case.

Quare Impedit. Upon the Declaration, it appeared, that a Grant of the next Avoidance was made to him, and one H. B. and after the Church became void, H. releaseth to the Plaintiff all his estate, right, and title; and he being disturbed brought a Quare Impedit in his own name only: And after Verdict, this matter was alledged in Arrest of Judgment, that the Release after Avoidance was void; for it is a thing in Action, which cannot be granted or released from one to another; but a Release before Avoidance, is good. And being argued by Harris and Fenner Serj. on the Defend. part, and by Drew and Beaumont on the Plain. part. It was adjudged against the Plaintiff, that the Release was void; for after the Avoidance, it is meerly a thing in Action, and so annexed to the person, that it cannot be granted or released. And they commanded the Roll of Staffords Case to be searched; but no Judgment was there entred. Vide Dyer 282.

(2)

Walter

Walter Moiles Case.

- (3) **C**ooper moved that W. M. had brought a Quare impedit, and died, pending the Writ; and he prayed to have another Writ by Journies accompt for his Executors; for he said he could not have it, but by the allowance of the Court, and the Court granted it, but said, regard well if it lieth in this case, or not; and in what form the Writ shall be.
Co. 6. 10. b.
- (4) Cooper desired the opinion of the Court, that if a Fieri facias be directed to make execution of Goods; and after the teste of the Writ, and before the Sheriff executes it, the party sells the Goods bona fide, if they can now be taken in Execution: And the Court held they might; for by the Award of Execution, the Goods were bound, so that they may be taken in Execution into whose hands soever they come. And Walmsly said, so it was ruled in a case at Hertford Term, wherein he was of Council. V. 2 Hen. 4. 11 Hen. 6.
Post. 181. 440.

Bullock *versus* Sir John Smith.

- (5) **A**ction. Sur trober of six Oxen in London, and there converted, &c. The Defendant said, he seized them in the Manor of D. in Essex, as Goods waved there; and so justifieth, absque hoc, that he was guilty in London, and per Curiam, it was no Plea; for it amounts but to the General Issue, containing no matter local to make the place material.
Co. 10. 91. a. c.
Ant. 168.
Post. 484. 504.

Termino Paschæ,
Tricesimo secundo ELIZABETHÆ,
in Banco Regina.

Marsh versus Astrey.

Action upon the Case, and declareth, That whereas he had brought a Writ of Entry against H. Champion, for certain Lands in East-Barnet, directed to the Sheriff of Hertford, returnable Octabis Martini, and delivered it to the Defendant, being Under-Sheriff of the said County, to be executed in Forma juris, and gave him 2 s. for executing it; and that such a day he had caused the said H. C. to be summoned according to the Writ; yet Falso & malitiose intending to deceive the Plaintiff, and to hinder him of his Recovery of the said Lands, did not return the said Writ of Summons at the said day of Octabis Martini, per quod he retardatus fuit, of his Recovery of the said Lands and declared to his damages of 1000 l. upon not guilty pleaded, it was found for the Plaintiff. Coke moved in Arrest of Judgment, That this Action being for Non-feasans, i.e. for not returning the Writ, the Action lieth not against the Under-Sheriff, but ought to be brought against the Sheriff himself; for he is responsible for all things concerning the Office; and he relied upon 19 H. 6. 29. 41 Ass. 12. 21 Ed. 3. 46. 2. It was not averred that he was Under-Sheriff, and continued in the Office at the said day of Octabis Martini; for otherwise the Action lieth not against him. Sed non allocantur. 1. The Under-Sheriff for a Tort done by himself, may be punished: And here it is alledged, that he Falso & malitiose intending to delay the Plaintiff of the Execution of his Writ, did not return it: So it is as an embezzling of the Writ, for which he is punishable; as 19 Hen. 6. &c. also he is charged in this Action: For that he took mony to return it, and did not. And to the second Exception, it shall be intended that he continued in the Office, for he was Under-Sheriff when the Writ was delivered to him: And it is alledged, he caused the Summons to be made, and did not return it at the day; by which it shall be intended that the Authority was in him: And for this falshood he is sued, and it is found by Verdict against him; and it was adjudged for the Plaintiff.

(1)
1 Rol. 93. 94.
2 Rol. 607.

Post. 178.

1 Rol. 94.

Tilley versus Anthony Wye Senior.

Appeal of Murder by R. Tilley of the death of G. Tilley his Brother, against A. Wye Senior, and declareth, That An. Wye Junior, (which was absent, and whom he would appeal, if present)

(2)

sent) 18 Feb. 30 Eliz. &c. Such an hour at D. percussit the said G. Tilley with a shot of a Dag, of which he languished until the 26 day of February following, upon which day he died; and that the said Anthony Wye Junior, feloniously and voluntarily him did kill and murder; and that the said A. Wye Senior, Fuit ad tunc & ibidem præsens abettans & comfortans the said A. Wye Junior, the felony and murder aforesaid to do, &c. Atkinson for A. Wye Senior (who was present) demurred upon this Declaration in the Appeal, because it is uncertain; for it is, that A. W. Junior such an hour, and place, made an assault upon the said G. T. And there and then gave him a mortal wound, of which he died, &c. And that the said A. W. Senior, was then present and abettant, &c. which is uncertain; for it may be he was present the same day, at the time when the assault was made, but was gone before the time of the stroke; and then he is not principal, 35 H. 6. 48. In Trespass the Defendant justifieth, that at the time of the Trespass supposed, he was Parson and took them for Cithes, and it was no Plea; for it may be he was at the time of the Trespass supposed, and not at the time of the Trespass done, so 35 Hen. 6. 12. Trespass for lying in wait to beat him: The Defendant saith, that at the time of the Trespass supposed, and after, he was his villain, and yet not good; for it may be, that he was not his villain at the time of the Trespass done, 3 H. 7. 11. 10 Edw. 4. 15. Also two days are mentioned, one the day of the stroke, and the other the day of the death; and it is alledged, that he was ad tunc & ibidem aidant, &c. so is uncertain to which of the days it is to be referred. Curia contra: For when it is said, that he was ad tunc & ibidem præsens, &c. to the felony and murder in manner aforesaid doing; this must refer to the time of the stroke, by which the felony was done. Wray said, if the Indictment had been, that such a year, day, place, and hour, the said A. W. Junior, made an assault and gave the stroke ut supra; and that the same year, day, and place, the said A. W. who is now appealed was present; this had not been good: For it may be intended at another hour, because the hour was not mentioned; and therefore it hath been adjudged, that in such case the hour is necessary to be put into the Indictment or Appeal, when the felony was done: for he cannot be principal, when he is not at the same time present; but as it is now, it is well enough: For it is, that he was ad tunc & ibidem præsent, &c. and cannot be intended, but he was present at the same instant of time. And of this opinion were the other Justices, but they would advise, &c.

Co. 4. 40. 2.

Hedd *versus* Chalenor.

(3)
2 Rol. 42. 135.
Ante 149.

Ant. 59.
2 Cr. 425.

Ejectione firmæ: and declares upon a Lease by Indenture made by Jane Beard, and the Jury found, that the true name of the Lessor was Johan, but she let the Land by the name of Jane, and prayed the discretion of the Court. And this being moved, Wray said, the names are both one; and so it had been adjudged before this time in this place, upon conference with the Grammarians, that Jane and Joane is one name. And Gawdy said, the Action is not grounded upon the Indenture, but upon the Lease, and the Indenture is but an enforcing of it, and it is found the let, &c. And afterwards, notwithstanding this variance, it was found for the Plaintiff.

Spire

Spire versus Ross.

Action upon the Statute of 5 Eliz. for perjury, it was found for the defendant, and Nine pound assessed for costs to him. And it was moved that Costs shall not be given against the plaintiff, for he sueth as a party grieved, and not as a common informer, and so not within the Statute of 28 Eliz. but it was answered that Costs shall be here upon the Statute of 21 H. 8. which giveth it upon every Action upon Statute. Gawdy, this cannot be for the Statute of 5 Eliz. was made after that Statute. Quere of it. (4)
5 El. Cap. 9.
18 El. cap. 5.

Lewis Vanvivee versus Mich. Vanvivee.

Debt. upon a Bond, the Condition was to stand to the Arbitrement of J.S. of all controversies between them. J.S. Arbitrated that the Defendant should deliver to the Plaintiff, Six Kentish Clothes which were bartred by J. D. for the third of the Plaintiff, and the breach was assigned in this point, and after Verdict for the Plaintiff. Fenner alledged in Arrest of Judgment, that this is out of the submission, for it appeareth not there was any controversy for it; and so void. Curia; it shall be intended to be in controversy if the contrary be not shewn; and that they were in the hands of the Defendant; and it was adjudged for the Plaintiff. (5)

Herd versus Burstowe.

Error in a Judgment in a scire facias upon a Recovery in Debt. (6)
1. Error, because the plaintiff sued a scire facias after the year to have Execution by Attorney, without a new Warrant of Attorney, which ought to be, as 33 H. 6. 49. 34 H. 6. 51. but it was said, he ought at first to assign this for Error, and to say that there is not any such Record of a Warrant of Attorney, for this is a several Record from the body of the Record; and he ought to have a certiorari to certify it. To which Gawdy agreed, there being no more Justices present. 2. Error, this is a scire facias against the Bail, for the not appearance of the principal; and it is not mentioned that process was awarded against him, but that it was prayed, & ei conceditur, but it is not, Ideo preceptum est vicecomiti, &c. as it ought to be; and although he that was Bail doth afterwards appear, this might be without process, and so not good. 3. The name of the Bailly that served the process, is not to the return of it. But it was said, that this is by Statute, which doth not extend to a Bailly, but to the Sheriff. 4. Error, Judgment was given without demurrer or Issue joyned; and although there need not be a Declaration in this case, no more then in a per quæ servitia, or a quid juris clamat, for these are Declarations in themselves, yet there ought to be a plea to it, and the plaintiff to reply to it; and upon the pleal there must be an issue or demurrer, and then a Judgment, and not otherwise, except upon a nihil dicit; and after for the second and fourth Error, the Judgment was reversed. v. 10 Ed. 4. 7. 11 H. 4. 5. 25 Ed. 4. 15.
Ante 84. 153.

Transams Case.

- (7) **P**rohibition. The Case was, Transam Parson of Denham sued one for Tithes in the Court of Norwich; and one that was Parson of Stonham, a Parish adjoyning came in for his Title; and said that the Land for which Tithes were demanded, are within his Parish of Stonham, and not within the Parish of Denham, and upon this they were at Issue and found for him, and sentence given for him; and Transam appealed to the Arch-bishop, and pending the appeal, Costs were assessed against him in the Court of N. according to the Statute of 32 H. 8. cap. 7. and Process against him there; and because the Issue was triable at the Common Law, he brought a prohibition to the Court of N. but for that no suit was there depending, but he had removed it before the Arch-Bishop by appeal, a consultation was awarded, for they might well proceed for Costs; but if he had not removed it, a prohibition had well been grantable; and he might have had it, though he was party to the Libel.

Post. 228.

Sale *versus* Marsh.

- (8) **A**ction for these Words, Thou hast used jugling with me, but thy jugling shall not serve thy trun, and hast forged a Writ of Quare Impedit, Innuendo a Writ of Quare Impedit against him, and the Bishop of Coventry. After Verdict it was moved by Lewis, that the words were not actionable. Curia, the first words are not actionable, but the last will well bear an Action, and the Plaintiff had Judgment.

Yelv. 146.

Dabridgecourt *versus* Smalbrooke.

- (9) **A**ssumpsit, That where the Defendant had recovered a Debt against Lane, and had a Capias ad satisfaciendum, directed to the Sheriff of War. and delivered it to the plaintiff being then Sheriff there, in consideration that he would make J. S. (whom the Defendant then name) his special Bailly to serve his process, that if the said Lane did escape, he would take no advantage against the Plaintiff (where in truth the delivery of the Writ, and the promise was to S. under Sheriff of the Plaintiff, and not to the Plaintiff himself) and alledges in fact, that he at the Defendants request made J. S. his special Bailly, who arrested the said L. and suffered him to escape, and that the Defendant against his promise had taken advantage of this escape, and had sued him and recovered so much, &c. And upon non Assumpsit pleaded it was found for the Plaintiff. And it was alledged in arrest of Judgment, that this is no consideration; and that the promise was against the Statute of 23 H. 6. Curia, an Assumpsit is within the Statute, and is as void as an Obligation, but here it is not contrary to the Statute; and it is a good consideration, that he should make one his special Bailly, which otherwise he would not do, nor trust him, but would have made his Warrant to his own Bailly, which was sworn, and peradventure bound to save him harmless against escapes, &c. and it was adjudged for the Plaintiff, v. Postea Hill. 34 placito 2. in Camera Scaccarii. pag. 271.

Co. 10. 101. b.
23 H. 6. c. 10.
Post. 271. 190.
230.

Ante 175.

Purcells

Purfell's Case.

HE was indicted of Felony before the Justices of Gaol delivery in the County of Som. and outlawed upon it, and brought *Ex- 8 H. 6.c.10.* roꝝ, because in the Indictment he is supposed to be of London, and the *capias* was awarded to the Sheriff of Som. whereas by the Statute it ought to be to the Sheriffs of London; 8 H. 6. cap. 10. in which he inhabited, and for this cause the utlary was reversed. And exception was taken to the enditment, which was taken and found before the Justices of Gaol delivery, which have not authority to take indictment unless they be Justices of Peace, 3 Mar. Br. Commissions 24. 2 Cr. 358. and for this cause the enditment was also discharged.

Hadman and Green, *versus* Ringewood. Antea
Mich. 31 & 32. placito. 5.

IT was moved by Tanfield, that the Action was not well brought, because it was supposed *ad damnum ipforum*, whereas it should be *ad damnum parochianorum*, 8 Ed. 4. 6. Coke, it may be either way; and he said the presidents are both ways, and Executors shall have *Trespas* of goods taken in the time of the Testator, supposing it to be *ad damnum ipforum*. But afterward it was agreed that the Churchwardens in whose time the goods were taken, may suppose it to be *ad damnum ipforum*, or *ad damnum parochianorum* at their choice, but the successors must of necessity suppose it to be *ad damnum parochianorum*; and for this cause it was adjudged that the plaintiff *nihil capiat per billam*. 2 Cr. 234. (11) Antea 145.

Wolman *versus* Tye, Mich. 31 & 32 Eliz.
Rot. 532.

The Assumpsit that the defendant did assume that if the plaintiff was ejected during the Term by him or any other, that he would give him Forty seven pound, and alledged that he was expelled during the Term, and Judgment was given for the Plaintiff, and a Writ of enquiry of Damages awarded and returned; it was moved in arrest of Judgment, that he alledged that he was expelled during the Term, but saith not by whom. Gawdy at first held, that by the Plea of the Defendant who had pleaded a special plea, this matter was waved, and a demurrer was joyned upon the Plea. But it was adjudged, that this was a thing material, and traversable, and without alledging of it the Plaintiff had no cause of Action, and no Plea of the Defendant could make it good. As in an Assumpsit to do a thing upon request, if he doth not alledge the time and place of the request, it is not good; and advantage may be taken upon it after non Assumpsit pleaded, Mich. 32 & 31 Eliz. it was adjudged for the Defendant. (12) 2 Rol. 71.b. Post. 675. Antea 74.

Harris. Case.

- (13) **A**ction upon the Case was brought by an Attorney of the Queens Bench against Harris; he pleaded the privilege of Oxford, and prayeth, &c. And it was held he should not have it, for the Plaintiff being privileged here, no other privilege shall be allowed: so if an Attorney here be sued by an Attorney of the Common place, he shall not have his privilege. But notwithstanding the Defendant said he would plead it at his peril.

Foxall *versus* Venables.

- (14) **A**ction upon the Case, and declares that he is an Inhabitant in D. in the Vil. of D. and that all the Inhabitants there time out of mind, &c. had a way to the Common, &c. and the Defendant stopped it, &c. and it was moved by Masly after verdict, in arrest of Judgment, that the Inhabitants cannot prescribe, but by way of usage; and he hath not alledged Title to the Common. Egerton Solicitor: Inhabitants cannot prescribe for matter of Interest, but for an easement they may, and the Plaintiff need not make a Title, because the Action is only for the disturbance of the way; and that Inhabitants may prescribe for an easement, he relied upon 2 Ed. 4. 5. & 25 Ed. 4. 29. but to profit or commodity in the Freehold of another, they cannot prescribe, 7 Ed. 4. 26. 18 Ed. 4. 3. Gawdy, there is no difference, but in both cases they ought to alledge an usage. 2 Mar. B. Prescript 100. 6 & 7 Ed. 6. Dy. 71. 18 Ed. 4. 3. Wray, contra, & adjournatur.
- Post. 363. 441.
448.

Bugberds Case, Hill. 31 Eliz. Rot. 4. & 488.

- (15) **E**rror in Quare Impedit, where damages were given for the Queen; and the Judgment was reversed, Mich. 32. placito 44. The Plaintiff had a Writ of Restitution awarded for the mean profits, and a fieri facias ad valentiam be bonis & catallis of the Incumbent of the Queen, and all in one Writ returnable, Crastino Trinitatis; the Sheriff takes the Inquisition upon the day of the return of the Writ, viz. Crastino Trinitatis and returneth it. And first exception was taken, that the Inquisition being taken upon the day of the return of the Writ, was void; for the day is excluded, and is only for the return of it. 31 H. 6. 13. 33 H. 6. 45. Second Exception; in the Writ of Inquisition there is comprised also a fieri facias, which is not to be. Curia, the Writ is well served and varieth from the case of the exigent, 33 H. 6. 45. and of the venire facias ad diem octabis there the day is excluded but not here: but if it had been taken the second day of Crast. Trinitatis, and before the fourth day of Crast. Trinitatis, it had not been good. As to the second exception, they may be both in one Writ, 6 & 7 Ed. 6. Dyer, the like process, and it was ruled accordingly; v. Pasch. 38. B. R. placito 26.
- Ant. 162.
2 Rol. 278.
- Post. 468.

Parkes *versus* Mosse, Hil. 31. Rot. 31.

Action for Trover, The Defendant pleaded a Recovery against J.P. and that a fieri facias was awarded to the Sheriff, and after the Writ awarded and delivered to the Sheriff. J.P. died possessed of the goods, and made the Plaintiff his Executor, and afterwards the Defendant by force of the Sheriff's Warrant, took these goods in execution, as Bailly to the Sheriff, and delivered them to him. The Plaintiff replieth, that the Sheriff returned upon the Writ tarde; and upon this it was demurred in Law. 1. Question, if the party dying after the Writ of Execution awarded, and before it was served, if it may be served upon his goods in the hands of his Executor or Administrator; and it was held it might, for by the Execution awarded, the goods are bound, and the Sheriff need not take notice of his death. 26 H. 7. 5. 6 Ed. 6. Dy. 76. 2. Question, if the false return of the Sheriff shall make the Bailly punishable, for that he did lawfully; for he was a Bailly errant, and a meer servant to the Sheriff; and not a Bailly of a Franchise. And it was held clearly that it should not; for by the Execution by the Bailly, the party was discharged of the Execution; and therefore it is not reason he shall take advantage against the Bailly. And it was adjudged for the Defendant.

(16)

Mo. 352.

1 Leon. 144.

1 Rol. 893.

2 Rol. 362.

Ante 174.

1 Cr. 447.

Williams *versus* Ashet Ash. Trin. 30. Eliz.

Rot. 2322.

Ejectione Firmæ, It was upon special Verdict found, that the Corporation of Mercers London were seised of the Lands in question, in the several possessions of two men; and being so seised made a Deed of Lease to the Plaintiff, and a Letter of Attorney to J.S. to deliver the Deed and the possession; the Attorney enters upon the possession of one of the men, and there delivers the Deed; and after enters into the possession of the other, and there doth deliver the Deed; and the question was if this were good, for the Land for which the second delivery was; for as to the first, it was held without question, that it shall pass; but for the second the doubt was, because one Deed cannot have two deliveries. But the Court held that as the verdict is found, this matter doth not come in question; for the Jury found that the Corporation was seised; and being so seised made the Deed; and then there is no impediment but that the delivery shall be good for all, for it shall not be intended but that the two men had possession only as Tenants at will to the Corporation; and then the delivery of the Lease in one place is good for all; and it shall not be intended that they had an Estate for years or life, except it be so shewn. And here the Defendant would have pleaded entry after the verdict in abatement of the Writ, but it was held clearly he had not day to plead it, but is put to his Audita querela. And Judgment was given for the Plaintiff.

(1)

Ant. 167.

Sir Francis Willoughby & Ralph Sacheverel *versus* Patrick Sacheverel, &c.

(2)

Attaint: Upon evidence it was moved, that whereas Pat. Sach. had brought an Action of Trespass against the now Plaintiffs for breaking his close, and depasturing his grass with their Cattle. Anno 15 Eliz. and continuing the said Trespass diversis diebus & vicibus until the day of the Writ purchased, which was 28 Eliz. and upon evidence it appeared that Sir F. and Ralph had entered and occupied for half a year, and afterward Patrick entered and occupied it for a time; and after R. entered, and after P. entered, and after R. re-entered and occupied it till the day of the Writ purchased: the question was if this entry by P. be not such an interruption of the Trespass, that he shall be forced for every Trespass to have several Actions, or that one Action with a continuando will serve for all. And the Court held clearly that one Action of Trespass with a continuando will serve for all; and it may well be brought with a continuando. Another question was moved, because it appeared that Sir F. entered only at the first, and not after that P. had re-entered; and yet the Jury had found Sir F. and R. guilty of the Trespass, and had assessed entire damages, Three hundred and ten pound; and in this it was said they had found falsly, and had given excessive Damages against Sir F. But the Court held clearly, that they might safely find them both guilty of the Trespass; but it seemeth the Damages were excessive against Sir F. and they had done better if they had found Sir F. guilty only of the first entry.

Utty Dales Case.

(3)
Post. 491.
Anst. 57.

Co. 5. 13. a.

HAnham Serj. demanded the opinion of the Court in this Case. A Lease is made to J.S. to have and to hold, to him and his Assignees for his own life, and for the life of A. and B. J.S. dieth; if his Estate be determined, because one cannot have a greater Estate of Freehold then his own life. Anderson and the Court held clearly it is a good limitation, and he hath an Estate for all their three lives; for although he himself cannot have an Estate but for his own life, yet he may have it to grant to another, and the habendum for their three lives is a good limitation; and by his death the Estate is not determined, but occupanti conceditur. And it was said by Anderson and Periam, that if Tenant *pur auter vie* makes a Lease for years to commence after his death, this is good and shall prevent an occupant; for the Land is bound with this Interest of the Lessee; and he shall have it against all others, during the Life of *cestuy a que vie*.

William Coke de Inner Temple, *versus* Ro. Bacon.

(4)

Audita querela upon a Recognisance, of which there was a Defeasance for payment of a lesser sum, and shewed a release of One hundred fifty five pound, parcel of the sum contained in the Defeasance,

Defeasance, and of all actions for it. And by all the Court, the release doth not extend to all, but only to the sum contained in the release; and the whole Recognisance is not rehearsed, but only this parcel, and he was put to shew other releases for the residue.

Pasch. 31 Eliz. in Scaccario.

St. Aubys Case.

The Case was, the Earl of Arundell being possessed of a Term for years in Lands, grants a Rent to St. Auby for his life, issuing out of the said Lands; and dieth, and this is found by office, and the Land now being in the Queens hand, Drew praieeth an allowance of this Rent, the Term yet having continuance for divers years. But Popham the Attorney General moved it was a void grant to charge the Land, for he cannot have a Franktenement out of a Chattel; and if he hath not a Franktenement according to the word of the grant, he can have no other Estate, for it is not granted for any time certain. Manwood, although this cannot be a grant to make a Freehold, yet it shall be a grant as it may be, viz. a grant for so many years as the Term endureth, if he live so long; for it is not a Franktenement in Law, but a Chattel; and to this opinion Gent and Clerk Barons inclined, but said, they would advise. (5)

Co. 7. 23. a.

Short *versus* Helyar, Hill. 32. Rot. 444.

Error in Trespass. 1. The venire facias bore Teste upon the Sunday, which is not dies juridicus, sed non allocatur, for it is helpt by the Statute 32 H. 8. 2. Error, Trespass was, pro defalcatione herbæ, & herbæ conculcatione pedibus ambulando, continuando, quo ad depasturationem & conculcat^o herbæ, &c, whereas depasturing was not mentioned before, but it was held but surplusage, and Judgment was affirmed. (6)

2 Cr. 162.

Moor 684.

Post. 781.

Post. 203.

Termino

Termino Trinitatis,
Tricesimo secundo ELIZABETHÆ,
In Banco Reginae.

Elnors Case.

(1)

Ante. 101.

Elnor & alii were indicted upon the Statute of 8 H. 6. of forcible Entry; and the Endicment was, quod cum in Statuto Parliam. tent' apud Westm. in Comitatu Middlesex, &c. quod Johannes Elnor and others, &c. de Slimbridge in Comitatu prædicto apud S. prædict. in com' prædicto one Close being the freehold of the Countess of W. with force and arms, &c. had entred, &c. and her expelled & disseised, &c. And exception was taken to this Endicment, because it is not certain in what County Slimbridge is, in which the Land is supposed to lie, for there are two Counties named before, Scil. Gloucester and Middlesex, so in Com' prædicto is uncertain; and if it be referred to that which is named last, as it shall be most properly referred, then it is to Middlesex; and an Endicment taken in the County of Gloucester of Land in Middlesex is void; and for this cause principally the Endicment was held insufficient; and the parties were discharged.

Dalton *versus* Selly.

(2)

1 Rol. 553.
Post. 713.
Ante 172.

Debt, It was held per curiam that a foreign attachment cannot be of a Debt before it be due, and therefore whereas one was indebted in a sum of money to be paid at Michaelmas, and it was attached before Michaelmas, but the Judgment of the attachment was not till after Michaelmas, it was clearly held to be void, because it was not due when attached.

Cowleigh *versus* Edwards. Pasch. 32 Eliz. rot. 310.

(3)

Ante 168.
Post. 379.

Faux Imprisonment, for imprisoning him at Bristol; the Defendant justifieth that he Arrested him at Gloucester, by vertue of a Commission of Rebellion, absque hoc that he was guilty at Bristol. And it was moved that the travers was not good, for the cause of the Justification is not local, and so might justify in the place where the Action was brought; otherwise it is, if the Commission had been to arrest him at Gloucester; and so was the opinion of Wray, Sed adjournatur.
Christian

Christian Plaice *versus* William Howe, Hill. 32.

Rot. 432.

Action for these words, Thou hast taken a false Oath in the Consistory Court at Exceter; and if the Action lay for these words, the Defendant did demur in Law; and it was alledged that the Action lay not, for it may have a good intendment, for every Judge before whom an Oath is taken may be said to take a false Oath, not of himself, but of another before him. 2. This is not a perjury punishable here, for the Statute of 5 Eliz. extends not to perjuries in the Spiritual Courts, and so is not punishable by the Common Law. Curia contra, as to the first, it cannot be intended, the Plaintiff being a woman, before whom no Oath can be taken, and to the second, although it is not punishable by the Statute, yet it is a great defamation, so that none will credit her in any thing; as to say of a Merchant, he is a Bankrupt, for the discredit; and though the Statute extends not to it, yet it leaves it to be punished as it was before, so that it is punishable in the Star-Chamber; for which it was adjudged for the Plaintiff. (4) Post. 297.609.

Edwards *versus* Watkin, Pasch. 32 Rot. 18. vel 189.

Error in Trespass: the Writ was Quare clausum fregit, and the Count was Clausa fregit, and for this variance the Judgment was reversed. (5) Post. 198.

Lucas *versus* Donne, Mich. 31 & 32 Rot. 394.

Error of a Judgment in the Court of Hellston, he sheweth not what Court it was, nor by what title it was held, and the Count was in English, and for these causes the Judgment was reversed. (6) Ante 85.

Devered *versus* Ratcliffe late Sheriff of London,
Pasch. 32. Rot. 339.

Debt for an Escape, and counts that whereas he had a judgment in Debt against one in London, and a Cap. ad satisfac. against him, upon which a non inventus was returned, for which one of his Sureties being in Prison there upon a plaint there, under the custody of the Defendant, was detained in Execution secundum consuetudinem civitatis prædictæ. as appeareth by the Record there; and after he escaped, &c. upon this the Defendant demurreth. 1. Cause, for that it is not expressly said, that there was such a custom, but only secundum consuetudinem, &c. 2. The Recognizance of the Bail is joyned, and only one is commanded to be detained in Execution. 3. The custom is not good, for he ought to have a Scire fac. against the Bail, for it is unreasonable to take him in execution without answer, for he might plead a release of the party, or that the principal is dead, and so discharge himself, &c. And for these causes it was held the Declaration was not good, and the custom unreasonable; and the Plaintiff had Judgment. (7) 1 Rol. 563. Post. 199.

Wood *versus* Payne.

- (8) **E**jectione firme : After Verdict it was alledged in Arrest of Judgment, that the Declaration was uncertain, viz. de uno mesuagio five tenemento, and four Acres of Land to the same belonging ; and for this uncertainty it was held clearly no judgment shall be given of the mesuage, nor of the damages or costs, for they are intire ; but judgment was prayed for the four Acres, but to that it was said to be uncertain also, for it appeareth not to which of them they did appertain. But Gawdy said, the words (pertaining) are void, for Land cannot properly belong to a house, as Hill and Granges case is ; and then it is as a declaration of Mesuage or Tenement, and four Acres of Land, which though it be void for the first, it is good for the Land ; and thereupon the Plaintiff released the damages, and for the four Acres had judgment : and it was said that in Mich. 27 & 28 Eliz. such judgment was given between Whitton and Roberts.

Kerry *versus* Bowyer.

- (9) **A**udita Querela : For that the Defendant recovered against him this Debt in this Court, and was in debt to the Plaintiff in another Debt, he attached it in his own hands in London, and upon this brought the Audita querela ; and it was clearly held, the Audita querela did not lie, for this inferiour Court cannot fetch this Debt out of this Court, and this Debt is not Attachable, as it was adjudged in Sir John Parrots Case, and Execution was awarded.

Farr and East.

- (10) **T**hey were endicted upon the Statute of 8 H. 6. and exceptions were taken to the Endictment. 1. The entry is supposed to be into a house and twenty Acres of Land, & eum disseisivit, but saith not (Inde) sed non allocatur, for it shall be intended. 2. There was not contra pacem ; which Gawdy held material. Wray contra, for it is vi & armis, &c. & contra formam Statuti, &c. which doth imply so much. 3. The Statute is, if a Recovery in Assise, or Action of Trespals by Verdict, or in any other manner, &c. and these words (or in any other manner) are omitted, so the Statute is mis-recited ; and this was held a material exception, for in this the sense of the Statute is altered, for this is tyed to a recovery by Verdict only ; but if it had been mis-recited in a point not material it had been otherwise, and the Endictment was discharged.

Magdalen Chamberlaine *versus* Thorpe, Pasch. 32.

Rot. 186.

- (11) **D**ebt upon a Recognizance taken in London : and declareth that the Mayor there had used to take Recognizances by custom of all except Infants and Feme Coverts, and upon any day except Sunday, and certain other days specially named, and this Recognizance was taken before the Mayor there. Tanfield alledged divers

divers exceptions in Arrest of Judgment. 1. The custom is unreasonable, viz. to take Recognizances of all persons, except Feme coverts and infants, and doth not except men de non sane memory: Sed non allocatur, for such may acknowledge a Recognizance, and have no remedy to avoid them; and therefore they are excepted which may. 2. Exception, that it is not averred that the Defendant was not an infant, &c. or that the day upon which it was taken, was none of the excepted days; Sed non allocatur, for it shall be intended, if the contrary be not shewn by the Defendant; and so the Justices said the Law is clearly taken at this day upon the Statute of 1 R. 3. 1 R. 3. c. 1. to plead a Feoffment by cestuy a que use. 3. Exception, that none can take Recognizances but Justices of Record which had Authority by Patent, &c. as the Justices of the Bench and Justices of Peace by Commission; and the Major is not a Judge of Record, but by custom; Sed non allocatur, for the Custom is good, and the Customs of London are confirmed by Parliament, and are good though strange; and so it was adjudged in this Court between Mabbe and Frying. 4. Exception, the Custom extends aswell to Recognizances taken of Strangers as Citizens, or for matters within the City; and for this cause Gawdy held it was not good. Co. 4. 124. 2.

Watkins *versus* Johns.

TRESPASS for Assault, Battery, and breaking of a pack of Clothes and taking one Cloth out of it, &c. Defendant as to the Assault and Battery pleads not guilty; and as to the pack of Clothes, &c. he justifieth, for that the Queen granted the Office of Aulnage with the moiety of the profits of it, to W. Owen, and that the said Owen by his Deed, bearing date, &c. at such place made him his Deputy, and because the Defendant did offer to sell this pack of Clothes, not having the Aulnage Seal to it, contrary to the Statute, he seized it as forfeited; and upon this plea, a demurrer. Snagg for the Plaintiff argued. 1. The Plaintiff declares of the breaking of a pack of Clothes, and taking a Cloth out of it; and he answers to the taking of the pack, but not to the taking of one Cloth out of it, which is specially mentioned. 2. He reciteth not the Statute which makes the Office of Aulnage. 3. He sheweth that the Defendant offered to sell it contrary to the Statute, and sheweth not which Statute, and there are two Statutes which give several punishments, 27 H. 8. cap. 8. 12. & 6 Ed. cap. 6. 4. He justifieth by deputation from Owen, but sheweth not that the Office was granted to him to exercise by Deputy, for this is an Office of trust, and otherwise cannot make a Deputy. 5. He pleadeth that Owen by Deed dated at Aburgavenny made him his Deputy, but sheweth not the place where the Deed was made, which is issuable, for it may bear date at Ab. and yet sealed and delivered at another place; and so there is no place from whence the Venue shall come if the Deed be denied. And for these causes the Plea was held clearly insufficient, and it was adjudged for the Plaintiff. (12)

Bugg & Nelson *versus* Woodward.(13)
Post 249.

Ante 136.

Prohibition, For suing for Tithes in Court-Christian; and doth suggest that one Prettiman was seised of the Land of which the Tythes are demanded, and in consideration of five pound paid by him to the said Parson (Woodward) concordatum & agreatum fuit between them, that he and his assignees should hold the Land discharged of Tithes during the life of the Parson, and that afterwards he let it to the Plaintiff, and upon this a Prohibition was granted, and it was held he need not make proof of it, for it was a composition with the Parson himself who sued. And a consultation was prayed, for the agreement is without Deed, and being for no time certain, but for the life of the Parson, it cannot be good without Deed; and it is only an agreement, and no grant to be discharged; and a grant of Tithes to a stranger cannot be without Deed; no more can it be to the Party himself that is Tenant of the Land. And it was ruled in the Common-Place between Wescled and Pepper, that a concordatum & agreatum between the Parson and his Parishioner, that for twenty shillings Rent he shall have his Tythes for twenty years if the Parson so long live, that a Prohibition lieth not; yet there it was personal, and here for life. Gawdy, a grant for life of Tithes is not good without Deeds, but here it is a contract for money,²¹ H.6.43. Lease for years of Tithes is good without Deed, Et adjournatur: vide residuum postea, Mich. 33 & 34 Eliz. placito 10.

Bushe's Case.

(14)

Ante 163.

Debt upon an escape against a Sheriff, he pleads nihil debet, and by Verdict it was found, that the Plaintiff recovered against J. S. in Debt, and after the year passed, had a Cap. ad satisfaciendum against him, and the Sheriff by force of it took him, and suffered him to escape; and if upon this matter he was chargeable for this Debt was the question, and it was adjudged he should; for though the process was erroneously awarded, yet it was sufficient for the Sheriff to arrest him, and he might justify in a false imprisonment, and therefore cannot let him at large.

Hungate *versus* Hamond.(15)

2 Cr. 29.

AJuroz was challenged and withdrawn; and upon a tales awarded, and process against the other Juroz, he appeared amongst them and was sworn, and tried the issue, and this being alledged in Arrest of Judgment, it was held erroneous, and the Judgment stand.

Richard Cotton's Case.

(16)
Ante 167.

1 Rol. 738.
Co. Lit. 252.

Ejectione firmæ: Upon evidence it was held, That if a Disseisor makes divers several Leases for years, and the Disseisee enters into one part in the name of all, this is good for all, for they are all derived out of one Freehold, and that an entry upon part of the Land is an entry into the house, which is in another part of the Land.

Met-

Metcalfe versus Deane.

The Jury were gone from the bar to confer of their Verdict, one (17)
of the Witnesses that was before sworn on the part of Deane, 2 Rol. 713.
was called by the Jurors; and he recited again his evidence to Moor 452.
them, and after they gave their Verdict for D. And complaint being Post. 411.
made to the Judge of the Assises of this misdemeanour, he examined Co. Lit. 227. b.
the Enquest, who confessed all the matter, and that the Evidence
was the same in effect that was given before & non alia nec diversa,
and this matter being returned upon the Postea, the opinion of the
Court was that the Verdict was not good, and a venire fac. de novo
was awarded. V. 35 H. 6. Examination 17. 11 H. 4. 17. and Brownlow
cited a President inter Leming and Kempe accordingly.

Termino

Termino Michaelis,

Tricesimo secundo & trices. tertio ELIZABETHÆ,
in Banco Regina.

Milward *versus* Clerk.

(1)

Co. 10. 99. b.

Ante 178.
Post. 200.

Assumpsit : and declareth that whereas the Defendant was arrested at his Suit upon Process, the Defendant in consideration that he should be permitted to go at large, and that the Plaintiff would give his warrant to the Bailiff who arrested him, to suffer him to go at large, that he would appear at the day of the return of the Process, or would give him ten pound, and alleged in fact, that he consented that he should be permitted to go at large, and gave warrant to the Bailiff, &c. and that he did not appear at the day, for which he brought Action for the ten pound : Upon non assumpsit it was found for the Plaintiff. Godfrey moved in Arrest of Judgment, that this was a void assumpsit, against the Statute of 23 H. 6. for it is to suffer him to go at large contrary to that Statute. Gawdy and Clench, it is a good assumpsit, being made to the party which had authority to dispense with his appearance ; but if the promise had been made to the Sheriff, or to any other to his use, it had been within the equity of the Statute. Fenner doubted, but afterwards judgment was commanded to be entred, if other matter be not shewn.

Parker *versus* Plummer.

(2)

Co. 8. 95. b.
Co. Lit. 4. b.

YElverton Serjeant demanded the opinion of the Court, P. having a term for seventy years, devised that his eldest Son should have the use and profit of it for three years, and that afterwards his youngest son should have his Lease and term, Saving that I will that my wife shall have half the issues and profits of the Land during her life, bearing and allowing half the charges thereof. And the question was if the Wife had any interest in it, or only to have an account for the profits of the Land received. Gawdy and Clench, she hath an interest in the Land ; for to have the issues and profits, and to have the Land is all one ; and so was the intent that she should have the Land with the Son for her life ; and if she hath no interest, she can have no Action ; for account lieth not for want of privity.

Tibbott *versus* Haynes, Pas. 32. Rot. 353.

Action for these words, Tibbott and one Gough agreed to have hired a man to kill me, and that Gough should shew me to the hired man to kill me. And upon not guilty, it was found for the Plaintiff. It was moved in Arrest of Judgment that an Action lieth not for these words; and so held Gawdy, for it is not alledged that any Act was done by the Plaintiff, nor any thing put in ure by him; but only a communication between him and G. but otherwise it is, if the words had been, He hath hired a man to kill me. Fenner contra, for it is an ill part, for which he might be bound to his good behaviour. Wray was absent; but afterward Wray being present, he agreed with Fenner, and judgment was given for the Plaintiff, against the opinion of Gawdy.

(3) 1 Vent. 323.

Ante 6.
2 Cr. 56.Westbourne *versus* Mordant.

Action upon the Case: and declareth that whereas he was possessed of a Meadow called Parsonage Meadow in W. adjoyning to a little Brook there, from the 20 Aprilis 31 Eliz. and adhuc inde possessionatus, the Defendant the said 20 April put in divers loads of stone into the said Brook, and by it obstupavit aquam illam, that it from the said 20 Ap. to the day of the Writ purchased, overflowed his Meadow, so that he could not have any benefit of it; and after Verdict found for the Plaintiff, it was moved in Arrest of Judgment, because the nuisance is supposed to be done before the Plaintiff's title did commence, so no cause of Action. Gawdy, the Declaration is good; for an Action of the Case declareth the whole matter, so that it is not material when the nuisance was erected, for he that is hurt by it shall have an Action. Fenner agreed, it may be the nuisance was not by the stopping till the running of the water, and the Action being brought as the truth is, is well brought; and Wray being absent they commanded judgment to be entered, if nothing said to the contrary.

(4)
2 Rol. 142.Co. 5. 101. 2.
Post. 109. 403.Sir William Waldegrave *versus* Ralph Agas, Inter Mich.
31 Eliz. Rot. 712.

Action for words: And declareth that he was Sheriff of Suffolke, and a Deputy Lieutenant there, and was Captain of six hundred Souldiers for the safeguard of the Queens person; that the Defendant præmissorum non ignarus, and of purpose to draw him into discredit, spake these words to one Edward Hill which ad tunc fuit & adhuc is his servant. It is well known that I am a true Subject, but thou servest no true Subject (Innuendo prædict. Willielmum Waldegrave) and that thy own Conscience doth accuse thee therefore. Upon not guilty pleaded, it was found for the Plaintiff, and damages five hundred pound. It was alledged by Lewes, in Arrest of judgment that

(5)
1 Rol. 79.

that an Action lieth not for these words, for he saith not that Sir W. W. is no true Subject; although the Plaintiff saith innuendo the Plaintiff, these are not the words of the Defendant, for perhaps E. H. did not serve any man, or his intent may be otherwise; and if they be intended of the Plaintiff, yet they are not such words of discredit, as for which Action lay; for it shall not be intended that he called him Traytor or Rebel, but that peradventure he was disobedient to some Process, or that he was Accountant, and made no true Account, and cited Stanhop and Blihs Case, which see 4 Co. and Kimzeys Case; he being a Bailiff brought an Action for these words, Thou dost serve false Warrants and deceivest the people; adjudged that the words were not actionable; for it is not averred by it that he made false Warrants, or knew they were false; and in the case of the Clerk of the Peace for Gloucester, You make false Records and justify them for true, no Action lay, for they might be false for mis-writing or otherwise; and in Savage and Cooks Case, circa 27 Eliz. adjudged that these words, Thou art a Papist, and not the Queens friend, are not actionable; and the innuendo cannot aid the matter, nor the averment that he was his servant will not serve, as it was adjudged in the Case of George against Parker, for these words, Thou hast broken my Shop, and taken my goods, innuendo, that he had robbed him of them, an Action did not lie; for the first words were not Actionable, and the second could not aid them. Godfrey contra, and he agreed the Case of Kimzey and of the Clerk of the Peace of the County of Gloucester, for he was of Council in them, for they shall be intended in a good sense, and could not be intended that they counterfeited Warrants, or Records; but here it shall be intended in malam partem, that he is no true Subject, but a Traitor to the Queen. And upon another day it was moved again; and Egerton Solicitor urged, that these words being spoken of a man of such credit as the Plaintiff, are to be more regarded then if spoken of a private man; and it is a Rule in the Civil Law, Sermo relatus ad personam debet. intelligi secundum conditionem personæ; and he cited the Case of Dr. Edward Boughton against the Bishop of Coventry and Lichfield, which was for these words, He is a vermine in the Commonwealth, and a corrupt man; and for that he was a Justice of Peace, and a man of good estimation, it was adjudged, after long arguments, that he should recover, and had four hundred Marks damages; and afterwards it was moved again by Coke for the Plaintiff, that the person of whom the words were spoken being considered, would bear an Action; and cited Birchlys Case. V. 4 Co. when words are spoken which touch one in his duty or course of life. And these Actions are for the discredit, and therefore ought to be adjudged according to the credit and place of the person of whom they were spoken; and Trin. 2 H. 8. Rot. An Action was brought by the Bishop of Winchester, for these words, My Lord of Winchester took me and imprisoned me till I entred into a Bond of twenty pounds to the Kings use, adjudged Actionable; and Hill. 19 Eliz. Rot. 484. The Lord Aburgaveny brought an Action for these words, My Lord of Ab. sent for us, and put some of us into the Stocks; sent some of us unto the Gaol, and put some of us into the house called Little Ease, and adjudged actionable; but such words as in the two last cases spoken of a private person were not actionable. Wray, the words themselves for the generality of them may have a good con-

Co. 4. 15. a. b.

Post. 308. 268.

2 Vol. 269.

Co. 4. 16. a.

construction and reasonable Intendment, and are not actionable; but the quality of the person of whom they are spoken being considered, he being touched in his credit, and course of life, they are actionable. As to call a Bishop Papist, is actionable; so to call a Judge a Corrupt man, for they concern them in their office; but to call a private man so, are not actionable. And whereas it was said, that it appeareth not they were spoken of the Plaintiff, but that it may be intended E. B. did not serve any man; as to that, the Innuendo takes away all uncertainty in that; for so it is in all Actions upon the Case for words, the (Innuendo) makes them spoken of the Plaintiff, and the Defendant is found guilty; and so is Estopped to say, he did not speak them of the Plaintiff. Gawdy, For the certainty of the person, there is no doubt, but that the (Innuendo) makes them as certain, as if he had said Sir William Walg. is no true Subject; but for the generality of the words, he doubted and desired to see Bucklies Case. But as to the words (true Subject) he said, they could not have any other reference, then that he was not true in his Allegiance, or in his Subjection, and cannot be intended, false in other matters of accompt, &c. And because Fenner was not satisfied, they would advise till another Term; and the next Term it was adjudged for the Plaintiff.

2 Cr. 202.

Post. 230.

Post. 268.

2 Cr. 202.

Tassall *versus* Shane, Trin. 32 Eliz. Rot. 828.

DEbt upon a Bond. The condition was to pay Eleven pound upon the 12. of February, Defendant pleads an accord 8. February, That if he paid Eight pound upon the said 12. of February, that he would accept it, for the payment of the eleven pound, and pleads a tender at the day, Et encore prest. But this being but a Concord, which is no Plea in Debt, without satisfaction; it was adjudged for the Plaintiff.

(6)

Co. 9. 79. a.

Co. 5. 117. b.

1 Rol. 12. 9.

Thomas Dearing's Case.

HE was indicted of murder. And Lewkener took divers Exceptions. 1. The Inquisition was taken before Th. G. Coroner of the Lord Barkley, but sheweth not, that he was Coroner of the County, or of what Liberty. 2. It is not shewn, how the Lord Barkley can make a Coroner, by Patent or Prescription. 3. It is quod percussit cum gladio, and saith not felonice. And for these causes the Indictment was discharged.

(7)

Tho. Greenleaf *versus* Jo. Barker.

Error of a Judgment given in an Assumpsit at Canterbury. 1. Error. That whereas the said J. B. brought an Assumpsit, and declared, That whereas the said J. B. was indebted to the said T. G. by Obligation in five pound, to be paid upon the first of November following, in consideration that he the third of November, at the instance and request of the Plaintiff, would pay him the said five pound, without suit or trouble; he assumed to deliver him a Bond in which J. S. was indebted to him in twenty shillings, with a Letter of Attorney to sue for the Debt. And upon this Declaration after Verdict, Judgment was given for the Plaintiff; and upon this Judgment, Error was brought. 1. Error, That the con-

(8)

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sideration

Ante 42.

1 Cr. 409.

Co. 5.36.b.7.a.
Post. 586.1 Cr. 8.
Post. 357.
2 Cr. 343.

sideration was not good, for he did no more then the Law did compel him to do, viz. to pay the money that was due before; and so was the opinion of Gawdy and Fenner: For he payeth no more then was due; but if it had been paid before the day, it is otherwise. For every consideration must be for the benefit of the Defendant, or some other at his request, or a thing done by the Plaintiff; for which he labourereth, or hath prejudice. As 37 H. 6. to cure one; and 20 Eliz. in the Common Place between Worthington and Sydenham in an Assumpsit. That whereas he was bail in the Queens Bench for J. S. servant of the Defendant, he such a day assumed to save him harmless; but it not being alledged, that it was at the time of the bail or before, nor at his request, but after it without consideration, it was void. 9 Edw. 4. Concord to deliver one his own Writings, is void. 2. Error, The Assumpsit is void; for it appearereth not the Plaintiff could have any benefit of it: For it is not to sue and recover the twenty shillings to his own use, and so is rather a charge; and of that opinion was Gawdy. Fenner contra. 3. Error, for that upon the Venire facias only twenty three were returned, whereas there are to be twenty four. Gawdy, it is helped by the Statute of Jeofails after Verdict; Fenner doubted. But both conceiving there was no consideration, and so a plain Error; Wray being absent, they were both of opinion to reverse the Judgment. Tanfield who was not of Council in the case, said it was adjudged, Pasch. 23 Eliz. inter Coke & Hewet, That in consideration he would at the request and instance of the Plaintiff, pay him twenty pound upon a Bond at the day when it was due, he assumed to deliver to him the Bond: This was adjudged a good consideration. Gawdy, that may be, for it is to deliver to him the same Bond which was to be delivered upon the payment of the money; but here it is collateral, and they would advise.

Rigg *versus* Clarke.

(9)

Error of a Judgment in an Action upon the case, where Clarke did declare, That whereas he was possessed of a Gelding, in consideration that he would lend his Gelding to B. to carry three bushels of Coals from Ware to the house of B. he promised he would not aliter eum onerare, and alledges, that the said B. aliter per viam prædictæ onerabat spadonem prædictæ & magis ponderosius onus super spadonem prædictæ imposuit; upon Non Assumpsit, and found for the Plaintiff, Judgment was given, and Error brought. 1. He saith, Per viam prædictæ, whereas it should be in via, but this was clearly disallowed; for it is all one, and of one sense. 2. Error, that it is alledged, aliter onerabat, and sheweth not how. Gawdy and Fenner held clearly it was Error: For to enable him to the Suit, he ought to shew how he over-burthened him. And being moved again, it was adjudged, that for this cause the Judgment shall be reversed; although Godfrey moved strongly, that it was well enough; for it lay not in the Conscience of the Plaintiff, how he did over-load him; nor is it material, how he did over-load him: For if he alledged in one manner, and it be found in another manner, it is found for the Plaintiff; and this is after Verdict. And although the Declaration is faulty in form, this is aided by the Statute of 18 Eliz. But notwithstanding these reasons, the Judgment was reversed; for it is a thing material which the Plaintiff is to shew.

Kennerley

Kinnerſley *verſus* Smart, Trin. 32 Eliz. Rot. 898.

DEbt upon an Obligation : The Defendant pleads, that at W. (10)
in the County of Warwick, there was a communication and
agreement between them for lending of money ; and that the
Plaintiff ſhould have ſo many Oren, which were of ſuch value
above ten pound per annum ; and for the performance of this uſuri-
ous Contract, the Bond was made, and pleads the Statute of
13 Eliz. to avoid the Bond. The Plaintiff ſaith, That it was well
and duly made upon good conſideration : *absque hoc*, that it was
made for ſuch uſurious contract : And upon this they were at
iſſue, and tried in the County of Warwick, and found for the Plain-
tiff. Tanfield, this iſſue is miſ-tried, for it ſhould be tried in London :
For the iſſue is ; that the Bond was not made upon an Uſurious
contract, and the Bond was ſuppoſed to be made at London ; and
the Bond being made there, the trial is to be there. Coke & Kenner- Post. 870.
ſley contra : For the Bond is confeſſed, but the Point is, If it were
made by Uſury, which is alledged to be at W. in the County of
Warwick ; and upon this is the iſſue taken, 8 Edw. 3. 8. An iſſue be-
ing, if a Deed were made by Dures, the iſſue ſhall be tried by a Venire
of the place where the Dures is ſuppoſed, and not where the Deed
is ſuppoſed to be made, 22 Ed. 3. 15. 25 H. 6. 24. Hill. 28 Eliz. Rot. 311.
vel 211. Inter Sibthorpe & Turnor. This Exception was taken, and
ruled, that the trial ſhall be in the County of Eſſex, where the Uſury
was ſuppoſed to be, and not at London, where the Deed is ſuppoſed
to be made. And Paſch. 32 Eliz. Rot. 303. The like rule, Inter Pay &
Wilkinſon. And this being moved divers days this Term ; upon the
laſt day of the Term the Plaintiff had Judgment.

Parcel's Caſe.

HE was indicted, that at ſuch a day, and divers days before and (11)
after he was a Common Barretor, & Perturbator Pacis, but
ſhewed no place where, nor cauſe, for which he is a Common Bar-
retor ; and theſe exceptions were taken by Lewkener : But the
Court held it good, without any ſpecial cauſe ſhewn, and the place
is not material, for it is in every place, and the trial ſhall be De cor-
pore comitatus.

Wilson *verſus* Jeffrey, Paſch. 30 Eliz. Rot. 219.

ERror of a Judgment given in a Writ of Covenant ; and the (12)
principal Error assigned was, That the Plaintiff declared up-
on an Indenture in this manner, *Quod cum per ſcriptum Indentatum*
factum inter eos Teſtatum fuit, &c. And doth not alledge in fact, That
he by ſuch an Indenture did Covenant. Fenner, ſo is the common
courſe in Declarations ; but in a Plea in Bar it is no good form. 1 Cr. 188.
And all the Prothonotaries of the Common Place certified, that 2 Cr. 537.
ſo are all their Preſidents ; and Loe and other Clerks of the
Queens Bench ſaid, ſo is their courſe ; and the Judgment was
affirmed.

Katherine Hume *versus* Luke Ogle.(13)
Co. 4. 42. b.

Appeal of the death of her husband, and declares, that the Defendant such a day at West-Lilburne in the said County, gave him a mortal wound, of which, at Wetwood in the said County he languished, and the same day there died; and so the said Defendant, the said day and year at West-Lilburne, aforesaid, her said husband *Modo & forma prædict' murdravit*; and although not guilty pleaded, and issue joyned upon it, yet he waded it, and demurred upon the Declaration (as it was clearly held by the Court he might :) For if the Declaration be not good, it is in vain to proceed to a trial, yet it was clearly held, that it is not peremptory to the Defendant; for if it be adjudged against him, it is but a *Respondes ouster*: And the cause of the Demurrer was, that the death is supposed to be at Wetwood, and yet the murder is supposed to be at West-Lilburne, which is contrary, and cannot be; for although the stroke is supposed to be at West-Lilburne, yet it is not felony till his death, which was at Wetwood, and there the murder is supposed to be done; and the case of Heyden (4 Co. fol. 41.) was cited. And as the Indictment there, was insufficient for the time; so here for the place, which is more material; for from this the venire shall come; but if it had been *Et sic murdravit modo & forma prædicta*, it had been good. And I've said, divers of the ancient Presidents are, that the murder is supposed to be where the stroke was. But the Justices held clearly, that the Indictment was ill; for of necessity it must be at the place of his death: And although the Presidents are so, yet they did pass *Sub silentio*, and were not well examined, and not to be regarded as Heydens case; and it was resolved, that there was no difference between the cases, and adjudged, that the Appeal did abate.

Co. 4. 42. b.

Sir Gilbert Gerrard, Master of the Rolls, *versus* Mary Dickenfon, Pasch. 31 Eliz. Rot. 453.(14)
Co. 4. 18. a.

Action upon the case for slandering his title, and declared, that whereas he was seised of the Mannor of Hely in the County of, &c. And Sir Ralph Egerton was in speech with him, to have a Lease of it for years, and offered so much for the Rent, and so much for a fine, the Defendant *præmissorum non ignara*; but intending to slander his title, said in the presence of divers, I have a Lease of the Mannor of Hely for ninety nine years, and published a Deed of Lease to divers, affirming it to be good, and offered to sell it, and all her interest in it, *ubi revera*, the Defendant did know it to be a forged Deed; and by reason of these words, Sir Ralph Egerton would not take a Lease, nor any other, by which he lost the commodity of his Land, to his damages of One thousand pound. The Defendant pleaded, that one W. Dickenfon her husband, died at Uxbridge, &c. After whose decease *Talis Indentura qualis in Narratione prædict' specificatur, & quoddam scriptum exemplificationis hujusmodi talis Indenturæ sub magno sigillo Angliæ sigillat'*, came to the possession of the Defendant amongst other writings; the which, the Defendant then and there did

did believe to be a good Lease, and duly made, sealed and delivered; for which, she doth justifie the words absque hoc, that she did know it to be a Deed of a forged Lease, and upon this it was demurred in Law, and argued by Coke and Warberton for the Plaintiff, and by Altham and Snagg Serjeant for the Defendant. And as to the Bar, it was held clearly by the Justices, and in manner confessed by the Defendants Council, that it was ill; for the saith Talis Indentura qualis, &c. so doth not answer to the Deed in the Declaration, for talis is not eadem. But as to the substance of the Declaration, it was moved, that the Action did not lie; for the Defendant saith, she had a Lease, which is not to be referred to the Deed of Lease, but to the Interest of the Lease; and when she claimeth an Interest, she is not punishable; and the cases of Conspiracy, 22 Edw. 3. 1. & 40 Edw. 3. 19. And the cases of publishing of forged Deeds, 9 H. 6. 26. 20 H. 6. 11. 10 H. 7. 29. 15 Edw. 4. 25. were cited, that the party is not punishable, claiming an interest, or not knowing it to be forged. And divers Exceptions were taken to the Declaration. 1. It is not averred, that the Defendant had not title. 2. It is said, she offered to sell, but saith not to whom, so incertain. 3. That she published diversis personis, but shewed not to whom. 4. It is said, that she knowing it to be forged, published it, and no place shewn of her knowing, which is material and traversable; and so a place ought of necessity to be incerted. Sed non allocatur. And as to the matter, it was said it was sufficient to entitle the Plaintiff to an Action: For if one entitle a Stranger to my Land, and not himself, an Action lieth, Trin. 24 Eliz. inter Johnson & Smith. The case was, Johnson enters into a communication with Sir. H. Bedingfield to sell him certain Land; and the Defendant knowing it, said in the Country, that a stranger had a Rent-charge out of it, by reason whereof Sir H. Bedingfield refused to proceed in the bargain. And Mildmay's (against Stanfield) case was cited (1 Co. 177.) So here when she derived no title to her self, but in effect saith, her husband had a Lease, which now is a stranger, an Action lieth not. Wray Chief Justice, the words, I have a Lease, &c. shall not be construed, that she had a Term or Interest in the Lease it self, but only an Indenture of Lease; and is as much as if she had said, that she had an Indenture of Lease made to her husband in her keeping, so makes no title to her self; and being so, all will agree she is punishable: But if she had said, that she had an Interest or Term for ninety nine years, and entituled her self to it, it were otherwise. But in all cases, when one doth entitle a stranger, it is not actionable, except it be shewn that some damage cometh to the Proprietor by it, viz. That he cannot let it or sell it, &c. and that an Action lieth not where one doth entitle himself, the case of 17 Edw. 4. 3. doth prove it: For if one saith J. S. is his Villain, an Action lieth not; but if he saith, J. S. is Villain to a stranger it is otherwise. Gawdy, The saying I have a Lease, amounts to as much, as I have an Interest for years, for so it is intended in common Par lance; and she doth not only say, she hath a Lease, but this is enforced by offering to sell it; but it being alledged, that she published it, knowing it to be forged, and so doth endamage the Plaintiff, and of purpose to stop him to let, &c. It seemeth, the Action is maintainable; and at Common Law, if one sue a forged Obligation, knowing it to be so, an Action of the case lay: And although she claimeth a Lease to her self,

Co. 4. 18. b.

Ante 341

Post. 427.

Co. 4. 18. a.

Post. 836.

Hob. 267.

self, yet the publishing it, knowing it to be forged, an Action lieth : And although it is said, that it is not published as a true Deed ; but *quali verum*, this is a plain Affirmative, that it was true ; and afterwards the Plaintiff had Judgment.

Co. 4. 18. b.

John Hooper's Case.

(15)
Post. 249. 583.
2 Inst. 669.

John Hooper alias Bartholomew, Carpenter, and others, were indicted upon the Statute of 8 H. 6. And because the addition came after the alias, it was held void, as to him, and the Indictment discharged. And in the same Indictment, one was indicted by the name of J. the wife of J. S. of D. and it was moved, if this were good without any other addition to the Wife, of her mystery, or place of her habitation. Gawdy held it was not, Clench and Fenner contra.

Co. Lit. 3. a.
2 Inst. 669.

Edward Walwin's Case.

(16) Error brought by him to reverse an Attalry upon an Indictment of Murder: the Error was ; for that in the Indictment he was named Edward Walwyn de Mackre, and the Capias was de Mackreo, and by the name of Walweene, whereas his name was Walwin ; and for these causes the Attalry was reversed.

Ante 85.

Berkenhead *versus* Nuthall.

(17) Error upon a Judgment in Debt. Error was, that in the Writ he demanded One hundred sixty six pounds thirteen shillings four pence, and in the Declaration he demanded One hundred seventy one pounds ten shillings, and for this variance the Judgment was reversed.

Post. 185.

The Archbishop of York against Sir Henry Barkly.

(18) Error upon a Judgment in a Quare impedit. Variance was assigned between the Record and the Writ ; for one was of the Church of Bonnington with a double (nn) and the other was Bonington with a single (n), and Tanfield compared it to the case of Attaint, which was overthrown, because one Record was York, and the other Yerk ; but inter Colcester and Colchester, in Bird and Shelberies case (V. Antea,) it was held to be no difference, because (h) non est litera, sed aspiratio. Another variance, because the Judgment was supposed to be given before the Lord Anderson, and his Companions ; whereas it was before the Lord Dyer, &c. And this was held a great variance, and it was commanded to be examined, &c.

Ante 172.

Leverett *versus* Townsend.

(19) Action upon the case, and declareth, That whereas he was seised of sixteen acres of Land in D. and by reason of it, had after harvest, severed Common in another parcel of Land of twenty acres adjoyning there, every year, the Defendant had plowed this Land, by which he was disturbed of his Common. After Verdict, it was alledged in Arrest of Judgment, that he having a Freehold in the Land, to which he claimed Common ; he was to have

have an Assize, and not an action upon the case, 2 H. 4. 11. 8 Eliz. Co. 9. 112. b. Dyer 258. But the Court, and Coke that was of Counsel of the same part, held he might have one action or the other: But Coke said, it was not expressed, when the disturbance was made, and so might be before Warrest, and then no cause of action. Gawdy and Fenner held it well enough; for the disturbance was by plowing up the Land, which was a Nuisance, and would remain so always; but they would advise. Ante 191: Post. 466.

Warter *versus* Perry and Spring.

Scire facias against them as Mainperners of Broke, they pleaded that B. was dead the day of the Judgment given: The Court at first held it no Plea; for it goeth in avoiding the Judgment, and proveth it to be erroneous, which cannot be avoided but by Error: But they might plead the death of B. before the Scire facias, and after Judgment; for then they could not bring in the body: But afterward the Plea was received, because they cannot have a Writ of Error to reverse the Judgment. (20) 1 Rol. 449. 742. Ante 183.

Veal *versus* Roberts, Trin. 32 Eliz. Rot. 676.

Ejectione firmæ. The case was, Stevens was seised of two customary Messuages and Lands to the same belonging, and Heydon was seised of two other customary Messuages and Lands to the same belonging; and W. & W. were possessed of certain Lands containing ten acres, called Normors (which were the Land in question;) All which were parcel of the Possessions of the Abbey of Gloucester. The Abbot and Covent let to J. V. the said four Messuages and Lands, Necnon the said Lands called Normors, Habendum & tenendum the said Messuages and Lands, &c. Necnon the said ten acres of Land, A tempore mortis sursum redditionis, forisfacturæ aut determinationis status & termini prædicti of S. H. W. & W. for years rendering Rent; the estate for years in Normors expired; the other estates of S. and H. were in being. The question was, if the Lease should commence for Normors. Johnson and Snagg argued, it should not, till all the estates were determined; for otherwise there should be a great inconvenience for the apportioning of the Rent. And if a Lease be made to commence after the death of J. S. & J. D. it shall not commence till both be dead. Coventry & Coke, è contra and relied upon Justice Windhams Case, (5 Co. fol. 7. 8. b.) and Pollards Case there cited. Gawdy and Fenner Justices held clearly it should commence presently for Normors; and Gawdy relied upon Adams & Wrotteslies Case in Comment. fol. That a Term in Reversion shall commence, not when the Term is run out in time only, but also when it is expired per surrender, or other means. And Fenner said, the case is stronger then Windhams case; for here is several Habendums, by reason of the word (Necnon.) And afterward Wray being present, it was adjudged accordingly. (21) Co. 5. 8. b. Pl. C. 119. a.

Fetherston *versus* Hutchinson.

Assumpsit, and declares, That whereas the Plaintiff had taken the body of one H. in Execution at the Suit of J. S. by virtue of a Warrant directed to him as Special Bailiff; the Defendant in (22) 23 H. 6. c. 10.

Ante 190.

in consideration he would permit him to go at large; and of two shillings to the Defendant paid, &c. promised to pay the Plaintiff all the money in which H. was condemned: And upon Assumpsit, it was found for the Plaintiff; and it was moved in Arrest of Judgment, that the consideration is not good, being contrary to the Statute of 23 H.6. And that a Promise and Obligation was all one. And though it be joyned with another consideration of two shillings, yet being void and against the Statute for part, it is void in all. V. Dive & Manningshams Case, in Comment. f.!

Wolley, Dean of E. and the Chapter *versus* Robinson.

- (23) **T** Respals. For entring into the Close of the Dean; after Verdict found for the Plaintiffs, it was moved in Arrest of Judgment, that this action being brought for the possessions of the Dean only, the Chapter was not to joyn. And for this cause Judgment was staied.

Warner *versus* Young.

- (24) **T** Respals. For entry into a Wood called Demsil-wood in L. in Suff. the Defendant pleaded, That the Duke of Norfolk was seised of this Wood, and of a Messuage, and of Land to the same belonging, and let to him the said Messuage and Lands for years by Indenture; and by it did Covenant, that for the reparation of the House, and the fencing he might take Trees in the Wood; and because part of the House was decayed, he took the Trees for reparation, &c. And upon this the Defendant did demur, because he doth not shew the Village or place where the Messuage, &c. was: That if an Issue was, that the Messuage was not in decay, no place is known from whence the Venue should be. And for this cause it was adjudged no good Plea, and the Plaintiff had Judgment.

Bouches Case.

- (25) **S**uffolk. He was indicted, for that he being Constable of the Hundred of H. arrested one for Burglary, and after at D. in the same County, he let him escape; and because no place was alledged where the Arrest was made: And if he should plead not guilty, the Venue should be as well from the place where the Arrest was made, as from the place of the escape; it was held, the Indictment was void, and the party was discharged.

Anonymus.

- (26) **W**its. Certain persons were indicted for entring into the Forest called Grovely Forest, and hunting there in a place called Denihaw Wood; and the Indictment being traversed, the Venire facias was awarded De vicineto de Grovely, and the Jury appearing at the Bar was discharged: For it was held, where a thing is supposed to be done in a place which is a Village in the Forest, the Venire facias shall be awarded De vicineto of the same Village: But if it doth not appear that it is a Village, then it shall be

he De Vicineto of the Forest, as 47 Ed. 3. 6 Hen. 7. 3. & 5 Hen. 7. But Gawdy and Fenner said, That if the Sheriff returns, there is no such Village or Parish; the Venire facias shall be awarded De corpore Comitatus. Ante 32.

Smith versus Hitchcock.

Action upon the case upon an Indebitatus est, 19. Novemb. 32 Eliz. the Defendant pleads he was indebted to the Plaintiff in Two hundred pounds, 30 Eliz. For which he gave him his Bond the same year. Which sum the Plaintiff had recovered against him in Debt, and had execution, Absque hoc, that adtunc, antea vel postea, he was indebted to the Plaintiff, aliter vel alio modo: And upon this Plea it was demurred in Law, Pudsey and Godfrey argued for the Plaintiff, that this is no good Plea; for it is but a traverse of the consideration, which is not traversable, but is to be proved upon the General Issue; and this Plea amounts but to a General Issue: And though this be but matter of form, yet this was alledged specially upon the Demurrer, and relied upon the case of 8 H. 6. 34 H. 6. The case of Trespass in a Warren. And this Plea doth answer to the Assumpsit, but by way of Argument, 8 Hen. 5. 9. 11 Ed. 4. Partridge contra. For this is the substance and material part of the Action, and for that relied upon 12 H. 4. 7. and Kennerly and Coopers case, Hill. 32 Eliz. Pl. 5. Gawdy, in every Action where Wager of Law lieth not, the Conveyance to the Action being a thing material, is traversable; but here because the consideration is executed, it is not traversable, as 5 Hen. 7. 21 Hen. 7. 13. Wray and Fenner, the consideration in an Action upon the case is material, but not traversable; as in an Action Sur trover, the Conversion is material, but not traversable: And it was adjudged for the Plaintiff. (27) 2 Vent. 295.

Cullier & Cullier.

They were sued in the Spiritual Court for incontinency, and the Judges there would examine them upon their oath, if they did it; but because Nemo tenetur prodere seipsum, in such cases of Defamation, but only in causes Testamentary and Patrimonial, where no discredit can be to the party by his oath; Coke prayed a Prohibition, and it was granted. (28) Moor 906. Post. 262. 2 Cr. 388.

Yeoman versus Stenlack.

Error. The Error was, that the Entry of the Warrant of Attorney of the Defendant was ponit loco, but saith not suo; but the Entry being, that the Plaintiff ponit loco suo, and that the Defendant ponit loco similiter, it is good enough; and the Judgment was affirmed. (29)

In a Bill of Perjury, the parties being at issue, Coke took exception at the Declaration; which was, that the Defendant falso deposuit, &c. but saith not, corrupte & voluntarie; but in the conclusion of the Declaration, it was & sic falso, corrupte, & voluntarie deposuit: But because it was not alledged at the first, when the fact was alledged, the Declaration was adjudged insufficient, and that the Plaintiff nihil cap. per Billam. Somerlands case. Antea. (30) Ante 147.

Ham & Paget *versus* Hitchcock, Trin. 32 Eliz. Rot. 989.

- (31) **D**Ebt upon an Obligation, the Defendant pleads, that the Obligation was made to them, and to one Bellamy; and that they three had an Action of Debt depending against him, and demanded Judgment *Si actio*; and upon this it was demurred: And because the Obligation made unto two, upon which they counted, cannot be intended an Obligation made to three; and if it be a Plea, it is in abatement of the Bill, and not in Bar it was adjudged without Argument for the Plaintiff.

Post. 253.

Blaby *versus* Eastwigg & Eastwigg.

- (32) **A**ction sur Case. After Verdict it was alledged in Arrest of Judgment, that one of the Defendants was dead after the day of Nisi prius; and because the party had not day to plead it, and the Court is not to take Cognisance of such Informations, they regarded it not, but gave Judgment for the Plaintiff.

1 Rol. 768.

1 Cr. 232.

2 Cr. 646.

Thomas *versus* Ward, Trin. 32 Eliz. Rot. 947.

- (33) **E**jectione firmæ. The Plaintiff declared of a Lease made to him of the Mannor of Middleton Cheney, by A. B. and C. the Defendant doth entitle himself by a Lease of the Bishop of Rochester, long time before the Lessors of the Plaintiff, &c. The Plaintiff by Replication confessed the Lease, but that it was by Indenture; and the Defendant by it did covenant, that he should not put out or disturb any of the Tenants of their Tenancies inhabiting there within the said Mannor, doing their duties according to the custom of the Mannor, Sub poena forisfacturæ of his interest; and sheweth that for that the Defendant had ousted one Anne Greene, Unam tenentium & inhabitantium ibidem, of the Tenement parcel of the said Mannor Nuper in possessione & occupatione dict. A. G. For this cause the Bishop entred for Condition broken, and let it to the Lessors of the Plaintiff. And upon this the Defendant did demur in Law; and the cause alledged was, That this is no Condition, but only a Covenant; for they are the words of the Lessee only, and not of the Lessor: But if the words had been, It is covenanted between them, &c. it had been otherwise, 28 Hen. 8. Dyer 7. Upon this difference, Houghton contra. Although the words sound as the words of the Lessee, yet being by Indenture, they are the words of the one and other: And although the words sound in Covenant, yet the intent of them is to defeat the estate, which cannot be by Covenant, but by Condition. Browning and Beestons case in Com. And he cited a case to be adjudged between Hill and Lockson; where the Lessee covenanted to grind his Corn at the Mill of the Lord, and other Covenants; and in the end of the Indenture, he did Covenant to perform all the Covenants within the same, &c. Sub poena forisfacturæ; and for not grinding his Corn, &c. the Lessor entred, and adjudged for him; and relied also upon 21 H. 6. 51. 32 Edw. 3. Annuity 30. where the words of one in a Deed, shall be construed the words of the other. And of that opinion were Wray and Gawdy clearly. But Tanfield moved, though it be a Condition, yet the breach

Post. 385.

Post. 385.

breach is not sufficiently shewn. First, Because he said, that he ousted Anne Greene, one of the Tenants and Inhabitants there, out of the Land Nuper in possessione & occupatione A. G. and it may be she was Tenant at Will, or had no lawful estate but by Disseisin, and it ought to have been Nuper in Tenura & Occupatione A. G. Secondly, That he ousted A. G. quæ fecit debitum suum, before expulsion, which may be she did it at once, and not always, as she ought to do. Thirdly, It is not said she did her duty according to the custom of the Mannor, but quod fecit debitum; which may be intended only in doing reverence, and not in doing her duty according to the custom of the Mannor: And these and other faults were held incurable; and thereupon it was adjudged for the Defendant.

Smith versus Bernard.

DEbt upon an Obligation; the Defendant pleads Uttery in the Plaintiff, and concludes in Abatement; the Plaintiff pleads a nul tiel Record. And the Defendant had day to bring in the Record, and did fail at the day; and because it was Debt upon Obligation, in which Uttery goeth in Bar, he failing of the Record, the Plaintiff had Judgment, but otherwise it is in Debt upon Contract; for there the Queen shall not have it. 6 Eliz. Dyer 227. (34) Co. Lit. 128, b.

Gunnell versus Bradish.

AVenire facias issued, bearing date the seventh of July, and was returnable the sixth of July; and because this was a judicial Process, and may be returnable De die in diem; it was held, it may be well amended: And it was said, that it is usual in the Common Bench, if a judicial Process bears teste upon Sunday, to amend it. (35) 2 Cr. 162. Post. 543. Ante 183. 2 Cr. 162.

Sir George Fermor versus Brooke.

Action upon the Case, for erecting a Bake-house in Tossiter, and declares, That whereas time out of mind, &c. there had been a Mannor called Tossiter in the same County; and for the same time, there had been a Town of Tossiter; and that all the Land within the said Town of Tossiter, had been holden of the said Mannor, of which he is Lord; and that he and all his Ancestors, and all those whose estate, &c. had used to have a Bake-house, and a Baker there, to bake White-bread and Horse-bread for all the Inhabitants there, and Strangers passengers; and that none by the said time, &c. had used to have a Bake-house there, but by their appointment; yet the Defendant had erected a Bake-house there Ad nocumentum suum. The Defendant taketh all by Protestation, except that he confessed, that there is such a Town; and pleaded, That at the time when he erected his Bake-house, that there were three Bakers there, and that he was an Apprentice to the Trade, and that he set up the Bake-house for the benefit of all persons, as it was lawful for him to do: And upon this Plea, the Plaintiff demurred; and it was argued by Francis Morgan for the Plaintiff, and Buckley for the Defendant: And it was (36) 1 Rol. 559. Co. 8. 125, b.

was adjudged for the Plaintiff; for the custom is between the Lord and his Tenants, which by Indenture may have a good and lawful beginning; and peradventure their Lands were given to them upon this condition; And it is reasonable, that the Lord maintaining a Bakehouse, that for this charge they should have reasonable recompence; and the Plaintiff had Judgment. Vide 8 Co. 125. b.

Stretton versus Browne.

- (37) **F**alse Imprisonment. The Defendant justifieth, that he was Constable of B. and that he appointed the Plaintiff to watch there; and because he refused, he put him in the Stocks: And upon this it was demurred. First, Because the Defendant did not shew that the Plaintiff was an Inhabitant there; and he cannot appoint a stranger to watch, neither by the Statute of Winchester, 13 Edw. 1. cap. 4. nor of 5 Hen. 4. cap. 3. Secondly, it was moved, the Constable cannot imprison one for refusing to Watch, but must complain to a Justice of Peace, and he may inflict punishment upon the Refusers. Thirdly, That he ought to shew it was the Plaintiffs turn to watch. Curia; For the first cause clearly, the Plea is not good; but for the second, Wray held, that the Constable might imprison one for refusing to Watch. Gawdy contra: And for the first cause it was adjudged for the Plaintiff.

Post. 287. 375.

Bradley versus Whorewood.

- (38) **R**eplevin, in the Writ the Defendant was named Whorewood; and in the Count, and proceeding after, he was named Horewood: And this variance after Verdict was alledged in Arrest of Judgment, and notwithstanding it was held good; for it is as if there were no Original, which is helped by the Statute; and if it be said a Variance, it may be amended; and the Plaintiff had Judgment.

1 Rol. 199.

Wellock versus Hamond, Trin. 32 Eliz. Rot. 48 r.

- (39) **T**respas. The Case upon special Verdict was. Thomas Wellock Copyholder in Fee of Land of the nature of Borough English, descendible to the puisne Son, and puisne Brother, had issue four Sons and a Daughter, and Surrenders the Land to the use of his Will, and deviseth the Land to his Wife for life, Remainder to J. his eldest Son, paying forty shillings to each of his Brothers, and to his Sister, within two years after the death of his Wife, and dieth; the Wife enters and dieth, J. enters and payeth not the Legacies within two years; but within five years he payeth them; William the youngest Son dieth without issue. J. surrenders the Land to the use of his Will, and deviseth them to his Wife, and dieth; the Wife enters and takes the Defendant to Husband. R. as puisne Brother and heir enters, the Defendant ousts him, and he brings Trespass, and it was found, that the Land was worth four pound per annum. The question was, if the entry of R. was lawful. Godfrey and Coke for the Plaintiff: The first point; the Land being worth four pound per

Co. 3. 20. 21. 2.

per annum, and J. being to pay eight pound, what estate passeth by the Devise? And they argued, that an estate for life only passeth, for no estate is limited; and the consideration is too little to make it a Fee-simple. And Godfrey cited a case in 10 Eliz. between Flatman and Clowton, That it was held by all the Justices, except Weston accordingly; but when the consideration is of the value of the Land, or near the value, it is otherwise. Second point, if the words paying be a Limitation or Condition, and they argued it was a Limitation and not a Condition; for if it be a Condition, it is void, and to no purpose, for it shall descend to him that is Heir to the Condition; and so is extinct, and no remedy to compel him to pay the forty shillings: And therefore the Law shall construe it a Limitation of his estate, that it shall cease, if he doth not pay it; and the Law shall transfer it to the Heir in Borough English. And although the word sound as a Condition, yet because they being so construed, would be void, they shall be expounded as a Limitation, and cited Crickmers case, which Vide ante, Mich. 31 & 32 Eliz. Placito Shirley & Johnson contra. Ante 146.
 It is a Fee-simple; for he payeth a consideration for it, and the value is not material, and cited 29 Hen. 8. Br. Testaments 18. 6 Edw. 6. Br. Estates 78. 38 Edw. 3. 14. Co. 6. 16. a. Post. 378.
 Secondly, The words are sufficient and apt to make a Condition, 7 Edw. 6. Dyer 74. 3 Mar. 127. 18 Eliz. Dyer 348. Post. 378.
 And this can be no Limitation, because the Lands are limited to other, if he pays not the money. And be it a Condition or Limitation, it is not found there was any demand of the money, and so no breach. Curia, it is a Fee, for the value is not material, and no Book speaks of the value. Secondly, It is a Limitation, and not a Condition: For if it be Condition, it doth extinguish in the Heir, and no remedy for the money, but being a Limitation, the Law call construe it, That upon the non-payment of the money his estate shall cease, and then the Law shall carry it to the Heir by the custom, without any Limitation over. And in a Devise it may well be, that an estate in Fee call cease in one, and shall be transferred to another. Thirdly, The money was to be paid without request, and it was adjudged for the Plaintiff. V. 3 Co. 2b. b. 3 Co. 21. a. Post. 378. Post. 376. 833.

Scroggs versus Griffin.

A Sumplis. The Plaintiff declared, that whereas one Brown and another did run for a Wager of five pound, which B. did win; and upon communication of it, the Plaintiff did affirm, that there was disceit and covin used in the said Hatch; the Defendant attunc & ibidem, in consideration of twelve pence delivered to him by the Plaintiff, assumed, That if he could prove that there was disceit in the running; that he upon request would give him forty shillings. Upon Non Assumpsit pleaded, and found for the Plaintiff, it was alleged, That request must be after the proof made. Curia contra: Proof ought always to be in the same Action, but when proof is referred to a particular person; and he can do no otherwise then he doth here, and the Action includes Proof and Request, and the Plaintiff had Judgment. (40) Post. 237.

Bennet *versus* Shortwright, Trin. 30 Eliz. Rot. 774.

- (41) **P**rohibition upon a Suit for Tithes of Corn, Wool, and Calves, and for the Corn makes Suggestion, that they had used in the Parish, to pay the tenth Sheaf in satisfaction of all Tithes for Corn to the Parson; and that he set them out, and the Parson had them, and ministred this Plea in the Court Christian, and they would not allow it; and it was held by the Court it was a good Suggestion: For if he set out the Tithes, and the Parson would not take them, there is no reason he should be charged again. And therefore Godfrey said, he would take issue upon it, and it was held he might: For the Wool, he made another Suggestion; for the Calves, he said they used to pay within the said Parish, &c. Two pence for the Milk of every Cow in satisfaction of Calves: And the proofs were, that there was such a usage for all the Land, except five Farms; and for this cause it was held he had failed in his Prescription, for it may be these Lands were parcel of the five Farms; but if it had been proved, that the Lands were not parcel, it had been otherwise: And for this cause a consultation was granted.

Nash *versus* Molins.

- (42) **P**rohibition for suing for Tithes in Bocking Park in Essex, and surmised, That the Lands were parcel of the Possessions of the Priory of Christs Church in Canterbury; and that the said Prior and his Predecessors had held it discharged of Tithes Tempore dissolutionis, and pleaded the Statute of 31 Hen. 8. The Defendant pleads, that the Prior and his Predecessors did not hold them discharged; and upon this, issue was joyned, and being tried at Bar, it did appear upon the evidence, that the Prior or his Predecessors, time out of mind, &c. never paid Tithes. But no cause was shewn by unity of Possession, real Composition, or other cause to shew it discharged. Coke said it was no evidence; for it is a prescription in non decimando. Curia contra: For a Spiritual Man may prescribe in non decimando, and by the Statute of 31 H. 8. he shall hold it discharged as the Prior held it; and if he held it discharged non refert by what means; for it shall be intended by lawful means: And the Jury afterwards found for the Plaintiff.

Post. 216.

Tooley *versus* Windham.

- (43) **A** Slumpfit. For that there were controversies between him and the Defendant, for the profits of certain Lands, which the Father of the Defendant had taken in his life time; and that he had purchased a Writ out of Chancery against the Defendant, to the intent to exhibit a Bill against him: Upon the return of the Writ, for the said profits, the Defendant in consideration he should surcease his Suit, promised to him, That if he could prove that his Father had taken the profits; or had the possession of the said Land under the title of the Father of the Plaintiff; that he would pay him for the profits of the said Land; and said in facto, that he had proved, that the Father of the Defendant had taken the

the profits under the title of the Father of the Plaintiff; and upon Non Assumpfit, it was found for the Plaintiff. Coke, This is no consideration; for the Suit in Chancery was unjust, and then the staying of it is no good consideration; and he sheweth not how the Father of the Defendant did hold it, viz. by Lease or otherwise. Curia, It is no consideration; for if the Father of the Defendant did take the profits, it is not reason his son should answer for them: And so the Suit in Chancery unjust, and the staying of it no good consideration; but if the Suit had been for Evidences, or otherwise, the staying of it had been a good consideration; but here it is for a personal Tort; for which, neither the Executor or Heir are to answer. And Trin. 33 Eliz. it being moved again, all the Court held it no good consideration; for he did not alledge, he was Heir or Executor, and so had no colour to charge him: And if it had been so alledged, yet no cause to charge him for a personal Tort: And it was adjudged for the Defendant. Post. 283.

Termino Michaelis, 32 & 33 Eliz. in Communi Banco.

Humphry Smalwood, Richard Cole, and Th. Sale, against the Bishop of Coventry and Marsh. Intrat. Pasch. 32 Eliz. Rot. 2065.

Quare Impedit brought by the Plaintiffs as Executors of John Sale for the Archdeaconry of Derby, which was abated, Trin. 31 Eliz. which vide antea, fol. Trin. 31 Placito 4. and was now revived. And three questions were now moved. 1. The Plaintiffs did count of a Grant of the next Avoidance made to their Testator, 23 Eliz. by the now Bishop the Defendant, and made their title by it: If this Grant be a good Grant within the Statute of 1 Eliz. And if it be not good; if it be void against the Bishop himself, or only voidable by the Successor, and not by him that granted it. 2. If the Executors may maintain an Action for a disturbance made to their Testator by the equity of the Statute of 4 Edw. 3. which giveth Action for goods taken in the time of the Testator. 3. The Bishop Defendant pleads a Presentment by himself, as Patron and Ordinary of Marsh, the other Defendant, and that he was instituted and inducted for six months before the Action brought; and so pleads Plenarty; if this were a Plenarty within the Statute of West. 2. And after Argument by the Serjeants, the Justices resolved for the Plaintiffs. First, That this Grant was good against the Bishop that granted it; for the Statute was not made for his benefit, but for the benefit of his Successor, that he shall not be prejudiced by the act of his Successor: But they held that a Grant of the Prochein Avoidance is within the Statute of 1 Eliz. and his Successor may avoid it. Secondly, That this action was within the equity of the Statute of 4 Ed. 3. for it is a Chattel that should go to the Executor, if the disturbance had not been; and for a disturbance in their own time, they shall recover damages to the use of the Testator; by the same reason for a disturbance in the time of their Testator, they shall recover damages, by the equity of the Statute of 4 Ed. 3. Thirdly, They all held that this is not a Plenarty within the Statute of West. 2. For it must

(1)
2 Rol. 350.
Ante 141.
Co. Lit. 45. a.
Co. Lit. 44. b.
Ante 141.
4 E. 3. c. 7.
2 Rol. 350.
2 Inst. 357.

must be Ex Praesentatione, non ex Collatione; and the Plaintiffs had Judgment.

Carter versus Ringstead, Hill 32 Eliz. Rot. 120.

- (2) **T** Respass. Upon special Verdict the case was, J. Bury, 35 Hen. 8. was seised of divers Lands in Odyham, and of the Mannor of Stapely in Odyham, and covenanted by Indenture to suffer a Recovery of all his Lands of Odyham, and of the Mannor of Stapely, and of his Lands in W. and L. And that this Recovery shall be of all his Lands in Odyham, to the use of himself and his Wife for their lives, and after to divers other uses; and for the Mannor of Stapely in Odyham, that the Recovery shall be to the use of himself, and of the heirs of his body, and after to other uses: The Recovery was suffered accordingly. Bury dieth, and his Wife married Carter, and the question was, if she shall have all the Lands in Odyham, or all except the Mannor of Stapely. And per Curiam, she shall have nothing in the Mannor of Stapely; for although by the first part of the Deed, she is to have all the Lands in Odyham, yet this being by way of Declaration of his intent and meaning, it shall be expounded as a Will, of which every part shall stand together if it may: And therefore it being expressly shewn, that the Mannor of Stapely shall be to other uses, the Law shall expound it so, and shall not be carried to her by the first words in the Deed. And so the opinion of the Court was against the Plaintiff. 6 Co. 64. b.
- Co. 8. 118. b.
- Co. 1. 95. b.

Clavell versus Mallory.

- (3) **A** Uditā querela, upon a Statute Staple acknowledged by one within age; and it was much questioned, if the Suit might be in this Court, or ought to be in Chancery, 16 Eliz. Dyer 322. And a president was shewn in 2 H. 5. that it lieth not here, but was to be in Chancery: But divers other presidents were shewn, that Suits had been upon a Statute Staple in this Court; and it was therefore ruled, that it lieth here, for the Chancery hath no more Record of it, then this Court; for the Statute doth remain with the party, and the Presidents in the Book of Entries are, that Suit had been here, and there is a Writ for it in the Register; and therefore they resolved, that a Suit might be upon it in this Court, and in the Queens Bench, as well as in Chancery. Another matter was moved, that in the Record the inspection of the Infant is not mentioned, and he is now of full age; so he cannot be inspected. But the Prothonotaries said, that the entry is Quod venit in propria persona, and prayeth an Inspection, and the Court would advise of the proof of his age, and so is their common course; and accordingly a president was shewn, Trin. 2 Eliz. Rot. 194. But the Court seemed to doubt of it, and would advise.
- 2 Cr. 59.

Rook versus Wilmot.

- (4) **D** Ebt upon a Recovery of Damages in the Exchequer; the Defendant pleaded, that a Fieri facias issued out of the Exchequer to levy the damages; and upon it he paid the money to the
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the Sheriff who was discharged of his Office before the return of the Writ, but the new Sheriff returned that he receit such a Writ so indorsed, viz. fieri feci de bonis, &c. the sum demanded (but the money was not brought into Court) and upon this the Plaintiff did demur. And it was adjudged for the Defendant, that the Plaintiff should be barred, for he having once paid the money, it is not reason he should be compelled to pay it again; and the Plaintiff is put to his remedy against the ancient Sheriff, if he will. V. Postea, Tr. 33 Eliz. Post. 238.
2 Cr. 73.

John Fabian *versus* Winston. Trin. 31 Eliz. Rot.

TRESPASS for Land in Uxbridge; the question was upon the avoiding of a Lease upon condition for not payment of the Rent; the condition was that if he doth not pay the Rent at the Feasts, in which, &c. or within twenty days after, that then, &c. and upon a special traverse the Issue was, if the Plaintiff by Edm. Bedle demanded Seven pound and ten shillings of Rent due to him for half a year, the Twentieth day after the Feast, by the space of half an hour before the Sun-set; and upon a special verdict it was found that the said Ed. Bedle petiit seven pound and ten shillings, pro redditu dimidii Anni, Anglice for half a years Rent, præfato J. Fabian tunc debet pro tenementis prædictis, and there remained demanding the Rent by the space of a quarter of an hour, & non plus before the Sun-set, tanquam ad, and after the Sun-set; and that no other Rent was due but the half years Rent due at the Feast of the Annunciation before; and the question was, if this verdict was found for the Plaintiff or Defendant. And all the Court held, as for the time, although it was not found to be half an hour, but a quarter of an hour, yet it was a good demand; for being demanded well enough for the time, it is not material although it be not precisely according to the traverse; but they all held this demand of the Rent (then due) is not good; for he ought precisely to shew upon his demand what Rent he demands; for if it were due five years before, it was then due; and therefore he ought expressly to shew what Rent, and for what time he demanded it; and although the Jury found that no other Rent was due, yet it is not material, for the request must be certain; and it was adjudged for the Defendant. (5)
Ante 140.157.

Giles Long *versus* Heminge, Tr. 30 Rot. 2024.

QUARE impedit, for disturbing him to present to the Church of Fromebellett, and declareth of an Advowson appendant to the Mannor of Fromebellett, by a feoffment of the Mannor by Tho. Long; the Defendant made title to it, and traverseteth, Absque hoc, that Tho. Long enfeoffed him of the Mannor, with the Advowson appendant; and the Jury found a special Verdict, That the said Tho. Long was seised in Fee of a Capital Messuage and Demesne Land in Fromebellett, and of the services of Fealty, and one penny Rent, by the hand of William Coyte, who was seised of certain Lands in Fee in Fr. and held them by the said services of the said T. L. and that the said Capital Messuage, Lands, and Services were known by the name of the Mannor of Fr. and that the said Advowson had been always belonging to the said Tenements

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Ante 39.

five manerio de Fr. and that 7 Eliz. the said Tho. L. by parol without Deed gave the said Mesuage, and all the said Tenements with the Advowson to the Plaintiff, and made Livery accordingly, and afterwards, 17 Eliz. the said Tho. L. granted the Advowson to the Defendant, and that 25 Eliz. Will. Coyte the Tenant did atturn to the Feoffment; and upon all this matter they prayed the discretion of the Court; and the Court resolved for the Plaintiff; for they all agreed it was a good Hannoꝝ, though all the Tenants but one are dismembꝛed from it; and when the Atturment came he had then the entire Hannoꝝ; and they said that an Advowson is properly appendant to the demesnes, and not to the services; and by the livery of the demesnes, the Advowson passed, and had passed, although there had been no Atturment; and it was adjudged for the Plaintiff.

Bishop *versus* Harecourt, Trin. 32 Eliz. Rot. 511.

(6)
Co. 5. 37. a.

2 Cr. 548.
1 Cr. 53.
1 Rol. 525.

A Sumpfit: And declared that in consideration of, &c. the Defendant did assume ad deliberandum quandam Indenturam ante finem Terminum Sanctæ Trinitatis tum proxim' sequent. and the promise was, 5. Junii, the Plaintiff alledged that Trinity Term incept 7. die Junii, & finivit 26. die Junii; and that he had not delivered, &c. upon non Assumpfit, it was found for the Plaintiff. And it was moved in arrest of Judgment, that the Court *ex officio* is to take notice of the beginning of the Term, and that was the Essoine day which was 3. Junii, and then the Indenture was not to be delivered till Trinity Term was a Twelvemonth; and of that opinion was Anderson; for the Essoin day is the first day of the Term, and so taken in all Pleas and Returns; the Three other Justices *contra*, for the Plaintiff had expressly alledged, that the Term began the 7. Junii, and the Defendant had not denied it; and the Court *ex officio*, are not to search the Rolls of the Court, &c. but admitting they ought so to do, and although in Law the Essoin day is the first day of the Term, and Writs may be returned then, yet in common speech that is the first day when the Court sits; and Anderson against his own opinion gave Judgment for the Plaintiff.

Termino

Termino Hillarii,

Tricesimo tertio ELIZABETHÆ,

in Banco Reginae.

William Parsons, *alias* Frowde, *versus* Christopher
Parsons *alias* Frowde, Int. Tr. 32 Eliz. Rot.

DEbt upon an Obligation of Five hundred pound, the Condition was to stand to an Arbitrement. The Arbitrators amongst other Articles did arbitrate that the Defendant should enjoy a House called Bennets house, of which the Plaintiff was Lessee for years during the Term, paying to the Plaintiff yearly twenty shillings; and for not payment of this twenty shillings Action was brought, the Defendant pleaded payment, and issue joyned and found against him; and it was alledged in Arrest of Judgment that this was a condition annexed to the award, and by not payment of it his Estate should cease; and not such part of the award, that for the not payment of it Debt should be upon the Obligation. But the Court held clearly that this was part of the award, and for not payment of it Debt might be brought upon the Obligation; and so was the intent of the Arbitrators. Another exception was, that the replication was & prædictus Willielmus Parsons, and saith not *alias* Frowde, so part of his name is omitted, and he is not intended the same person that was named before. But the Court held it not material, for it being & prædictus Willielmus; that which cometh afterwards is not material; and it cannot be intended another person; and if it be, it shall be amended; and it was adjudged for the Plaintiff. Nota, Mich. 18 & 19 Eliz. inter Treffam & Robins accordingly adjudged for the first point. (1)

Robert Limmer *versus* William Every.

ERror, The Error assigned was, that the said W. E. had brought a Debt upon an Obligation by the name of W. E. Administrator, bonorum & cattallor. A. E. durante minore ætate of J. E. Executor of the said A. E. Executor of R. Every, and demands a Debt upon an Obligation. (2)

Hob. 246.

Obligation of Twenty nine pound made to the said R. E. the first Testator, whereas he could not bring an Action by this name, but as Administrator of R. E. But it was said that Administration of the Goods of R. E. being committed to him by this name, Omnium bonorum, &c. A. E. it may well be committed to him by this name; especially when A. E. did not die intestate, but made an Executor. 10 Ed. 4. 1. that by the grant of Administration of the goods of the Executor, Administration is by it granted of all the goods of the first Testator. 27 H. 8. 7. Curia contra, clearly, for by this Administration committed he hath no authority to meddle with the goods of the first Testator; and for this cause the Judgment was reversed.

Minge *versus* Earle, Pasch. 32. Rot. 208. vel 408.

(3)
Post. 267.

DEbt upon an Obligation; the condition was, that whereas the Defendant had sold certain Woods to the Plaintiff, growing upon certain Land called Spalding in Peasemarch in the County of Sussex, if the Plaintiff may enjoy it, &c. and if the ground whereupon the Wood standeth be four miles from Rie, that then, &c. the Defendant pleaded that the Plaintiff may enjoy it, and this Land by the nearest and usual high-way for carriages is four thousand paces, reckoning five foot to every pace, from Rie, Upon which Plea the Plaintiff demurred. Cooper Serjeant argued that the Plea was not good, for he doth not answer to the Condition, which is four miles, also for the miles it is mentioned in divers Statutes, 2 H. 4. 23. 1 Eliz. 15. 23 Eliz. 5, but in Statutes it shall be taken according to the intention of them, and this is according to the usual ways, and not as a Bird or Arrow may fly; but in Bonds no such intent appeareth, and therefore it shall be according to the account of the Country, and common reputation; and he answereth not to the miles, but to the paces. Towse contra, We have pleaded so, because we will not put it upon the Country, but upon the Law; for it is perilous to put it upon the Country when it is a doubt how it shall be construed. Gawdy and Wray conceived, that to the exceptions to the pleading it was well enough; for if One thousand paces make a mile, it is good, which tant' amount that it is four miles; but the doubt is, how the miles shall be construed; for Wray said, in the Case of Cambridge, it was held that a mile shall be certain, and accounted by the most near way, and shall not be taken as a Bird shall fly.

Foster & Wilson *versus* Mapes, Trin: 32 Eliz. Rot. 71.

(4)
Hob. 35.

COvenant upon an Indenture; the Defendant pleads non est factum, and the Jury found that this Deed indented was made between the Plaintiff and the Defendant, and that the Defendant did seal his part, and delivered it to the Plaintiffs, but they did not deliver their part, &c. and if, &c. And the Court without argument held clearly, that it was a good Deed to charge the Defendant. And Fenner said it hath been adjudged, that if a man
bargains

bargains and sells his Land by Indenture, and the Bargainor doth deliver his part of the said Indenture, and the other never delivereth his Counterpart, yet it is good; and for this point they resolved to give Judgment for the Plaintiff. But afterwards Hobart moved in arrest of Judgment, that a sufficient breach was not assigned; for the Covenant is, that whereas he had let to the Plaintiffs the Parsonage of B. that he would save them harmless, concerning it, against M. Blunt; and they alledge that M. B. entred upon them, and put them out; and that he was Parson at the time of the entry, which is not sufficiently alledged, for it is not averred that the entry of M. B. was lawful; and if his entry was not lawful, it is no breach of Covenant, for it is intended of a lawful interruption. Curia contra, for when the Covenant is to save them harmless against a person certain, he ought to defend him against the entry of that person, be it by droit or tort, for he is dammified if he be disturbed, though by wrong, as 2 Ed. 4. 18. but if the Covenant had been to save him harmless against all persons, there it shall be taken for a lawful entry or eviction; and the words to save harmless amounts to more then a Warranty, for that is for lawful titles; but here it is to be intended that M. B. had good title, for it is alledged that he is Parson, and this is of the Rectory; and that he entred and let it; by which it shall be intended he had Interest; and it was adjudged for the Plaintiff.

Hob. 35.

1 Rol. 430.

Post. 675.

Trussel's Case.

HE was removed out of London by Habeas corpus; and it was returned upon the Writ, that he was detained there for one Execution, and for divers other Actions at the suit of divers persons, and it was moved to the Court that he should be discharged of all the Actions, and of the Execution, for he is a person attainted of Felony, and had neither Lands or Goods to satisfy them, and his Body is not his own, but at the Queens pleasure; and all the Justices held that as to the Actions he should be discharged, for a person attainted shall not be put to answer, nor shall he put in Execution, and so are all the Books; but they said they had spoken with the Justices of the Common Bench, and Barons of the Exchequer, who in both Courts had adjudged the contrary, and upon the very matter in Law, and not upon the form of pleading, but they would discharge their consciences as they had; for they found no Book against their opinion, wherefore they all resolved he should be discharged of the Actions, but for the Execution they would advise, for then peradventure the party should lose it for ever. But Egerton Solicitor who moved it, said, when he is let at liberty by the Act of the Court, this doth not discharge him of the Execution for ever; and so it had been taken in this Court. And afterwards, Pasch. 33 Eliz. it was moved again, that he being attained of Felony was let go at large, but not pardoned of the Felony, and being at large was arrested at the Suit of Ognell, by a Writ of Execution upon a Statute out of Chancery; and afterwards he removed himself by a Habeas corpus into the Queens Bench, and removed the Record of his attainder, and brought a Seire facias against Ognell, comprehending all this matter,

(3)

Post. 516. 7.

Ognell

Ante 164.
Post. 516.

Ognel appeared, and protestando, he was not the same person who was attainted, for Plea said that he was at large, and out of prison when he was arrested upon the Writ of Execution; and upon this it was demurred; and afterwards Trin. 33. they all resolved that he shall be discharged of the Execution, upon the Statute; for being a person attainted of Felony, the Queen hath Interest in his body, so he cannot be taken in Execution for Debt, wherefore they did discharge him of it.

Andrews Case of Grayes Inn.

- (6) **G**awdy and Fenner Justices were of opinion, that upon a Lease for years by Indenture, by demisit, & ad firmam tradidit, that a Covenant lieth against the Lessor if he enters; but if a stranger enters, it lieth not without an express warranty; for if in a Covenant against the Lessor, upon these words he shall recover the Term it self, 32 H. 6. 32. 9 Eliz. Dyer 258.

Post. 674.

Austin *versus* White.

- (7) **A**ction for these words, Thou wert laid of the French Pox, adjudged Actionable. And Fenner said it was adjudged in this Court, that for these words, Thou wert laid of the Pox, Action did lie, for it cannot be intended but of the French Pox.

Ante 2.
2 Cr. 144. 430.
Post. 289.

Peake *versus* Pollard.

- (8) **A**ction for these words, Thou art a mutinous and seditious man, and didst procure the Queens Subjects to Sedition. Gawdy; the words are not actionable, for it is not said, he moved them to Sedition against the Queen; and to this opinion the other Justices did incline, but this was only upon motion.

2 Rol. 99.

Lacy *versus* Reynolds.

- (9) **A**ction for words, which were, He is as very a Thief as any is in Warwick Gaol, and avers that J. S. was then a Prisoner in Warwick Gaol, condemned for Horse-stealing, and it was clearly held that for these words Action did lie, with this averment, but not otherwise; but after verdict this matter was alledged in Arrest of Judgment, that the Defendant did plead the Bar, quod quidam ignotus came to Warwick, and there cut the purse of J. N. and the Plaintiff sciens this, him did receive and comfort, and by reason of it, spoke the words; the Plaintiff replied de injuria sua propria, and upon this Issue was joyned, and found for the Plaintiff. And it was alledged that the Issue is ill joyned, for this matter doth not prove the Plaintiff a Thief, although it doth prove him a Felon; and so held the Court that the Issue was not well joyned, but they conceived that in as much as he had by this confessed the words, although the Issue is mis-joyned, and a mis-trial, yet this is as void, and the Court shall

2 Cr. 687.
Post. 308.

shall give Judgment upon his confession; and the Plaintiff shall not have his damages taxed by the Court, but shall have a new writ to enquire of damages; and it was so adjudged. V.22 Ed.4.46.

Damport *versus* Thatcher, v. antea, Mich. 31 & 32 pl.6.
Inter Mich. 32 & 33 Eliz. Rot. 519.

Error of a Judgment given in the Common Bench. 1. Error because, as it appeareth before, the Record between them was removed into the Queens Bench by a Writ of Error; and then the Judgment in the Scire facias was reversed, as to the Sureties, and no Judgment was given against the Plaintiff, whereupon the Plaintiff went into the Common Bench, and shewed this matter to the Court, and prayed his Judgment might be entred, and so it was, and Judgment given, and entred upon Record which there remains; and this matter was assigned for Error; for they had no Authority to give Judgment; for the Record was removed from thence, before the Writ of Error brought, so they had no Record before them to give Judgment. Gawdy, the Writ of Error was to remove the Record, si judicium inde redditum sit; so when no Judgment was given, the Record was not removed, but always remains with them, so that notwithstanding they might give Judgment upon it, 9 H. 6. 4. 4 Eliz. Dy. 206. and by this second Writ of Error brought, it is affirmed that the first Record doth remain with them; and of this opinion were the other Justices. 2. Error, for that the Writ was brought against an Administrator, and saith not that the Intestate obiit intestatus; sed non allocatur, for so is the usual form, 9 H. 5. 6. 3. Because it appeareth there was no habeas corpus or distringas, whereas the trial was by verdict, for this was certified upon a Writ of Certiorari awarded: but it was held that this is aided by the Statute of Jeofails, 18 Eliz. that after verdict Judgment shall not be reversed for want of a Writ original or judicial; but they all held if there never was a Habeas corpus or Distringas awarded, this shall not be aided by the Statute; for then they had no Authority to take the Jury; and they could not know if they were the Jurors returned upon the first Writ; but it shall be here intended there were such Writs, for the Jury was taken; and it cannot be intended that they would or could call them without such a Writ; and upon this presumption it shall be intended there were such Writs, but that they are embesilled; and this is directly aided by the Statute; and the Judgment was affirmed; but the Judgment in the Scire facias stood reversed as before.

(10)
Ante 143.

Ante 145.

Post. 259.

Crews *versus* Bayles, Tr. 32 Rot. 149.

- (11) **E**rror to reverse an Outlary after Judgment in a Bill of privilege; and because no process of Outlary was awardable, for Capias did not lie in the Original, it was held a manifest Error, and the Outlary reversed.

Meade *versus* Cheyney.

- (12) **T**he Plaintiff recovered against the Defendant as Executor of Skipwith; and upon a fieri facias a devastavit was returned; and upon this he prayed an Elegit, & habuit de terris executoris.

2 Leon. 188.
Mo. 299.
Post. 318. 530.

Wickham Bishop of Lincoln against Cooper.

- (13) **P**rohibition for suing for Tithes, and made suggestion that he and all his Predecessors, &c. were seised of the Mannor of which the Tithes were demanded, discharged of Tithes during the time that it was in their possession; and shewed that in the time of Ed. 6. this Mannor was conveyed to the Duke of Somerset, and was afterwards regranted and came to the Bishoprick again. And Fleming moved for a consultation; for it was a prescription in non decimando, which cannot be; and upon his own shewing the prescription was interrupted, and cannot be revived. Curia contra; for the prescription for a spiritual person is good; and the Bishops of Canterbury and Winchester use to prescribe so; and the prescription is not determined when it came to the Bishoprick again; for tithe is not a thing issuing out of Land; and unity of possession doth not extinct them, nor a Release of all the right to the Land.

Ante 206.

Harvy *versus* Thomas, Int. Mich. 31 & 32 Rot. 414.

- (14) **T**he Case was; Harrison and his Wife sold the Land of the Feme by deed indented, but it was not enrolled within the six months; and afterwards the Baron alone makes a Lease by parol, and then the Baron and Feme levy a Fine to the Bargainee, and die; the question was, if the Conusee of a Fine shall avoid this Lease. And it was adjudged he should; for being made by the Baron only, it was void against the Feme, and no acceptance could make it good; and as it shall be void to the Feme, so to the Conusee; so of a Rent charge granted by the Baron, or a Recognisance by him. And so it was resolved in the Lord Muntjoys Case. 24 Eliz. that the Recognisance of the Baron shall not bind the Conusee of a Fine, and the Conusee is in by the Feme, and the Baron joyneeth only for confort.

Co. 2. 77. b.

1 Rol. 389.

Ante 130.

Green *versus* Edwards, Trin. 32. Rot. 1832.

- (15) **T**he Case upon Demurrer was, Land was let to J. S. for ninety years if he liveth so long; and if he dieth within the Term, that then his Wife shall have it, durante toto residuo termini prædicti.

1 And. 258.
1 Leon. 218.
Moor 297.
Co. 1. 153. b.

J. S.

J. S. dieth within the term, the question was if his Wife shall have it during the residue of the term; and P. 33 Eliz. it was resolved by all the Justices, that she shall not; for the term was wholly determined, and the limitation to her was void; for as a remainder it cannot inure, for a remainder must be created with the particular estate, and is to be limited for a certain estate, viz. for years, life, in Fee, &c. and here no certain estate is limited to her; for although it is limited to her during the residue of the term, and so shall be intended a Lease for years; yet forasmuch as every Lease for years is to have a certain commencement and ending, here it is uncertain if she shall ever have it, for J. S. may out-live the ninety years, and therefore a Termor cannot grant his term after his death, and so the remainder here is void. But Anderfon said, if the Wife had been party to the Deed, this peradventure might have been good to her, not by way of remainder, but by immediate grant and demise for so many years which should be to come; and durante termino, shall not be taken for the interest but for the time, which Walmisly and Windham did expressly deny, for they held it is at first void for the incertainty when it shall commence, or whether it shall commence; and it was adjudged that the Wife took nothing. V. 1 Co. 155.

Vautry *versus* Aplén.

R Eplevin: Defendant justifies as servant to J. S. as in his Freehold, the Plaintiff conveyeth by a Lease for years, from the Queen by her Letters Patents, but saith not Curia hic prolat. and traverseth the Freehold of J. S. and upon this the Defendant demurreth generally, for want of these words, Curia hic prolat. and doth not shew it for cause; and if it were matter of substance or of form, and so amendable by the Statute of 27 Eliz. was well debated. And Periam and Walmisly at first conceived that it was matter of substance; for by this manner of pleading, the Defendant lost the advantage to demand Oyer of the patents, for without saying (hic in curia prolat.) he cannot demand Oyer; and if there be variance between them and the pleading, he may pray that they be entred in hæc verba, of which now he hath lost the advantage; but afterwards P. 33 Eliz. it was held by all the Justices (except Walmisly) that it was but matter of form and not much material, for it was but an inducement to the travers and so not traversable, and it may be amended; and they said, if the Defendant maketh no defence, and that there wants an averment to the Plea, these may be amended, and shall be inserted, for the truth of the matter appeareth; and in this case the Letters Patents are not issuable: but Periam said, if such Plea had been in an Abowry when it was issuable, it should be otherwise; and it was adjudged accordingly for the Plaintiff.

Richmond *versus* Butcher, Hill. 33 Eliz. Rot. 315.

R Eplevin. Upon demurrer the case was; John Colvell was seised in Fee, and let the Land for twenty one years rendring twenty Milling Rent during the term, to him, his Executors and Assignees, and dieth, the Defendant as servant to his heir for Rent behind after the death of the Lessor, distraineth; and after argument it was adjudged that the heir shall not have the Rent, for it being

being reserved to the Lessor, his Executors and Assigns, and the Heir being none of them, he cannot have it, 27 H. 8. 15. 21 H. 7. 25. 10 Ed. 4. 18. 11 Ed. 3. 86. Nota, they relied upon a Book shewn to them in writing in 12 Ed. 2. where it was so adjudged. 2 Sand. 370. 1. 1 Vent. 162. R. 613. 634.

Foster versus Fountain.

(4) **E**jectione firmæ: It was held upon evidence by the Court, that if a Fine be levied, and an Indenture to lead the use of it, be sealed and delivered afterwards, this is not sufficient to lead the use of the Fine, except it be averred and proved that the Conusor intended before the Fine levied, to levy it to this use: *Quære.* Co. 9. 10. b.

Bind versus Plain.

(5) **T**he Plaintiff counts that whereas he recovered against Tho. Ward in the Queens Court in Southwark, held before the Steward of the Mayor of London, twelve pound, and had a fieri facias to the Bailiff there to make execution of the goods of the said Thomas Ward which were in his hands: and whereas the Bailiff was ready to do execution of the said goods, the Defendant did assume to the Plaintiff, in consideration that he 11. of September delivered to him the said goods, that he would within fourteen days after Michaelmas pay to him twenty Marks, or otherwise deliver to him the said goods again, if in the mean time no other made title to them, and proved them to be his goods; and averred that none made title to them between the 11. of Sept. and fourteen days after Mich. the Defendant pleads non assumpsit; the Jury find the recovery and the assumpsit, but find further that the said T. W. long time before the recovery had sold the goods to R. W. but with this proviso, that he shall have the possession of them for four years, which are not yet expired; and if he then pay such a sum of money, the sale should be void, and that R. W. made title to them by force of this sale, Et si, &c. Cooper Serjeant alledged that the Declaration was not good. 1. Because it was not shewn by what title the Court of S. was held. 2. That the Bailiff was ready to make execution, but sheweth not where the goods were; but these exceptions were over-ruled not to be material, for they are but the inducement and conveyance to the Action. 3. There was neither time nor place of request alledged, but only sepius requisitus; Sed non allocatur, for it is to be paid at a day certain, and no request needful; otherwise, if request ought to have been made. 4. That upon the matter found judgment ought to be for the Defendant; for it is found the Plaintiff had only a special property, and the vendee the general property, and so no cause of the re-delivery, and so no cause of the consideration, and it is found the Vendee had title; so it is sufficiently proved a stranger had title; but Pak. 33 Eliz. the Court resolved for the Plaintiff, for they held that the Plaintiff having possession of the goods quomodocunque he came to them, he is chargeable to Th. W. for them, although he hath but a special property, and he may maintain an Action for them; so his delivery of the goods is a sufficient consideration; for by this the Defendant had the benefit of the use of them, and the Plaintiff hath loss, for he is chargeable to the Action of T. W. and especially the consideration is good, being only for the re-delivery of

of them, or payment of such a sum. And although he recited that he had these goods liable to the execution, which is not true, for T.W. having only a special property, they are not liable to this Debt, yet this is but a naked and void recital, and all the substance of the Declaration is upon the delivery of them; and this being found, it was a good Assumpsit, and it was adjudged for the Plaintiff. Error brought and Judgment affirmed, Pasch. 35. placito 16. B.R.

Mulgrave versus Ogden.

Action sur trover of twenty Barrels of Butter, and counts that he tam negligenter custodivit, that they became of little value, and upon this it was demurred, and held by all the Justices, that no Action upon the Case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moatheaten; or if one find a Horse, and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion; so if he of purpose misuseth it; as if one finds paper and puts it into the water, &c. but for negligent keeping no law punisheth him, Et adjournatur. (6)

Agnes Jennings versus Gower.

Deht as Executrix: The case was, the Testator of the Plaintiff deviseth a term to J. Watts, and deviseth that if Agnes his Wife suffers the Devisee to enjoy it three years, that she shall have all his goods as Executrix; but if she doth disturb him, then he makes G. J. his son his Executor and dieth; Agnes as Executrix brings the Action within three years. Anderson at first conceived that the Action could not be brought within the three years, for this is a condition precedent, so that until the performance of it, she shall not be Executrix; but the other Justices held she was Executrix presently; for although in grants, estates shall not be till the condition precedent be performed, yet it is otherwise in a Will, for a Will shall be guided by the intent of the party; and this shall not be construed as a condition precedent, but as a condition to abridge her power to be Executrix if she perform it not; for so by Periam the intent appeareth here by the words subsequent, viz. if she disturbe, that then G. J. to be Executor, which doth prove that in the mean time he intended she should be Executrix, and afterwards P. 33 Eliz. it was adjudged for the Plaintiff that she was Executrix until she disturbed, and that the plea of the Defendant, viz. that she had made disturbance, was not good, without alledging in particular how she disturbed. Post. 914. Co. 8. 91. a. (7)

Smy versus June & Alios.

Ejectione firmæ: The Case upon special Verdict was, Sir Tho. Cotton was seised of the Land in question in Fee, and conveyeth it to the use of himself for life, remainder to Cheney Cotton his eldest Son in tail, remainder to William his second Son, & primogenito filio prædicti Willielmi & hæredibus masculis dicti primogeniti filii dicti Will. & pro defectu talis exitus, remanere inde hæredibus masculis dicti Willielmi; and of Sir Tho. Cotton, with divers remainders over. Cheyny Cotton dieth (8)

without issue; and after William the second son had issue, W. his eldest son, and goeth beyond Sea; Sir Th. C. 29 Eliz. levieth a fine of this Land, which was to the use of himself for life, and after to the use of Ro. Cotton his third son in tail, with divers remainders over; and afterwards 21 Eliz. William the second son dieth beyond Sea, Will. his son and heir being then and now within age; Sir Tho. Cotton dieth 27 Eliz. & 31 Eliz. W. enters being within age, and lets it to the Defendant, reserving no Rent, but at will only; Robert Cotton enters and lets it to the Plaintiff, upon which the Defendants re-enter, & fi. &c. And it was argued by Drew and Glanville Serjeants for the Defendants, and by Beaumont and Hamon for the Plaintiff. 1. Matter, if W. the second son had an estate tail by the limitation to him and his first son, and to the heirs males of the body of his first son, for he then had no son; so it is void to the first son, if it shall vest in W. by the intent of the Donor. 2. Admit he hath not an estate tail by this limitation (as it was after agreed by all the Justices that he had not) if by the remainder after limited to the heirs males of the body of W. and of Sir Th. C. they have joynt or severall estates tail; and as to that, it was clearly agreed that they have severall estates tail and not joint, so that clearly the fine of Sir T. was good to bar W. of one moiety, for he was Tenant in tail of it. 3. Matter upon the Statute of 4 H. 7. if the Fine being levied W. the son being beyond Sea, if his heir shall have five years after his death; for the Statute is, he shall have five years after his return; and in this case he never returns, and so is out of the words, and the proviso shall not be taken by equity. But all the Justices to this resolved to the contrary, for the intent of the Statute shall be observed; as the Statute speaks, that an infant shall make his claim within five years after his age, yet if he claimeth within his age, it is good, yet it is out of the words. 4. Matter, if Tenant for life levy a Fine, and he in the reversion or remainder doth not make his claim within five years after the Fine levied, after the Tenant for life dieth, if he shall have new five years after his death. And all the Justices held he should, for this is as another title accrued to him, and it may be he had no consens of the forfeiture; and if he had, it is at his election if he will take advantage of it; and so Zomes case was cited to be adjudged 7 Eliz. 5. Matter, that yet the Plaintiff shall recover, for the title of the Defendants, was void, for they claim by Lease at will of an Infant where no rent was reserved, and so void. Curia, although they have no title, yet it appeareth the Plaintiff had no title to a moiety, and then he could not punish the Defendants for his moiety in this Action where he must make title; otherwise perhaps in trespass; and for the other moiety, he shall not have an Action without an express Ouster, which is not found; wherefore it was adjudged for the Defendants. V. Co. 2. Institutes 519.

Termino Hillarii, 33 Eliz. in Scaccario.

(10)
1 And. 303.
Poph 25. 53.
Moor 291.
1 Rol. 475.
2 Rol. 184. 215.
2 Leon. 134.

Sir Moyle Finch *versus* Throckmorton, Int. Hill. 32 Rot.

The Case upon demurrer was; King Philip and Queen Mary 1 & 2 Ph. & Mary; Demised the Site of the Priory of Raveston in the County of Buck. to Th. Throckmorton for seventy years rendering rent at

at the Feasts of the Annunciation and Saint Michael, with a proviso that upon non-payment within forty days after the Feasts, the Lease should cease and be void: 9 Eliz. the rent was not paid at Mich. nor within forty days after, but afterward the Queens Receiver received it, and maketh an Acquittance as if it had been paid at the day, and receiveth the rent afterwards every year till 30 Eliz. and makes acquittances of it: 30 Eliz. the Queen grants this Land in Fee to Sir Tho. Henneage, and afterward an Office was found, which found the non-payment 9 Eliz. upon which Sir Th. Henneage entred, and let it to the Plaintiff, &c. 1. Question, if the Lease was void or not without Office. 2. If the acquittance could make it good. 3. Admit there must be an Office, if after the Patent it cometh time enough for the Patentee to avoid it. And this was divers times argued at the Bar, and afterwards by the Barons, and all the Barons agreed for the Plaintiff; and this Lease was void immediately upon the non-payment; for the words are that upon non-payment the Lease shall cease and be void, so that the Land is discharged of this contract of the term, and the Patentee is no longer a termor, nor (as Manwood said) a Tenant at will, nor at sufferance, but only as a Bailiff or Pernor of the profits de son tort, and then all the acceptance after cannot make a void Lease good; and the office is only necessary to inform the Queen when the condition was broken, to entitle her to all the mean profits, and to reduce the possession, if the estate had continued out of the Queen; but as this case is only to entitle her to the mean profits, and being found only for this purpose it is well enough for the time, notwithstanding the Patent of the Inheritance, for they held that the first estate ended as by limitation, and in such case no office is needful to entitle the Queens; also it ends by the limitation in the first Letters Patents which are a Record, so the Record which doth create it doth destroy it, and the Patentee might enter as in Land of which there was no Lease; and it was adjudged for the Plaintiff. Nota, a Writ of Error was brought in the Exchequer Chamber, and Error assigned in the matter of Law, and after argument Mich. 36 & 37 Eliz. the judgment was affirmed.

1 Cr. 100. 173.

2 Cr. 56. b.

Ante 167.

2 Cr. 344.

Co. 3. 64. b.

2 Rol. 215.

Co. 10. 114. b.

Co. Lit. 215. a.

Co. 5. 52. a.

Post. 855.

2 Co. 344.

Termino Paschæ,

Tricesimo tertio ELIZABETHÆ,

in Banco Reginæ.

Fermor *versus* Dorrington.

(1)

Post. 730.

2 Cr. 214.

Co. 5.42.3.
Post. 258.

Post. 256.

Ante 57.

Action for words, which were, I will prove Fermor to be a perjured Knave; after Verdict it was alledged in Arrest of Judgment that the words are not actionable, for he doth not say he was perjured, but that he would prove him perjured; for it may be, that if he doth any act after, that he may be convinced of it; but all the Court held that the Action lay, and the words cannot have such construction. Another matter was alledged, that in the Venire fac. and Distringas, one Taverner was named one of the Jurors, but in the return of the Distringas in lieu of Taverner one Turnor was returned, and was sworn and tried the matter, so it is a mis-trial being tried by one that was not returned in the Venire fac. and Coke cited a president in this Court between Dousby and Willot, where a Juror was returned by the name of Gregory Willot, and in the Distringas he was named George W. and he with others passed upon the Inquest, and for this cause the judgment was staied: and another president in the Exchequer, where one Mizael was returned upon the Venire fac. and upon the Distringas one Michael, and both these were returned for surnames; and because Michael was sworn, &c. the judgment was staied, and so it seemed to the Court; but they at first doubted if the variance in the surname be a cause to stay judgment, but for variance in the Christian name, they agreed clearly the judgment shall be staied, but one may have two surnames; but afterwards it was resolved the judgment should be staied.

Taylor against Beal.

(2)

Debt for Rent reserved upon a Lease for years: the issue being joyned if the Rent were paid or not, the Defendant gave in evidence for part of the Rent, that the Plaintiff by Covenant was to repair the House and did not, and that thereupon he expended part of the Rent in repairing the House; and the question was if this evidence will maintain the issue: Gawdy conceived it did, for the Law giveth this liberty to the Lessee to expend the Rent in reparations, for he shall be otherwise at great mischief, for the House may fall upon his head before it be repaired, and therefore the Law alloweth him to repair it, and recoupe the Rent,

Rent. V. 12 H. 8. 1. 11 Ri. 2. Barr. 242. 14 H. 4. 27. Fenner, it is no evidence; for if the Lessor will not repair it, he is to have his covenants against him. Clench seemed he might well expend the Rent in reparations, but he ought to have pleaded it, and cannot give it in evidence upon the general issue; and they thereupon moved the Jury to find the special matter; and as to the residue of the Rent, he shewed that he paid it to others that had Rents charge out of the Lands, which the Lessor had covenanted to pay, and that by the commandment of the Lessor he paid the Rent, in discharge of the said Rents; and this was clearly held good; for payment to another by the Plaintiffs appointment, is payment to himself.

Trusloe versus Yewre.

IT was agreed upon evidence, that where a controverſie was between two persons for a Lease of Land, who submitted themselves to the Arbitrement of J. S. for it, and J. S. did award that one of them shall have the Land, this is a good gift of the interest of the term, 12 Aff. 25. but if the Award were that he shall permit and suffer the other to enjoy the term, this giveth not the interest in it. Also it was held, that if a term be devised to an Executor, the remainder over, and the Executor enters generally, this shall be taken as a Devise, for it is more for his benefit; but they moved the Jury to find these matters specially, but they would not, but gave a general Verdict. (3)

Co. 10. 47. b.
Post. 348.

Gore versus Parkhurst.

Ejectione firmæ: Bail was put in for the Defendant by the name of Parkes, but the Declaration and all the proceeding was by the name of Parkhurst, and this matter after verdict was alleged in Arrest of Judgment; and Trin. 33. it was adjudged that for this cause, Plaintiff nihil cap. per billam; for it doth not appear that the Defendant against whom the Judgment was given, was in custodia Mareschalli, and otherwise the proceeding against him is coram non iudice, 31 H. 6. 10. and it cannot be intended the same person, neither can it be amended. And the Court said, if there be a Bail, and the Bail is pulled off the file, the party is without remedy. (4)

In an appeal of murder the Defendant was acquitted, and the abbottoys and damages were enquired and assessed to six pence. Godfrey moved that the damages might be increased by the Court as they may by West. 2. cap. 12. and the Court said, they shall be increased. (5)

Withington versus Dalaber.

In appeal of murder by a Feme, the Defendant pleaded nient accouple in loyal matrimony; & si trove que soit, not guilty to the Felony; the Plaintiff replies that she was accoupled in loyal matrimony, and doth (6)

Post. 495

doth not answer or plead that he was guilty of the Felony. And it was moved, that this was a discontinuance. Curia, when a Plea is pleaded which is triable at Common Law, and concludes over to the Felony, there the Plaintiff ought to reply and conclude over to the Felony; but when he pleads a Plea triable otherwise then by the Common Law, it is otherwise.

Dethick's Case.

(7)

Post. 542.

HE was endicted upon the Statute of 5 Ed. 6. for striking in Saint Pauls Church-yard; and it was moved, that it being the Church-yard of a Cathedral-Church, it is not within the Statute; Curia contra, Then he pleaded that he was by the Queens Patent created Garter King of Arms, and demands judgment, because he is not so named; and because it was a name parcel of his dignity and not of his office only; for the Patent is, Creamus coronamus & nomen imponimus de Garter Rex heraldorum, and therefore in all suits against him he is to be named by this name; for this cause he was discharged of the Endictment.

The Lady Ratcliff *versus* Shubley. Int. Trin. 31 Eliz. Rot. 415.

(8)

2 Cr. 468.
Hob. 503.

Action for words, which were, She is as very a Thief as any that robbeth by the High-way-side. Upon not guilty pleaded, the Jury found that he spake these words, She is a worse Thief than any that robbeth by the High-way-side; and the question was if upon these words found by the Verdict she should have judgment. And the Court held clearly that the words in both cases are actionable; but Gawdy and Fenner held that the words found do not agree with the Declaration; for the Jury do not find that the Defendant at the time mentioned in the Declaration, spoke the words in the Verdict; so it may be he spoke them at several times, and differs from Bridges Case 3 Mar. Dy. 75. where the Jury found he spake part of the words but not all; for there they did acquit him of the residue, and the words are not of one sence. Wray contra, As very a Thief, and a worse Thief, are all one.

Cole *versus* Wall and Burnell.

(9)

Co. 4. 26. a.

Ejectione custodiæ of a Ward and his Land, and declareth that the Lord of the Mannor of S. had the custody of the heir of his Coppelholder, and of his Land, by the custom there, until the heir came to his age of fourteen years, and that he might commit the custody of his body and Land to whom he pleased; and that one Cl. died seised of his Land being a Coppelholder of Inheritance, and that the Lord granted to him the custody of the heir, being within the age of fourteen years, and the Defendant ejected him; after Verdict, it was alledged that an Ejectione firmæ doth not lie of a Coppelhold Estate, and so it was ruled by the whole Court; and the Judgment was stayed. And the Justices said, that an Ejectione firmæ doth lie of a Lease made by a Coppelholder

Coppyholder, but not of a Demise made by the Lord of a Coppyhold, by Coppy of Court Roll. But afterwards Trin. 33 Eliz. this case was moved again, and alledged, that this Action is an Action upon the case, in nature of an Ejectione custodiæ; and not upon a grant by Coppy, but upon a grant at Common Law: And thereupon it was adjudged, that the Action lay.

Guldeslew *versus* Ward.

Action for these words, Thou hast stoln a load of Hoppoles; and it was ruled, that they were actionable; for it shall not be intended but they were cut down before, for otherwise they could not be said Hoppoles, or that he could otherwise steal them. (9)

Marsh and his Wife. *Antea.*

MArsh and his Wife, as Executrix to Wilkenfon, brought a Writ of Error to Reverse an Attainder of Felony against the Testator; and the Error assigned was, That the Exigent issued to London, and the Sheriffs returned Quod exigi fecer' de Comitatu in Comitatum, where it ought to be De Hustingo in hustingum, for they have no Counties; and for this cause it was held a manifest Error. But the principal question was, if Error lieth by an Executor to Reverse an Attainder of Felony in the Testator. Coke and Popham Attorney-General alledged, That it cannot be maintained by an Executor. First, Because a person attained cannot have Executor. Secondly, Executor cannot have Error, but to Reverse a Judgment in the personalty: But here the Judgment is more high, for it is in the realty, and it may be mischievous, for the Executor may pursue faintly; and so the Judgment may be affirmed, and bind the Heir. Thirdly, upon a Writ of Error to Reverse an Attainder in Felony, a Scire facias ought to be to warn the Lords mediate and immediate, which cannot be at the suit of an Executor. Gawdy conceived the Action did well lie: for Executors are privy to the Judgment, and peradventure have all the loss; for it may be that he that is outlawed had only Goods, and no Land. And as to the disability alledged, that the Testator was attained, and so had no Goods, nor can make an Executor; It is not material in this suit, where they are to Reverse the Attainder which doth disable them, as 11 H. 4. 64. But it doth not appear by that Book, that he was outlawed for Felony. And as to the faint pursuing of the Action, the Heir and Executor by reason of their several interests, may have several Writs of Error, as the Tenant and Vouchee may. And as to the Scire facias, this needs not be in respect of the Goods which are intended to be in the Queens hands, who is always present in Court; and it is to be well considered, if it may be against the Lords; (but the Clerks said, a Scire facias had been awarded against the Lords.) Wray, the disability alledged is not to be objected against the Executor, the suit being to Reverse it: And the Case is to be well considered, for it may be very mischievous against the Lord, Et adjournatur. Post. 273. V. Residuum. V. Postea, Pasch. 34 Eliz. Placito 2.

(10)
1 Rol. 912.
Co. 5. 111. 2.
Post. 273.

Post. 273.]

Garnons *versus* Sir Henry Weston. Int. Trin. 32 Eliz.
Rot. 877.

(11) **E**Rror upon a Judgment given in an Assise of a Rent-charge of Fifty pound per annum, in which the title was ; John Vaughan and Anne his Wife (Mother of the Plaintiff in the Assise) were seised of the Mannors of Huntington-English, and Huntington-Welsh, and by Fine, 18 Eliz. conveyed the Mannors (inter alia) to one Whitney, per nomen of two Mannors, and of fifty Messuages, and three hundred acers of Land, &c. Who by the same Fine rendered the said Rent of fifty pound to them, and the heirs of A. and rendered the Mannors and Tenements aforesaid to them for their lives, Remainder to Fr. their son in tail, Remainder to the heirs of A. And that J. V. and A. died, and that the Rent descended to the Plaintiff as son and heir of A. and that Fr. entred as in his Remainder ; and thereof infeoffed the said G. who was tenant in the Assise ; and upon Nul tort, Nul Disseisin pleaded, and found for the Plaintiff, he had Judgment to recover ; and upon this Error was brought. 1. Error, That this Fine is pleaded of these Mannors (inter alia) so it may be intended, that other Lands passed in the Fine ; so an Assise brought against him that was only Tenant of the Mannors, is not good ; for all the Tenants of the Land charged are to be named. 2. Because the life of Fr. who was Tenant in tail, was not averred. 3. That the Fine by the grant of the Rent, and of the Land to the same person, by the Fine, is Repugnant for the Rent, and so void ; for he cannot take the Land and Rent at the same time. 4. When she had the Remainder in Fee of the Land charged, the Rent by this is extinct. Stevens for the Plaintiff, and Bourchier for the Defendant. To the first, Gawdy and Clench held it to be Error ; for it being inter alia, the per nomen shall be intended of more then the two Mannors ; and the Co-tenants of the residue not being named, it is not good. Fenner contra. To the second Error, they all held, the life of Fr. needed not to be averred, for he had made a Feoffment, and so the estate did continue. To the third Error, it seemed to them, that the Rent granted by the same Fine that the Land was granted, was good ; for the Law shall marshal them, and the grant of both shall be good. For first, the Rent shall pass, and then it shall be as a purchase of the Land by A. who was seised in Fee of the Rent ; and the purchase of the Remainder in Fee shall not extinct the Rent, but it shall be in esse, during the particular Estate ; for by this the possession is only charged. And therefore Gawdy said, the difference is where one hath a Rent-service, and he purchaseth the Remainder or Reversion in Fee, all the whole Seigniorie is extinct : for the intire Tenancy is held, but the purchase of the Reversion or Remainder in Fee doth not extinct a Rent-charge ; for it is chargeable upon the Possession, for he shall abow as in Land chargeable to his Distress. Et adjournatur. Nota, It was discontinued by the death of Sir Henry Weston.

Co. Lit. 312.b.

Page *versus* Faucet, Pasch. 29 Eliz. Rot. 121.

Error of a Judgment given in Lynne. Error assigned was, that (12)
the Judgment was given at a Court held there 16. February,
26 Eliz. And this day was Sunday, and it was so found by the ex-
amination of the Almanacks of that year: And it was ruled, that Ante 210:
this examination was sufficient, and a trial per Pais was not ne-
cessary, although it were an error in fact. And the Judgment was
reversed.

Ward *versus* Knight, Trin. 30 Eliz. Rot. 646.

Action sur Case, and declares, That whereas Lostocke is an ancient (13)
Village, and ancient Demesne of the Crown of England; 1 Rol. 321.
and that the Tenants and Men of ancient Demesne are to be quit
of Toll in all places, &c. And that he was an Inhabitant and Te-
nant there, and had brought his goods to Yarmouth; the Defendant
not being ignorant thereof, had taken one Cable of his goods for
Toll, &c. The Defendant did justify, for that Yarmouth is an ancient
Borough, Incorporated of Bailiffs and Burgeses, and had
used from the time, &c. to have a Water-Bailiff there, and had
used from the time, &c. to have Toll of the Tenants and Inhabi-
tants of Lostocke, for any of their goods brought there by Sea for
Merchandise, and if it be not paid, to distrain, &c. And the Plain-
tiff being an Inhabitant of Lostocke, brought by Sea twenty hundred
weight of Cable Ropes to Yarmouth for Merchandise; for which he
demanded Toll, and because it was not paid, took this Cable Rope
Nomine districtionis, &c. And upon this it was demurred, and it was
argued by Golding for the Plaintiff, and by Hobart for the Defendant;
and in the same Term it was adjudged for the Defendant: They
gave no publick reason of it, but privately did agree between them-
selves for the substance of the matter; for Wray said, it is not reason
they should be discharged for Merchandise, and so are the Books.
Vide 9 H. 8. 25. 19 H. 6. 66. 7 H. 4. 43. Fitz. N. B. 228. a. contr.

Lovelace *versus* Grimsden, Mich. 32 & 33 Eliz. Rot. 94.

Error of a Judgment in the Common Bench. Error assigned (14)
was, that in Trespas for taking of five horses, the Defendant
justifieth, for that one Guillam was amerced for blood-shed within
his Leet; and that he and all those which were Lords of the Man-
nor from the time, &c. had used to distrain the Beast of any which
came within the Manor, and were in the possession of any man
that was amerced in the Leet for the Amercement; and said, that
these five horses were in the possession of Guillam; for which he
did distrain them, &c. The Plaintiff took issue, that they were
not in the possession of Guillam: And upon this issue joyned, it
was found for the Plaintiff, and Judgment given for him; and it
was assigned for Error, that the issue was joyned upon a thing
meerly void; and so no issue, and not aided by the Statute of
Joefails: And the Court agreed, that if there be no matter of War
in the Plea, and the issue joyned upon it, this is void, and not
helped

helped by the Statute of Jeofails : But if the Plea containeth matter of Bar, and issue is joyned upon a thing not material; this is aided by the Statute of 32 H. 8. But here is no matter of Bar; for the Prescription is agreed to be void, and then if no Bar, no Issue; and so can be no mis-joyning of issues, when there is no Issue joyned. And although the Bar was ill, so that the Plaintiff might have had Judgment upon the Bar; yet Judgment being given upon the Verdict, where no issue was joyned, is erroneous. And they all did agree, That the Judgment should be reversed; but they would advise till the next Term.

Green versus Penilden.

- (15) **P**rohibition for suing for Tithes, was prayed; for that he had pleaded in the Spiritual Court, that the said P. was not lawful Incumbent, but one Taylor. Which Plea they would not allow the Parishioner to plead to the right of the Incumbency; and it was granted per Curiam: For he being the Tenant of the Land, may plead it, or else he shall be twice charged for his Tithes.

Man's Case.

- (16) **H**e had married his Wives sisters daughter; for which he was sued before the High-Commissioners: For although this was not prohibited within the Levitical degrees, yet because degrees more remote are forbidden, they gave sentence of Divorce: And he grounded his Prohibition upon the Statute of 32 H. 8. cap. 38. And a Consultation was prayed and granted, because the Prohibition is not to be, if it be not within the Levitical degrees. And here it was general, and therefore not good. V. Coke upon Littleton, f. 235.

Stransham versus Cullington.

- (17) **P**rohibition for suing for Tythes, as Proprietor of the Rectory of Cednam, and shewed, That the Tithes did grow Inter loca decimabilia of that Parish, as he ought to do, and that must be first proved: The Defendant there pleaded, That the Land was in the Parish of Ashpole, and that he had paid the Tithes there; and upon this they are at trial, and upon this he had a Prohibition: For the bounds of the Parish are triable by the Common Law. And upon another Prohibition for Tithes, Unity of Possession in the time of the Abbot, at the time of the Dissolution was surmised, and proved it by the testimony of Mr. Hynde and another, who said, they had seen a Deed of Appropriation of the Parsonage to the Abbot; For which they verily thought, that there was an Unity of Possession at the time of the Dissolution. And this was ruled no proof, for it may be intended not to continue, and a Consultation was granted; but they said, that heat-say shall be allowed for a proof.

Appleshwart *versus* Nortly, Mich. 32 & 33 Eliz.
Rot. 472.

A Sumpfit. That in consideration he promised the Defendant to marry his Daughter, he promiseth to give the Plaintiff forty pounds. Et dicit in facto, that he had married his Daughter : Upon Non Assumpfit, it was found for the Plaintiff ; and it was alledged in Arrest of Judgment, that no time or place was alledged of the Request. Sed non allocatur, for it is in nature of a debt, and it is not here appointed to be upon Request, but otherwise it is of a thing collateral. (18) Ante 74.

Hopkins *versus* Stapers.

A Sumpfit. For that in consideration he had sold and delivered One thousand couples of Newland Fish, Ad usum proprium of the Defendant ; and in consideration he had shipped the said Fish, and agreed to transport them from Bristol to St. Lucar in Spain, and to re-transport from thence the value of the Fish, to London or Bristol ; Secundum usum mercatorum, the Defendant promised to pay to him One hundred and twenty pound, upon the arriving of them in Portu St. Lucar ; and alledges in facto, that he arrived with them ad Portum St. Lucar, and had re-ported from thence goods, to the value of the Fish at London, Secundum usum meacatorum. Upon Non Assumpfit pleaded, and found for the Plaintiff, Egerton moved in Arrest of Judgment : First, That it is no consideration ; for he saith he had sold and delivered the Fish to the use of the Defendant, but sheweth not to whom ; by which it might appear, the property was altered by the sale. Secondly, he said in consideration he agreed to transport, but saith not with whom ; and it may be he agreed with a stranger, which doth not bind the Defendant. Thirdly, The promise is, he shall be paid when he arriveth in Portu St. Lucar, and he shewed he arrived ad Portum ; which is no performance of the consideration ; and there is a difference between (ad & in) in conditions and considerations, though not in charges ; and he relied upon 16 H. 7. 9. 3 H. 4. 9. Fourthly, he shewed, that he brought goods of that value to London, but sheweth not to whom the property of the goods did belong ; so they might be the goods of a stranger : Curia contra in omnibus. For to the first and fourth, they said it shall be intended, that the goods were sold and delivered to the Defendant, and that he re-reported the goods of the Defendant ; for it is Secundum usum mercatorum, which implieth both. To the second, it shall be intended that he agreed with the Defendant himself ; and if it were with a stranger to his use, it is all one. To the third, (ad & in) are of the same effect, and shall not be intended otherwise ; and it was adjudged for the Plaintiff. (19)

Mead *versus* Bygott.

(20) **A** Sumpsit. That whereas J. Arnold levied a Plaintiff in the Court of Stepney against Stokes, and a precept to attach the goods of Stokes were directed to the Plaintiff, being Bailiff there: And whereas he attached Stokes by two quarters of Corn, and delivered them to the said Arnold to deliver them at the next Court; the Defendant assumed to save him harmless of the said Corn. Upon Non Assumpsit pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment, that the consideration and promise was against Law, and so void; and so the opinion of the Court. For first, Attachment cannot be of Corn out of Sacks; secondly, if it may, it is to be kept by the Bailiff, and he ought not to deliver them out of his hand to the party Plaintiff; and so the promise is against Law, and void.

Ante 178.

Sir Richard Buckley *versus* Wood, Mich. 31 & 32 Eliz.
Rot. 381.

(21)
Co. 4. 14. b.
Ante 193.
Post. 247.

Action for words, and declared, That whereas the Defendant did exhibit a Bill against him in the Star-Chamber, 30 Eliz. containing (inter alia) that he was a noseler of Theeves, Murderers, and Pirates, &c. and recited a great part of the Bill; that afterwards the Defendant at Pausbery in Salop, 7. May, 31 Eliz. said, He would justifie his Bill to be true in every part, &c. The Defendant pleads, that the said seventh of May at Westminster, in the County of Middlesex: He was demanded by the Lord Chancellor, if his Bill were true; and he said it was true in all points, absque hoc, Quod dixit prædicta verba, before or after the said day, Aliter vel alio modo: And upon this the Plaintiff did demur, and Mich. 32 & 33 Eliz. Tanfield argued, that the matter in the Declaration is not sufficient to maintain the Action; for it is for exhibiting the Bill, and saying it was true in all points. As to the first, For exhibiting a Bill in course of Justice, no Action lieth; and if it be false, he shall be punished by costs given in the Star-Chamber, and not by Action. And although the matters are not punishable there as Felonies, yet they are punishable there as misdemeanors in him who was a Justice of Peace, and a Deputy Lieutenant of the County, and may be punished for abusing his Office, 11 Eliz. Dyer 285. a scandalis magnatum; for an Action for forging a false Deed brought against the Lord B. held not maintainable. And Mich. 27 & 28 Eliz. in this Court between Tuthill and Osborne, for exhibiting divers Articles to the Justices of Peace at the Quarter-Sessions, to have the Good-behaviour; although they were false, yet not actionable, for it is in a course of Justice: So Mich. 8 & 9 Eliz. between Stanley and Curson. One was brought in by Subpoena ad testificandum, and upon his oath declared matter of Infamy against the Plaintiff; yet he coming in by course of Justice, and if he swears falsely, he may be punished for Perjury; it was adjudged an Action did not lie. And for the other words in Justification of his Bill, no Action lieth: For it is not said, he shewed the contents of his Bill, and so can be no slander; and for saying he had a Bill depending against one, is no slander. Coke contra, He agreed, that if

Co. 4. 14. b.

if his Bill of Complaint was in course of Justice, no Action did lie; but here he complains of divers matters which did not concern himself, but others, with which he had nothing to do; and it was the Lord Clintons Case, 19 Eliz. And this is no Star-Chamber matter, which toucheth his life; and one Leonards case was dismissed for the like cause, where one exhibited an English Bill in the said Court, containing divers slanderous matters, an Action upon the case did lie, and Pasch. 23 Eliz. in this Court between Bowes and Stanley, which was entred Trin. 21 Eliz. Rot. 559. This very cause was adjudged, Where one exhibited a Bill in Star-Chamber, and after came into the Country, and spoke of the matters of his Bill at Stafford, and affirmed them to be true, and adjudged an Action lay; for he shewed not his counsel, but publickly, and our Declaration was framed upon that president; Et adjournatur. V. Postea, 33 & 34 Eliz. Placito 7. Co. 4. 15. a.

Chambers and Johns.

They were indicted for incroaching upon the High-way, Et unum Tenementum ibidem erectaverunt, where it should be crexerunt; for there is no such Latine word as erectaverunt; and it is not Anglice did erect, which had been good. And for this cause it was discharged. (22) Co. 5. 121. b. Ante 137.

Penhallo's Case.

He was indicted upon the Statute of 5 Edw. 6. cap. 4. for drawing his Dagger in the Church of B. against J. S. And doth not say (according to the Statute) to the intent to strike him; and for this cause it was void: But then it was moved, if this were not good as for an Assault, that he might be fined upon it; but per Curiam, it is void in all: for being indicted upon the Statute, it is void as to an offence at the Common Law. (23) 5 E. 6. c. 4. Post. 319. 494. 697. Post. 307.

Wing *versus* Harris.

Ejectione Firmæ. Upon a special Verdict. H. 8. was seised of certain Lands called Burnels, and of the Site of the Hospital of St. Johns in Wells: He demised Burnells to Aylsworth for twenty one years, and afterwards granted the Reversion of it (inter alia) to the Bishop of Wells in Fee; and afterwards the Bishop granted those Lands (inter alia) to Edward the Sixth, which did descend from him to Queen Mary: and afterwards Queen Mary demised the Lands to the said Aylsworth for sixty years, not reciting the first Lease made to Aylsworth. This case was argued Mich. 32 & 33 Eliz. and Pasch. 33 Eliz. adjudged, that the Lease for sixty years was void, for not recital of the Lease for twenty one years: For although by the taking of the second Lease the first was drowned, yet at the instant time of the taking of the second Lease it was in esse; and therefore ought to have been recited, especially being a Lease upon Record; but of a Lease by matter in Fact, they agreed there need be no recital, The objection against it was, because the Reversion had been conveyed to the Bishop; so in his time the Lease might have determined without any matter of Record. And for this cause, when it came to the Queens hand, it need not be recited: But the Court held, For as much as Aylsworth was the (24) 2 Rol. 290. Moor 415. & 6. 3 Leon. 242. Hob. 808. 1 Cr. 198.

the person that was the Lessee, and might well have knowledge of it, if it had been so done, and no such thing is done, when the Reversion was in the Queens hands, it is as if it had never been granted from the Crown; and for this cause it was adjudged accordingly. There were other points in the case, but it was resolved only upon this.

Termino Paschæ, 33 Eliz. in Communi Banco.

The Warden of All-Souls Colledge in
Oxen *versus* Tanworth.

- (1) **A** Writ of Right was brought, by Custos & Collegium of All-Souls in Oxon; and the Writ was *Quod clamant tenere de nobis in Liberam puram & perpetuam elemosinam, & quod clamant esse jus & hæreditatem suam, &c.* And exceptions were taken to the Writ. First, it ought to be in *Liberam elemosinam* and not *Puram & Perpetuam*. Secondly, it ought to be *Elemosinam* with a double *ce*. Thirdly, they ought not to shew any tenure in special, but generally *Tenant de nobis*. Fourthly, for that they say not *In jure Collegii*; *Sed non allocatur*. For the first is but Surplussage, and not material; the second, the common course is so, and therefore it is good. Thirdly, they did well to express the Tenure; for otherwise it might be taken for a Tenure in capite, which they do well to avoid. Fourthly, when the Writ is brought by Custos & Collegium, this cannot be but *In jure Collegii*, as in their Incorporation; for they have no other capacity, and the presidents are both ways.

Perrot *versus* Austin.

- (2) **T**he Case was, A. covenanteth with B. to put his son an Apprentice to C. or otherwise, that his Executors shall pay B. twenty pound. A. doth not put his son an Apprentice to C. and dieth; B. brings debt against the Executors of A. And it was resolved by the Court, that it lieth not for two causes. First, It cannot be a debt in the Executor, where it was no debt in the Testator; And if one covenants to pay ten pound, debt lieth against him or his Executors, as 40 Edw. 3. & 28 Hen. 8. Dyer, are; but if he doth covenant, that his Executors shall pay ten pound, an Action lieth not against them. The second reason: The first part of the Deed sounds in covenant, and the second part shall be of the same nature and condition. *Quære* of this Reason.

Co. Lit. 386. a.

Oglethorp *versus* Hyde.

- (3) **D**ebt upon an Obligation to perform Covenants; the Defendant pleadeth generally performance of Covenants, where some are in the Negative, and some in the Affirmative; it was held, that this is but matter of Form, and is aided by the Statute of 27 Eliz. except the party sheweth it for cause of his Demurrer, that some of the Covenants are in the Negative, and some in the Affirmative; for the Court shall adjudge according to the truth of the matter; But if any of the Covenants are in the

Co. Lit. 303. b.
Co. 8. 133. b.
2 Cr. 560.

the disjunctive, it is otherwise; for the Court cannot know which of them in the disjunctive he hath performed. Co. Lit. 303.b.

Ascue versus Fuliambe.

Audita Querela, because Execution was sued upon a Statute acknowledged in the City of Lincoln as a Statute-Merchant, which had but one seal, where it ought to be with two seals according to the Statute De Mercatoribus, 13 Ed. 1. And issue was joyned, if it were sealed with a seal of two pieces, and tried for the Plaintiff by a Jury of the City of Lincoln. And it was alledged in Arrest of Judgment, that the issue ought to be tried by the Certificate of the Mayor, and not per pais. Curia contra, For this is a matter of fact, and no parcel of the Record. The second cause, Lincoln is in the Bargent, so it shall be intended to be tried by pais of the County of Lincoln, whereas it was and ought to be tried by a Venue of the City. Thirdly, a Writ of Error lieth upon this matter, and not an Audita Querela, 18 Ed. 3. 25. where Error is in suing Execution. But it was held clearly, that where a Statute is erroneously acknowledged as here, no Writ of Error lieth, but an Audita querela; for this is no Record. But if it be well acknowledged, and removed hither, and Execution is here erroneous, Error lieth thereof. Fourthly, this shall be taken as a Statute acknowledged according to the Statute of Acton Burnell of 11 Ed. 1. and not according to the Statute of 13 Edw. 1. De mercatoribus: So it is good for the goods and body; Curia contra: For the Comisee having sued Execution upon it as a Statute-Merchant, he shall not now be received to say, but that it was acknowledged according to that Statute for which the Plaintiff had Judgment. V. Pasch. 36 Eliz. in Banco Regine, Post. 319. Placito 6.

Brunkhorne's Case.

Scire facias against B. and others, which were bail for one Parker; and their Recognizance was, if P. were condemned, that he shall pay the Debt within such a time, or render his body to prison. P. being condemned, and not rendering his body to prison, Scire facias was brought against them: Upon this Recognizance they pleaded, that P. such a day before the day in the Recognizance, paid the money. And this was held a good Plea without a Specialty, for the Recognizance, as to them, is but as an Obligation with a Condition; upon which they might well plead performance. V. contra. Ter. Ante 132. Pasch. 31 Eliz. Ordeways case. Antea Pasch. 31 Eliz. but the party in the Scire facias, upon this recovery cannot plead it, except satisfaction be acknowledged upon Record; for by nude payment he shall not avoid a matter of Record. Post. 238.

Leonard versus Bacon.

Formedon. The Tenant pleads Non-tenure, and upon this they were at issue; and it was found, that before the Writ purchased, the Tenant infeoffed divers persons, to the intent to defraud them which had cause of Action for the same Lands, and notwithstanding he took the profits. And this Verdict was adjudged for the

the Demandant, for the Feoffment was void against him by the Statute of 13 Eliz. 5.

Hayes versus Allen.

- (7) **S**Ur cui in vita of a Messuage, the parties being at issue, it was found by Verdict that a Discontinuance being of the Messuage, the Discontinuee pulls it down, and erected a new house, part of the Land discontinued, and part upon his own Land adjoyning; and if upon this matter the Writ was well brought of the entire Messuage, or that it was to have been brought of such part of the house; and how the Judgment should be in this case, was the question. And after Argument, it was adjudged for the Demandant, that the Writ was well brought by the name of the whole Messuage, and there needed not Foreprise; for the Action is to be brought as the Land is at the time of the bringing the Action, and there is no other form of Writ in the Register but for the intire house; and it was adjudged, that the Demandant should recover; but the Judgment was entred specially, that the Demandant should recover Messuagium prædict^o, scilicet, So much in length, and so much in breadth, according to what the Verdict found upon the Land in demand. V. Cokes, Entries 642. The Record of this case. V. 39 Hen. 6. 8. 33 Ed. 3. Entries 80. 11 H. 4. Dower 175. & 179. 16 Ed. 3. Brief 650. 32 H. 8. Dyer 47. Fitz. N. Br. 192. Nota, that Mich. 33 & 34 Eliz. Rot. 111. a Writ of Error was brought, and the Error was assigned in the very point adjudged; and after Argument, the Judgment was affirmed.

Post. 286. 290.
611.

Clark versus Penruddock.

- (8) **T**he case adjudged as it is reported, 5 Co. 100. b. against the opinion of Anderson; but two Exceptions were taken to the Writ. 1. That it did not warrant the Count, for the Writ was Prosterne Domum, and the Count was Prosterne Penthouse, and so variant and not warranted by the Writ, Sed non allocatur; for so is the form in the Register, Prosterne Domum, where only part is to the Pulfance. 2. Exception, That the Writ is Modo querentis, but sheweth not how the Messuage came to him; for if he cometh to it in Le post, as by Disseisin, there is no colour for him to have remedy. Sed non allocatur, for the Count maketh it sufficiently certain.

Post. 241.
Post. 659.

Atkinson versus Atkinson.

- (6) **A**ction for words, viz. I have served thee with the Queens Letter, for stealing of goods out of my Mothers house; upon not guilty pleaded, and found for the Plaintiff, it was adjudged, that the Action did not lie; for the Defendant doth not say expressly, that he had stolen the goods, but that he had served him, &c. which may be, though he did not steal them; so it is only a charge by Implication. Periam cited a case of one Nowel a Clerk of this Court, where the words were, Thou wast cubbed up for forging of Writs, and ruled no Action lay.

2 Cr. 154.
Hob. 177.

1 Cr. 268.

Bighton *versus* Sawle.

It was agreed by the Court, that where Judgment was given (8)
upon Demurrer, that after a Writ of Enquiry of Damages is
returned, before a new Judgment given upon it, the Defendant
may alledge any matter in Arrest of Judgment: But Periam said, Co. II. 40. a.
this is where the damages are the principal, but in debt where the
debt is the principal, and he hath Judgment to recover, and a Writ
of Enquiry of Damages, it is otherwise. And Anderfon said, that
in Prat and Russels case where a Judgment was given in the Queens
Bench, before the Statute of 27 Eliz. and the Writ of Enquiry
of Damages was returned after the Statute, and then the Judg-
ment was given upon it; that this Judgment by the opinion of all
the Justices was reverfable by force of that Statute.

Termino Paschæ, 33 Eliz. in Scaccario.

Owen Joans *versus* Elizabeth Hoel, Trin. 32 Eliz.
Rot. ultimo.

EJectiōe firmæ of seven Closes, one called Greenmead, and so gave (1)
to the other several names; after Verdict found for the Plain-
tiff; upon not guilty pleaded, it was moved in Arrest of Judgment;
that he ought to count of a certain number of Acres; for now no
Writ of Execution can be awarded to put him in possession, and
so it is in every Præcipe for Land. Curia contra; That is well enough;
for when a name is given to every Close, although the content of Co. II. 55. a.
Post. 339.
the Acres are not mentioed, viz. so many of Land, so many of
Pasture, &c. it is sufficient, though it were more formal to expreſs
the Acres; and it is aided by the Statute of Jeofails, and the Court
is ascertained of the truth. And Popham Attorney said, he had known
it thice so adjudged; and the Plaintiff had Judgment.

Termino Trinitatis,
Tricesimo tertio ELIZABETHÆ,
in Banco Reginae.

Vander Plunken *versus* Griffith.

(1)
8 El. c. 2.

Action upon the Statute of 8 Eliz. for causing him to be arrested in the name of Baildree, and three others, where the three others never consented to it; and that this was for veration, none of them having cause of Action: The Defendant pleaded not guilty, and found for the Plaintiff. And it was moved in Arrest of Judgment, that this case is not within the Statute; for if he causeth one to be arrested in the name of one of the Plaintiffs, though the other do not assent, he is out of the Statute; for he hath colour to do it, and it cannot be said to be maliciously done; for one of the parties may give him sufficient authority to sue: To which it was answered, that then the Statute shall be defrauded; for then one that is a beggarly person, and cannot pay costs, yet peradventure may consent that one shall sue in his name, and of the others, especially in an Action of Trespass; but otherwise in an Action of Debt: And of this opinion were Wray and Gawdy; but the other Justices contra, that it is out of the Statute, for the reason given before. But an Exception was taken to the Declaration, that the Statute was mis-recited; for the Statute is, If any person shall voluntarily procure any other to be arrested, to answer in the Court of, &c. where any privilege is used to hold Plea in Actions personal. And where the Statute is recited, where any privilege is used to hold Plea in any Action, omitting personal; so as recited, it refers to all actions: And so was the opinion of the Court, that it was a plain mis-recital; and though the Statute is general and need not to be recited, yet when he reciteth it falsely, it makes the Plea ill: And for this cause principally it was adjudged, that the Plaintiff Nihil capiat per billam.

Post. 245.
Ante 57.

Tedcastle *versus* Holliwell, Intrat. Mich. 32 & 33 Eliz.
Rot. 423.

(2)
2 Rol. 594.

DEbt upon an Obligation. The Condition, that whereas J. D. hath bound himself to be an Apprentice with the Plaintiff; if the said J. D. during his Apprenticeship, or any other by his assent or procurement, take or riotously mispend any goods of the Plaintiff; if then the Defendant within one month after notice thereof given to him, satisfy and pay to the Plaintiff for all such sums of money or wares, &c. so taken or notoriously spent by the

the said J. D. or any other by his procurement or consent, the same being sufficiently proved, that then, &c. the Defendant *protestando* that the said J. D. nor any person by his consent (not making mention of procurement) had not taken nor riotously spent any goods of the Plaintiff, &c. For Plea saith, That the Plaintiff had not sufficiently proved before Action brought, that the said J. D. had taken or riotously spent any goods of the Plaintiff: Upon which Plea, the Plaintiff demurred; and it was argued by Daniel for the Plaintiff, and by Godfrey for the Defendant. And the question only was, if the proof should be in this action, or by any other means before? and what proof shall serve. V. 10 Edw. 4. 11. 7 Rich. 2. Bar. 241. And Scroggs case, *Post.* 470. *Ante* 205. Anrea. Mich. 32 & 33 Eliz. And Gawdy and Fenner conceived the proof must be before the action brought by some collateral means, (but said not what means or in what manner) for the Defendant is not to pay, but so much as is taken and proved to be taken or spent, &c. and this within one month after notice, so he is to have time to pay after proof made, and notice given; and this cannot be in this action. But much was not spoken to it, for there was an incurable fault in the pleading: For he for Plea saith, that the Plaintiff had not made proof that J. D. took or riotously spent, &c. but speaks not, that any other by his consent or procurement; and so doth not answer to the substance of the Condition, and for this it was held clearly ill: And for this cause it was adjudged for the Plaintiff, although it was said, *Qui per alium facit per seipsum facit*: So the Plea extends to it, but the Court *contra*. But for the matter in Law, they said it was strong against the Plaintiff. *Post.* 239.

Salteston and Offely *versus* Payne.

The Plaintiffs Sheriffs of London brought an action upon the Case; for that the Defendant being in Execution under their custody for Fifty three pound, at the suit of Spicer, had escaped, the said Spicer not satisfied; for which they were compelled to pay the debt; the Defendant pleads, confessing all the matter; and that after this escape Spicer had acknowledged satisfaction of Record. And upon this it was demurred; and the Court held clearly, that an action upon the Case lieth against a prisoner for an escape out of Execution, to the intent to make the Sheriff chargeable with the Debt; and so adjudged between Hill and Holt, *Quod vide antea*: *Ante* 53. That the Sheriff shall have an action, *Quia onerabilis*. Fitz. N. Br. 130. b. 13 Hen. 7. 2. 14 Hen. 7. 1. But here because the Defendant is to be charged, for that the Plaintiffs are chargeable with the Debt, and not otherwise, and the Defendant hath pleaded satisfaction acknowledged upon Record, which may be by his means, which is not denied; for otherwise the Plaintiff might have shewn the special matter by Replication; and so the Plaintiffs are to have no loss, and so no cause of action, it was adjudged for the Defendant, and the Plaintiff *Nihil capiat per billam*. (3)

Mountney *versus* Andrews.

Scire facias upon a Judgment in debt: The Defendant pleads, that upon a *Fieri facias* directed to the Sheriff of the County of Leicester; (4)

Ante 233.
Post. 390.
Ante 209.

Leicester; for levying the debt, he by force of it, took divers sheep of the Defendants for the debt, and yet detaineth them: And this was ruled a good Plea per Curiam; although he doth not alledge that the Writ is returned, and although the Writ is conditional, Ita quod habeas denarios, &c. For the Plaintiff hath his remedy against the Sheriff, and the Execution is lawful, which the Defendant cannot resist. Vide antea, Rooks case, Mich. 32 & 33 Eliz. fol. 208. 9.

Allen *versus* Hill, Mich. 32 & 33 Eliz. Rot. 54.

- (5) **E** Jecione firmæ, for a house in Cornhil, London; upon a special Verdict the case was; Fr. Benson being seised of the house in Fee, 4 Eliz. devised it to Agnes his Wife for life; and after to the Heirs of his body, the Remainder to Th. Benson his Brother in Fee. Proviso, That if the said Agnes clearly departs out of London, and dwell in the Country, that then she shall have a Rent out of the said house, &c. And found further, that Francis died without issue, and that Th. Benson died, and that R. is his Heir, and that afterward, 15 Eliz. Agnes totaliter departed from London, and went to Milton in Suffolk: And after the said R. before entry made by him, and the Executor of Fr. released to Agnes; and afterwards entred, and let to the Plaintiff, and that Agnes married one Huggins; and the Defendant entred by his commandment. The substance of the matter was, if this proviso doth determine the estate before entry, for if so, she was Tenant at Sufferance, and the Release could not enure to her estate: For it was agreed, it was a good Proviso to make her estate to determine; although there be no words (to cease) or that it shall be void; but being in a Will, it is implied in the words, (that then she shall have a Rent) which cannot be, if her estate be not determined. And the Justices said, she is but Tenant at Sufferance; for if the devise had been express, That if she doth such an act her estate shall cease, after such act done, though she continue in possession, and dieth, this is no Freehold in her; and here is as much in substance. And Wray said it was held at an Assembly of all the Justices, That if Tenant per auter vie continue in possession after the death of cestuy a que vie, he is but Tenant at Sufferance, and his descent shall not take away an entry; which Gawdy agreed, and that 18 Edw. 4. 25. is not Law: But there was a default in the Verdict, for it was found that she totaliter departed from London, and went to Milton in Suffolk: but it was found, that she dwelt out of London, and this is part of the Condition: And this not being found, it is not found that the Condition is broken; and then notwithstanding any matter found, the entry of the Defendant is lawful. And it was moved, That as to it, a Venire facias de novo should issue to examine this point better, if she dwelt in the Country; for it was said in this point, the Verdict was not well examined. But the Court held, that the Verdict is full; upon which a Judgment might be given, and then no Venire facias de novo is to be awarded; for it is found for the Defendant, when it is not found that the Condition is broken; and for this cause only it was adjudged for the Defendant. But then it was objected, that the life of Agnes was not found, and then the Defendant cannot enter. Fenner said, it shall be intended she is living

2 Cr. 170.

living: for the Jury did not doubt of it, for they find that if his entry upon the matter found is lawful, that he is not guilty: So they doubted of nothing but that point, and so it was adjudged in 28 Eliz. in this Court. And Judgment was, Quod querens nihil capiat per billam. Co. 5. 97. a.

Simonds *versus* Lawnd.

T Respass. The Jury found a special Verdict, That R. L. Father of the Defendant was a Copyholder of the Land in Fee, and surrendered it to the use of the Defendant in Fee, upon condition he should perform the Covenant in such an Indenture: The Defendant after admittance surrendered the Land to the use of the Plaintiff in Fee, upon condition if the Defendant paid ten pound, the surrender to be void: The Defendant neither paid the ten pound, nor performed the Covenants in the Indenture: The Father enters, and dieth seised, and it descends to the Defendant, and he enters, upon whom the Plaintiff enters: The question was, if this entry were lawful, and adjudged it was not: for by the entry of the Father, both the Surrenders are defeated. So the Defendant may confess and avoid what was done to the Plaintiff, and it was adjudged for the Defendant. (6)

Johns *versus* Gittings, Hill, 33 Eliz. Rot.

A Ction for words, Thou hast played the Thief with me, and hast stoln my Cloath, and half a yard of Velvet. The Defendant pleaded, that the Plaintiff was his Taylor, and that upon the day of, &c. he delivered to him a yard and half of Velvet, to make him a pair of hose, and he made them too streight. Ratione cuius, he spake these words, Thou hast stoln part of the Velvet which I delivered you; absque hoc, That he spake any words aliter vel alio modo. Upon which the Plaintiff demurred; for the Plea and Traverse do not confess any words of slander, and then the Traverse is meerly void. L. 5 Edw. 4. 26. 9 Edw. 4. 15. 37 Hen. 6. 34. 22 Hen. 6. 17. And of this opinion was the Court; but a manifest fault was alledged in the Plea, for he did not answer to the words, Thou hast stoln my Cloth; so it is vicious and cannot be cured, and it was adjudged for the Plaintiff. Ante 237. (7)

Gastrell *versus* Townsend.

A Ction for words. Thou hast sought the blood of my Husband, and wast his death; for if thou hadst been an honest Woman, he had been alive yet. And avers in facto that her Husband was killed: It was moved, the Action lieth not; for it is not said, she did any unlawful act; and it was cited to be adjudged, Mich. 18 & 19 Eliz. That for these words, Thou wert the death of J.S. Action lieth not, for it may be by grief. But it was ruled here, that the Action lieth, for they shall be taken to be spoken in Malam partem, and it was adjudged for the Plaintiff. (8)

Elsden & Page *versus* Barnes, Hill. 33 Eliz. Rot. 519.

- (10) **E**rror to Reverse an Attlay in Trespass. 1. The Plaintiff in the original was named Barnes, and in the exigent, Bernes; so an (e) for (a) Gawdy held it no Error, because it was in the name of the Plaintiff. Fenner contra, For the exigent issued at the suit of a wrong person. 2. The original was blaba sua, and the exigent was blada; and this was held a plain Variance, and the Attlay reversed.

Ante 50.

Downes *versus* Savage, Trin. 32 Eliz. Rot. 772.

- (11) **E**rror to Reverse a Fine in Chester, the Conusance was taken of it by one, and the Dedimus potestatem to him, and another jointly; and this was erroneous.

Ashbrooke *versus* Snape.

- (12) **I**t was agreed by all the Justices, that if one be bound in an Obligation, and afterwards promiseth to pay the money, Assumpsit lieth upon this promise; and if he recover all in damages, this shall be a Bar in Debt upon the Obligation.

Post. 242 283.
1 Cr. 415.
2 Cr. 110.

Barnes *versus* May.

- (13) **A**ssumpsit. That whereas he sold to the Defendant a pack of wooll for twenty pound, to be paid at a day certain, and licet requisitus, viz. at such a day and place, &c. he had not paid it; and that he sold to the Defendant another Pack of Wooll for ten pound to be paid when required, Et licet similiter requisitus, &c. without alledging day and place, yet adjudged good, for it shall refer to the first day and place of request.

Termino Trinitatis, 33 Eliz. in Communi Banco.

The Queen *versus* the Archbishop of York and S. Buck.
Int. Hill. 33 Eliz. Rot. 2350.

- (14) **Q**uare impedit, for disturbing to present to the Church of Ackworth, as in right of the Dutchy of Lancaster, and declared, that whereas Henry the Eighth was seised, &c. and presented R. Dean, Henry the Eighth dieth, and it descended to Edward the Sixth, and from him to M. Mary, and from her to Queen Elizabeth, and that it became void, &c. The Archbishop pleaded, that Heath his predecessor was seised of the Advowson as in gros, and collated to it J. S. his Clerk, who was admitted, instituted, and inducted, and died seised; and so pleaded three several Collations one after another, and demanded Judgment if Action lay against him by the Queen; the other Defendant Incumbent pleaded the same Plea. And upon this it was demurred; and the question was, if this double or treble usurpation put the Queen out of possession of an Advowson which she had in right of the Dutchy of Lancaster; and adjudged it did not: For she shall have her privilege

Iedge in this as if it had been in Right of the Crown; and for such aduowson a double usurpation did not put her out of possession as it hath been adjudged. And here is no usurpation, but a collation which shall not put a common person out of possession; and it was adjudged for the Queen, and a Wit to the Arch-Bishop of Canterbury: nota, an exception was taken that the Wit was general, and did not mention that the Queen had it in Right of the Dutchy, but the Count was special, and shewed it, but it was awarded good; and so is the Register, and a president shewn in 32 H. 6. accordingly.

Post 519.

Co. 6. 29. b.

Post. 811.

Ante 234.

Hall *versus* Turbett.

R Eplevin: The Defendant justifieth by reason of a Fine assessed by a Steward in a Court Leete, for not coming to the Court and doing his suit; and for it a distress taken; and upon this it was demurred. And all the Justices held that the Assessment being without presentment, that he ought to do suit at Court, was without Warrant; and in such case he shall be rather amerced than fined; for Anderson said, for such offences as are within the Comuissance of the Steward as Judge, and of which he hath the view, he may Assess a Fine, but of others not, except they be presented; and non constat to the Steward if he were resident within the Leete or not, or what cause he had for his absence. And Periam said, if he shall Assess the Fine, he will Assess it too grievous; and so the party shall have no remedy; but for Amerciaments, a moderata misericordia lieth, 10 H. 6. 7. and for this cause the Plaintiff had Judgment.

(2)

Co. 8. 41. a.

Kindler *versus* Leverfage.

R Eplevin. The Case was, A. seised of the Land made a Lease at Will rendring six pound per annum, and by another Deed reciting this Rent, he granted eundem redditum to the Defendant for his life; the Lease at Will determines; the question was if the Grantee shall have this Rent for his life according to the words of the grant. And resolved he should, for eundem shall be taken for talem, viz. eundem in specie: viz. six pound per annum, as in the Queens patent, of a grant of eadem libertates to Islington, quas London, &c. this is not the same, but tales libertates; and it was afterwards adjudged for the Avowant, that the Rent shall continue during his life.

(3)

Margaret Palmes *versus* the Bishop of Peterborough.

Quare Impedit. He pleads that he demanded of J. S. the Presentee of the Plaintiff to see his Letters of Orders, and he would not shew them; and for this cause for that he was not ascertained whether he were Deacon or not, and also he demanded of him Letters missive or Testimonials testifying his ability; and because he had not his Letters of Orders, nor Letters missive, nor made

(4)

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proof of them otherwise to the Bishop, he desired leave of the Bishop to bring them; and he gave them a week, and he went away, and came not again, and that the six months past, and he collated by Laps; and upon demurrer upon it, it was adjudged for the Plaintiff, for these were not causes to stay the admittance, and the Clerk is not bound to shew his Letters of Orders or missive to the Bishop, but the Bishop must try him upon examination for one and other; and the Plea is not alledged in fact, but pro eo quod non monstravit, so all cometh under the (eo quod) and so no part of it is traversable; and for one and the other cause it was adjudged for the Plaintiff.

Co. 5. 57. a.

Reade *versus* Johnson.

(5) **A**ssumpsit for Twenty four pound; and declares upon an indebtedness *assumpsit*; Defendant pleads *non assumpsit*; the Jury found that the Plaintiff let to the Defendant Land for Seven years rendring Eight pound per annum, and the Rent was arere for Three years; and that the Defendant did owe no other Debt, or made any other promise, & si &c. And it was held by the Justices, that the Action did not lie, but only an Action of Debt.

Ant. 240.
Co. 10. 77. a.
Post. 786. 859.

Simpson *versus* Titterell, Mich. 32 & 33 Eliz.

Rot. 914.

(6) **E**jectione firmæ: One Bendlows let the Land to the Defendant for years, proviso *semper*, and it is further Covenanted that the Lessee shall not assign his term to any other, except to the lessor paying as much as another; and if the lessor will not have it, that then he may alien it to none except his mother or his son; the Lessee assigned it to his mother, Lessor entered and let it to the Plaintiff; the question was if the words were a Condition, or only a Covenant. And all the Justices held it was a good Condition to defeat the Estate; for Periam said, proviso always implieth a Condition, if there be not words subsequent which may peradventure change it into a Covenant, as where there is another penalty annexed to it for non performance, as Dockwrays Case, 27 H.8. 14. but it is a rule in provisos, where the proviso is that the Lessee shall perform or not perform a thing, and no penalty to it, this is a Condition, otherwise it is void; but if a penalty is annexed, aliter est; to which the rest of the Justices agreed. And it was adjudged for the Plaintiff that the entry was lawful.

1 Rol. 410.

Co. Lit. 203. b.
Co. 2. 71. b.
Post. 385.
Ant. 73.

Barret *versus* Hevesett, Pasch. 33. rot. 810.

(7) **T**respas for assault, Battery and wounding, apud Downham in the County of Suff. 26 September, 21 Eliz. the Defendant pleaded *quoad vi & armis*, not guilty, and *quo ad residuum trasgressionis actio non &c.* for he said that Philip Earl of Arundel was seised of sixty acres of pasture called Shepherds Hole in Thetford in the said County of Suffolk,

Suffolk, and let them to Ro: Whitney, 28 Eliz. for twenty one years, and that the Plaintiff tempore quo clausum prædict' fregit & cuniculos ipsius Rob. ibidem inventos cum retibus & aliis ingeniis capere voluit, for which the Defendant as servant to the said R. and by his commandment tempore quo & molliter manus imposuit upon the Plaintiff at T. in the said sixty Acres to hinder him from taking and carrying away the said conies, quæ est eadem insultus & transgressio unde, &c. absque hoc that he is guilty de transgressione & insultu, &c. alibi vel alio modo in Dict' Com' Suff. prout, &c. & hoc. and upon this it was demurred in Law, and adjudged for the Plaintiff. Nota, this Case was taken out of the Record delivered to the Reporter by Brownlow, Prothonotary.

Termino Trinitatis, 33 Eliz. in Curia Wardorum.

Hartopps Case.

Elizabeth Hartopp devised Lands to Denham and three others in Fee, to the use of Th. Hartopp her Brother, and the heirs males of his body; and for default of such Issue, to the heirs females of his body, with other remainders over. Tho. dieth having Issue a Daughter, his Wife enseint with a Son, which is afterwards born. And afterwards Elizabeth H. dieth; The question was, if the Son or Daughter or neither of them should have the Land; and upon argument ruled by Wray and Anderson chief Justices, Kingsmill and Morris Surbeyor and Attorney of the Court of Wards, that neither of them should have the Land; for it being devised to the use of Tho. ut supra, and he dying before the deviser, this cannot vest in the heir, for it never vested in the Ancestor; for the words (heirs) are not to give the immediate Estate, but by way of limitation; and if this shall vest in the heir, it shall vest in him as a purchaser, which was not the intent of the deviser, and so shall be void; and they conceived the Case doth not differ from Bret and Rigdins Case; but because the Office was not fully found, they would not resolve it, but a melius inquirendum was awarded.

Termino Michaelis,
Tricesimo tertio, & quarto ELIZABETHÆ,
In Banco Reginae.

Kenfon *versus* Reading, Int. Hill. 30. rot. 542.

(1)
2 Rol. 454.

Ante 6.
Hob. 170.

TRESPASS, The Case upon a special verdict was. The Queen had the Rectory of Greenwich to which the Manor of D. did appertain; and granted them per nomen Rectoriæ, and all the Lands, Tenements, Underwoods, and Hereditaments to the same belonging, Salvis semper & omnino reservatis omnibus grossis arboribus boscis & maheremiis de & super præmissis. And if by these words Boscis, the Underwoods which are before let expressly were excepted or not, was the Question. Winter for the Plaintiff argued that the Underwoods are excepted. Foster, contra; for the underwoods being granted by express words cannot be excepted no more in the Case of the Queen then of a Common person; for the exception of that which is expressly granted is void, otherwise it is of a thing that passeth only by implication; and here the word (grossis) extendeth to boscis, arboribus, &c. and so nothing is excepted but grossis arboribus, &c. and not the Underwoods. And so was the opinion of the Court, that an exception in the Queens grant cannot be of that which is before expressly granted, and her intent here is apparant by the word (grossis) to except only the great Wood, and it shall be referred as well to the Trees as to the rest; and it was adjudged for the Defendant.

Hill *versus* Pilkinton, Hillar. 32. Rot. 171.

(2)

DEbt upon an Obligation, the Condition was to perform Covenants in a Lease, the Defend. pleads Covenants performed. The Plaintiff by replication shewed the Covenants in the Indenture; whereof one was that he should enjoy such Lands let to him quietly without interruption, and sheweth in fact, that the Defendant 20 Martii. 30 Eliz. had disturbed him, and in that assigneth the breach; the Defendant by rejoinder sheweth that in the Indenture there was a proviso, that if he payeth 10 l. the 31 of March 30 Eliz. that then the Indenture and all therein contained shall be void: and alledgeth that he paid the 10 l. at the day (but this was after the disturbance supposed) and hereupon it was demurred; and after opening of the Case by Bevercotts for the Plaintiff it was adjudged without any great argument for the Plaintiff; for by the Covenant broken before the Condition performed, the Obligation was forfeited;

feited; and it is not material that the Covenants become void before the Action brought. But Wray said, that if the proviso had been that upon the payment of the 10l. as well the Obligation as the Indenture should be void, it had been peradventure otherwise; for then the Bond was void before the Action brought, & 35 H. 8. Dy. 57. and Bylowes Case was cited, where a Parson made a Lease for years, in which were divers Covenants, and after he became non resident, by which the Indenture became void, yet he might maintain an Action of Covenant, for a Covenant broken before his non residency, v. Dr. Hectors Case, antea, Mich. 29 & 30. B. R. placito 37. Ante 78.

Porter versus Gray, Tr. 33. Rot. 365.

A Vowry for an amerciamment in a Leete; for that Ed. 6. granted the hundred of H. in which was a Leete to G. Owen in Fee, who died seised, and it descended to J. Owen his cousin and Heir, who being seised, granted it to Foster in Fee, who by Deed enrolled granted it to the Earl of Leicester in Fee, who by Deed enrolled granted it to the Lord Norris in Fee; and for that the Defendant was resiant within the hundred, and appeared not at a Leete held 23 April, 32 Eliz. he was amerced Twelve pence; and for that the distress, &c. And upon this abowry it was demurred in Law. 1. Because he pleaded that G. Owen died, and it descended to J. O. his cousin and Heir, and shewed not that G. died without Issue, Sed non allocatur, for it shall be clearly intended. 2. That he said that J. O. did grant it to Foster, but shewed no Deed of the grant; and it was ruled to be ill, for this cause; for it cannot be granted but by Deed, which must be shewn. 3. That the Defendant did not shew that the Court was held within a month after Easter; and this was held a good exception, it being a Leete by grant; but of a Leete by prescription it is otherwise, 20 H. 7. 22. 18 H. 6. 11. and they were of opinion to give Judgment for the Plaintiff, but would advise, &c. (3)
2 Inst. 72.
2 Inst. 72.
Ante 125.

Love versus Wotton, Hill. 33. Rot. 188.

Debt upon an Obligation, the Defendant pleaded the Statute of Usury made 6 Feb. 13 Eliz. (whereas the Parliament did begin the second of Feb. 13 Eliz.) and that the Obligation was taken by Usury; the Plaintiff replied it was not made for Usury; &c. Contra formam Statuti modo & forma prædict. and upon this they were at Issue, and found for the Plaintiff; and for that the Statute was misrecited, and it was a general Law of which the Court is to take Consuance; although both the parties do agree there is such a Statute, yet the Court well knowing there is no such Statute, and so cannot be contra formam Statuti, the Court held no Judgment could be given for the Plaintiff, it being in the Barr of the Defendant, the Court held it clearly ill; and that a repleader ought to be, although it was after verdict; and it was adjudged that there should be a repleader. (4)
Ante 236.

Tayler versus Fisher, Pasch. 32 Eliz. Rot. 146.

TRESPASS for breaking his House, and taking away a Corsett and a Pike of the Plaintiffs. The Defendant pleaded that long time (5)

Post: 876.

time before the Trespass supposed, J. Barnfield was seised of the said Corslet and Pike as of his own goods remaining in the Plaintiffs house, and that he sold them to the Defend. and thereupon he tempore quo, &c. came to the Plaint. house and demanded them; and the Wife of the Plaint. then and there (the Plaint. being absent,) licensed him to enter into the house, and take them; and he thereupon entred, &c. and took them, as it was lawful for him to do, &c. And upon this it was demurred. And after divers motions it was adjudged for the Plaint. that he should recover as to the entring into the house, but not as to the goods; for the goods being in the Plaint. house, and it not appearing how they came there, viz. either as Trespass or otherwise, he cannot of his own head enter; and the Wives license to enter into her husbands house is not good, for she cannot give one Authority to enter into her husbands house; but Gawdy contra, for it may be intended the Goods were there by the Plaintiffs Licence, and then he might well enter and take them; but the three other Judges contra: and it was adjudged for the Plaintiff, v. 30 Ed. 3. 12.

Bretton & Elizabetha Uxor *versus* Bolton of Graies Inn.

(6)

A Stumpfit: The Plaintiffs declared that whereas Tho. Bolton was the Brother of the Defendant, and the Defendant was a Counsellor, & peritus in lege, and whereas the Defendant did know that the said T. was seised to him and the Heirs males of his body, the remainder to the Defendant, and to the heirs males of his body, of the Mannor of Heywood in the County of Norfolk, and that the said E. the Wife of the Plaintiff had lent 100 l. to the said T. for the payment of which sum at a certain day to come, the said T. and the Defendant were obliged by their writing Obligatory, sigillo suo sigillat' joyntly and severally in 200 l. the Defendant in consideration that the said Eliza. at his special instance should deliver to the said T. the said writing Obligatory to be cancelled; and should lend to the said T. another 100 l. did assume to the said Eliz. that if she would refer to the Defendant the making of the said assurance for the 200 l. and would use no other Counsel then the Counsel of the Defendant, that he would provide talem assurantiam pro inde pro prædict' Eliz. per qualem ipsa eadem Eliz. haberet majus advantagium of the said T. if he should make default of payment of the said 200 l. then she had before for the said 100 l. and alledged in fact, that the trusting to his promise used no other Counsel, &c. And delivered to the said T. the said bond to be cancelled; and that she lent to the said T. the other 100 l. and that the Defendant not regarding his promise, but intending to defraud her, then and there knowing that the said T. was ad tunc, ut præfatur, seised in Tayle, viz. to him and his Heirs males of his body (but saith not where the reversion or remainder was) then and there falso & maliciose provided for her assurance a grant of an annual Rent issuing out of the said Mannor of H. to have in Fee (and shewed it in certain) which was a Rent secke; which she trusting to the said promise received for her security of her 200 l. and alledged in fact that the said T. within one year died without issue, by which after his death the said Rent ceased and became void; and the said Mannor came to the Defendant discharged of the said Rent; and further alledged that the Defendant provided no other assurance for the payment of the said 200 l. and

and that the said 200 l. and every part thereof were yet unpaid, & sic: the Defendant falsely and maliciously deceived the said Plaintiff in providing the said assurance for the payment of the said 200 l. by which she is without remedy for the payment of the said Rent or the said 200 l. ad damnum 400 l. the Defendant pleaded non Assumpsit, and found against him. And divers matters were alledged in Arrest of Judgment. 1. It was alledged that whereas the said T. and the Defendant were obliged per scriptum suum Obligatorium sigillo suo sigillat' and so is uncertain, for it cannot be the Bond of both, for it is sigillo suo, &c. in the singular number. Sed non allocatur, for sigillo suo may be referred to both their seals, and both may use one seal. 2. The Assumpsit is that if she at his instance and request would deliver the Bond, &c. and she alledgeth that she delivered the Bond, &c. but saith not that she delivered it at his instance; and if it was not delivered at his instance, but upon some other consideration, as it may be intended; it is no performance of the consideration. Sed non allocatur, for when she delivered the Bond to be cancelled, it shall be intended upon the consideration before, and at the request of the Defendant. 3. For that it was alledged that the Defendant well-knowing that the said T. was seised ut prefertur in Tayle, but saith not in whom the remainder was; and it might be to his right heirs; and then the Rent-charge may have continuance. Sed non allocatur, for when in the recital it is said that T. was seised in Tayle, the remainder to the Defendant; and it is said afterwards that T. was seised ut prefertur in Tayle, this shall be intended with remainder over as before. 4. Upon the substance of the matter; that this assurance that was made was better then what she had before, for it is not alledged when the first 100 l. was to be paid, but at a day to come which may be long after; and here the Rent that was granted being an Inheritance which charged the Land, was a better assurance then a Bond which charged the Goods, for which she had no remedy if the Obligor left no Aliens to his Executor. But the Court held clearly the contrary, for the Bond charged his person and his Executors after his death, but this Rent did only charge his Land during his life; and he being dead, she had no remedy. 5. The conclusion of the Action sounds in nature of a disceit, and then the Issue non Assumpsit is no answer to that the Plaintiffs have charged the Defendant. Sed non allocatur, for the Plaintiffs having declared upon the whole matter, and having shewed to the Court sufficient matter that the Defendant had not performed his promise, the conclusion is not material, but the Court shall adjudge upon the whole matter precedent; so it is a good issue. And the Plaintiffs had Judgment.

Sir Richard Buckley, *versus* Wood, Cujus principium
antea, f. Pasch. 33. placito 21.

IT was now moved again by Egerton for the Plaintiff, that the Bill was not lawfully exhibited in the Star-chamber, for mat- (7)
ters concerning his life which were not examinable there, for then Ante 230.
his own Oath shall prejudice him; and if the Action did not lie for the exhibiting, yet it lay when he spoke of it in the Country; and spoke of the substance thereof (as it is expressly alledged in the Declaration)

claration) and said that his Bill, and all that was contained in it was true, for this an Action lieth; for this is not in a course of Justice. Tanfield, if the Bill containeth any matter of slander of another, then of him against whom it is exhibited, an Action lieth as in 2 Eliz. between Stanley and Coursep; where the witness goeth beyond the point in Issue, or question, and slandereth a third person, Action lieth; but here the exhibiting of the Bill is only in course of Justice, and concerneth himself only, and so is not punishable; and then his saying in the Country that his Bill was true, &c. is not punishable. And he said that the Declaration is incertain, for it is that the Defendant did exhibit his Bill, conteyning (inter alia) this matter which is not good; for it might be there were words of qualification in the Bill, which qualified the first words, and therefore the whole Bill was to be recited. But all the Justices held this exception not to be material; for if there were any words of qualification, they were to be alledged by the Defendant, and it shall not be otherwise intended, but rather that it contained this matter of slander amongst other matters of slander. And for the matter they all resolved that the Action lay; for they were not matters examinable in Star-chamber; and when he exhibited the Bill maliciously in slander of the Plaintiff for matters not examinable there, it is reason he should be punished, and especially when he spoke of the matters in the Country, and published them and affirmed they were true. But Wray said, if the Bill had been well exhibited, for which matters the Court might take examination, so that his complaint was in course of Justice, an Action did not lye, although they were false and scandalous; and if it did not lye for exhibiting the Bill, then it lay not for saying that it was true; but in the principal Case they resolved ut supra. And the President Bowes his Case was seen in Court, which was all one with this Case, except that the words (inter alia) were left out; and all the Bill was recited, and afterwards at the end of the Term it was adjudged for the Plaintiff, 4 Co. 14. B.

Post. 564. 725.

Co. 4. 15. 2.

Dalton versus Sheffington, Tr. 32. Rot. 110.

(8)
Ant. 85.

Error to reverse an Outlary; the Original was Sheffington, and the mean process Skeffington, and for this variance it was reversed.

Atkins versus Atkins, Hill. 33. Rot. 776.

(9)

Error to reverse a Judgment in Norwich, in a Writ of Dower. The Case was, J.S. devised Land to S. and to the Heirs of his body; and after his decease to B. the eldest son of S. and to the Heirs of his body, the remainder over to three other of the Sons of S. in the same Mannor. The question was what Estate S. had in the Land. Hubbard argued that he had an Estate for life, the remainder to his sons as purchasers. Coke contra. That he had an Estate Tayle, for by the first words an express Estate in Tayle was given to him; and there are no special words to correct or alter them; and it was afterwards adjudged that S. had an Estate in Tayle; and that his wife should have Dower, and the first Judgment in the Writ of Dower was affirmed.

Nelson

Nelson & Bugg *versus* Woodward. Cujus principium antea. Trinit. 32. placito 13.

Prohibition: the Case was moved again: Gawdy Justice held that consultation should not be granted, for it is as a contract for Tythes to come, which may be without Deed, and may be for life or years, and it is a contract that goeth in discharge of payment of Tythes, but a Lease or grant of Tythes must be by Deed 21 H. 6. 43. and here a Prohibition lieth to avoid circuitry of Action; and of this opinion was Clench Justice, Wray & Fenner contra; that this is a sale, and cannot be without Deed, and a grant and contract for Tythes is all one; but a sale for one year may be of Tythes without Deed, and it is not reason he should make a Deed to every one of his Parishioners for each of their Tythes for a year; and Wray said he had conferred with the Justices of his house, and they were of his opinion. And as to the circuitry of Action, the Plaintiffs here can have no Action upon the promise, for this was made with P. and although they are assignees of the Land, yet they can have no Action, & Postea p. 35. Eliz. it was adjudged for the Defendant, that this agreement cannot be without Deed, and the Assignee hath no colour to take thereof advantage, and a consultation was granted. (10)
2 Rol. 63.
Ant. 188.
2 Cr. 137.
Yelv. 94.
1 Cr. 137.

Leeks Case.

HE was Endicted by the name of John Leeks, alias Style de Dets, and it was held to be ill, for he ought to have his addition before the alias dictus, and so it was ruled in Grymes case, although both the names be not recited in the alias. (11)
Ante 198.

Lacy *versus* Lacy.

Assumpsit: That whereas the Defendant was possessed of a Lease for years, the reversion to the Queen, in consideration of ten pound paid by the Plaintiff to him in hand, and of ten pound to be paid to him upon the procuring of a new Lease to the Plaintiff, the Defendant did promise to surrender his Lease, and to procure a new Lease to the Plaintiff before the end of Trinity Term, and that he had not performed it: upon non assumpsit pleaded it was found for the Plaintiff; and it was said in Arrest of Judgment that the Declaration was not good, because he did not alledge he was ready to pay the other ten pound at the end of Trinity Term; Sed non allocatur: for it was not to be paid till the Defendant procured the Lease, so he was to do the first Act; and the Plaintiff had Judgment. (12)

Brable *versus* Hollywell, Tr. 33 Eliz. Rot. 483.

Assumpsit: The Plaintiff counts that the Defendant upon a certain consideration promised to deliver to him forty quarters of Wheat between Sturbridge Fair and Christmas, if the Plaintiff liked thereof at Sturbridge Fair; and shewed he liked thereof, and upon the last of November at such a place required the Defendant to deliver them, which he had not done. Upon

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(13)

non assumpsit pleaded it was found for the Plaintiff; and it was alledged in Arrest of Judgment, that the Declaration is not good, because it is not shewn in the Court that he shewed his liking to the Defendant, and his liking is secret, of which the Defendant cannot take notice; and therefore of necessity it must be alledged 17 Ed. 4. and so it was ruled this Term between Chapman and Hurst, which is entred Tri. 33. Rot. 487. But it was answered, that his liking was sufficiently shewn, when it is alledged he required them at such a day; but the Court held this will not aid him as this case is, for the liking is to be at Sturbridge Fair, and here a request is alledged ult. Nov. which is long after, and at another place. And Judgment was given for the Defendant.

(14)

Ant. 201.

Assumpsit: The Plaintiff declared that the Defendant in consideration the Plaintiff should serve him for one year, and manure his Land, &c. promised to pay him forty shillings, and alledged in fact that he served him for one year and manured his Land, &c. the Defendant pleads, the Plaintiff did not serve him for one year, but departed from his service within the year, and upon issue joyned, it was found for the Plaintiff; and it was alledged in arrest of Judgment, that the issue was not well joyned, for it was a traverse of the consideration, which is not traversable, but it was ruled good, and the Plaintiff had judgment. Nota, the reason seemed to be, because it was a consideration executory.

Coles versus Haveland.

(15)
Moor 419.

Yelv. 153.

Action for these words, Coles hath strained a Mare, innuendo carnaliter cognovit aquam; the Jury found that the Defendant spake the words, C. hath strained a Mare, meaning that carnaliter cognovit. And upon these words the Plaintiff had Judgment, although it was alledged that the words in themselves had no sence, and the Innuendo will not help the matter, but only denote the person; but because the Verdict hath found precisely that this was his meaning, and it is a phrase of the Country, It was adjudged for the Plaintiff.

Stoner versus Audely.

(16)

Ant. 6.
2 Cr. 331.

Action for these words, ff. Aid me to Stoner, for I have Felony to lay to his charge, for he would have robbed me. After Verdict for the Plaintiff, it was alledged in Arrest of Judgment, that the words are not actionable, for perhaps the saying, I have Felony to lay to his Charge, of themselves are actionable; but when he saith further, for he would have robbed me, they prove no felony, but extenuate the first words, and shew what he did intend, and the last words are not actionable; for to say, One would have robbed me, an Action lieth not, without shewing some overt Act put in ure, which is Felony, or cause to bind one to his good behaviour; for though he had an intent, peradventure he repented of it, and did no evil Act. And Lea cited a Case adjudged in 27 & 28 Eliz. inter Tetul & Osborne, that these words, scilicet, Thou wouldst have murdered me, are not actionable; and for this cause the Court inclined that an Action did not lye, Sed adjour natur.

Stapleton

Stapleton *versus* Frier, Tr. 33. Eliz, Rot. 189.

Action for words, &c. My Lord President of the North shewed Mr. Stapleton his hand set to a Book, whereby he had consented to the late Rebels of the North, but by the means of Mr. Fairfax, my Lord President was perswaded, and the matter suppressed. After Verdict for the Plaintiff it was moved in Arrest of Judgment, that an Action lay not, for it is not said he consented to the Rebels, but that his Hand was set to a Book, whereby he did consent, &c. but sheweth not who set to his Hand, and it might be done by another; also it is not said he consented to them in their Rebellion, but the consent may be in some other matter, nor that he knew they were Rebels; also it appeareth not in what they were Rebels, if in Treason or only upon process of Rebellion; Curia contra in omnibus; for it cannot be his Hand, if he himself sets it not to the Book, but another may write his name; and when he said, he consented to the Rebels, and shewed not any certain person, this cannot be otherwise intended but that he consented to all the Rebels in their Rebellion; but if he had said that he consented to A. and B. which were Rebels, this peradventure may be intended that he consented to them in some other matter, as it was ruled 26 Eliz. inter Brown and Lisle, where the words were, He was Confederate with Campion the Jesuite, no Action lay, for it is not said he knew him to be a Jesuite, nor in what manner he was Confederate with him. And in this Term it was adjudged for the Plaintiff. (17)

Ant. 52.

Dullingham *versus* Kyfeley.

Prohibition: And surmised that K. the Defendant being Proprietor of the Parsonage of Sapto in Suff. had sued Curtis in the Court Christian, for Tythes of certain Land in the Parish of S. the Plaintiff being Parson of Hemington in the same County came in pro interesse suo, and alledged there is a custom within the Parish of Sa. that the Parson of Hem. shall have thirteen Cheeses for the Tythes of these Lands in Sa. and that in recompente thereof the Parson of Sa. had thirteen Cheeses for the Tythes of such Lands in Hem. and upon this matter he grounded his Prohibition, alledging that he had pleaded this in the Spiritual Court, and it would not be received. Tanfield moved that the Prohibition lieth not, for it is for one that is not sued, and it is not reason he should stay the suit of a Stranger. Also here the very right of Tythes is to come in question, and not the Bounds of the Parish, and so is not triable here, as 35 H. 6. 39, & 47. & 14 H. 4. 17. are, Coke contra, for the right of Tythes is not here in question, but a modus decimandi, and so is triable here; and this was a good matter for the Parishioner to plead; and that which the Parishioner may plead, he that cometh in pro interesse may plead. Gawdy, the Parishioner might well plead it, but when the Parson of another Parish will plead it, by this the right of Tythes will come in question between the two Parsons; 20 H. 6. 18. (18)

Ant. 71.

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between two Parsons, this Court hath no jurisdiction: for the trial of the right, &c. belongs to the Civil Law, 31 H. 6. and afterwards the Court was of opinion to grant a consultation. Sed adjournatur.

Smith versus Clerke.

(19)
13. El. c. 12.

Prohibition: The Case upon special Verdict was, two Incumbents were of the Church of Ungery Hatly in the County of Camb. one sued the other in the Spiritual Court to deprive him for not reading the Articles, and giving his assent to them according to the Statute of 13 Eliz. and the Issue being if he gave his assent, the Jury found, that he read the Articles and said, I give my consent unto them so far forth as they agree with the word of God. And it was adjudged, that it was not such unfained consent as the Statute intendeth, but it ought to be absolute without Condition. And a Consultation was awarded.

Murrel versus Smith.

(20)
Co. 4. 24. b.

Post. 499.

Ejectione firmæ V. 4. Co. 24. b. The Court held that he remained a Copyholder as before, and the Heir might enter without admittance, yet should pay his usual Fine, and do all his services, except suit at Court, for that is gone by severance from the manor, and should be subject to forfeitures as waste, &c. And Fenner Justice said, that he might surrender his Estate to the grantee of the Freehold, to the use of the grantee, for he had the reversion, but could not surrender to the grantee to the use of another, nor the grantee cannot grant it by Copy to another; so the Copyholder must always keep it in his hand; but quære of this: and the other Justices gave no opinion of this point.

Smith versus Havens.

(21)

Post. 678.

Trespas: Upon demurrer the Case was, I. S. by his Will in writing, devised that if Eliz. his Wife think good to bring up his children in Learning, and to find them Meat, Drink, and Apparel, that then she shall have his Land till I. S. his Son attaine his age of twenty four years, and dieth; the wife undertaketh the bringing up of the children, and dieth before the Son came to twenty four years of age; the question was, if this was only a matter of confidence, or of an interest also in the Land. And all the Justices were of opinion, that it was not only a confidence but an Interest, and it was tied with the condition to bring up the children; and if it should determine the children should be without remedy for their education, 4 Eliz. Dy. 210. & adjournatur.

Jeffery versus Coyte.

(22)
Ant. 56.

Ejectione firmæ: The Case upon special Verdict was, Avice Trevelian being Tenant for life, the remainder to Thomas her Son in tail, they two 2 & 3 Ph. & Mar. let the land by Indenture to Agnes Browne for life, remainder to W. B. for life, rendring ten pound rent per ann. Avice dieth, Tho. that was in remainder, accepts the rent of Ag. B. and dieth, Hugh T. the issue of Thomas accepts the rent of the said A. B. and after enters and makes a Feoient and levieth a Fine to

to I. S. Ag. B. re-enters and dieth, W. B. as in his remainder enters. The question was, if I. S. the purchaser might avoid this Lease in remainder; or if the acceptance of the Rent from the first Tenant for life made this Lease good to W. B. in the remainder. Gawdy, this acceptance of the Rent by the issue in tail maketh good both the Estate for life, and the remainder to W. B. for they make but one Estate; and if a Lease be made to two, and the issue in tail accepts the Rent of one of them, and saith he will accept him only for his Tenant, yet it is good for both, and these Estates are directed out of both the Interests of Avice and Thomas their son, for they shall joyn in an Action of Waste, 27 H. 8. fo 17 Eliz. Dy. 339. If Tenant for life, and he in the remainder joyn in a Lease for life, it is a forfeiture, for the Lease is derived out of both their Estates, and if it enured by way of confirmation it could be no forfeiture; and here when Avice the Tenant for life is dead, the estate shall be said to be created only by him in the remainder; and all the Justices agreed if it were only the confirmation of Tho. then the acceptance of the Rent by his issue should not make the estate in the remainder good. Wray and Fenner held the Lease is derived out of both their interests; and if any can avoid it, it must be the issue intail. Clench doubted, for he conceived that the estate was only created by the Tenant for life, and so had granted a reversion; and so the acceptance by the Issue should not bind him; but it was afterwards adjudged that the estate in remainder was good and would not be avoided by a Purchaser.

Co. Lit. 251.b.

Ante 154.

Ant. 56.

Stone *versus* Radish, Tr. 33. Eliz. Rot. 762.

DEbt upon an obligation; the Condition was for the delivery of twenty quarters of Wheat; the Defendant pleaded that pendente billa the Plaintiff had accepted fifteen quarters, and demands judgment of the Bill; and it was adjudged no Plea, for it is collateral and not parcel of the sum contained in the obligation; and if it be a Plea, it is a Plea in Bar and not in abatement. And it was adjudged for the Plaintiff.

(23)
Post. 260.Ante 202.
Post. 342.

Acton *versus* Hill, Int. Tr. 33. Rot. 393.

DEbt upon an obligation; The Condition was that whereas the Defendant was made Sub-collector of the Subsidy by the Plaintiff, if he gave a sufficient accompt in the Exchequer of all Sums which he received, and if he dischargeth or saveth harmless the Plaintiff of these Receipts against the Queen, and procureth to the Plaintiff a sufficient acquittance or discharge out of the Exchequer, as in the like case is used, that then, &c. the Defendant pleads that he had accompted, &c. and had discharged and saved harmless the Plaintiff, &c. and had procured him an Acquittance, &c. and hereupon it was demurred. Wild moved for the Plaintiff that the Plea was not good, for he pleads in the affirmative that he had discharged, &c. and shewed not how, &c. 35 H. 6. 21. 40 Ed. 3. 20: Gawdy, if the discharge is to a particular thing, he must shew how, &c. but otherwise it is when it is to multiplicity of things, for then a general pleading is good, 5 Ed. 4. 8. and so peradventure it is here. Et adjournatur.

(24)

Post. 393. 477
Co. 2. 4. 2.

Clerke

Clerke *versus* Hopkins, Hill. 32. Eliz. Rot. 238.

(25)

Ant. 43.

Co. 5. 27. b.

A Scumpfit against the Defendant as Executor to Simons; he pleaded, that he is not Executor, and that he never administered, &c. the Plaintiff replieth, that at D. in the County of B. he administered goods to the value of, &c. And upon this they were at issue. The Jury find a special Verdict that the said S. made his Wife Executrix and died, the Wife proveth the Will and Administrators, and made I. S. her Son of the age of thirteen years Executor, and the Defendant Overseer, and dieth; the Infant proveth the Will, the Defendant by the consent of the Infant selleth certain Goods, to the value of one hundred and forty pounds, to the use of the Infant; and if this were Administration, they pray the discretion of the Court. Tredway moved for the Plaintiff, that this is an Administration, for although an Infant may be an Executor, yet he must do things as an Executor; but it is not found that the Goods were sold in execution of the Will, for then it would not be an Administration in the Defendant, 1 Eliz. Dy. 166. 9 Eliz. Dy. 255. and an Infant of the age of thirteen years cannot give his assent to the sale of the Goods. Curia contra; for an Infant Executor is to pay Debts, and then he must sell Goods to pay them, for peradventure the Creditors will not stay, nor take Goods for their Debts; and therefore the sale by the Infant himself is good, so is the sale by another by his consent, and when it is no prejudice to the Infant, it is without doubt good; and here he doing it as a servant to the Infant, it is no Administration; and it was adjudged that the Plaintiff should be barred.

Laund *versus* Tucker.

(26)

Co. 3. 78. 9.

3 Co. 78. b.
Ante 220.

E Jectiōe firmæ: It was found by special Verdict that Tenant for Life, and I. S. joynd in a Fine sur conis. de droit come ceo, &c. to a stranger who rendred to I. S. for eighty years, remainder to the Tenant for life in Fee. Proclamations pass, and the five years pass without entry by him in the reversion, Tenant for life dieth; the question was, if he in the Reversion should have other five years. and it was adjudged he should, and so it was adjudged in *Somes Case*, 7 Eliz.

Hogg *versus* Cross, Hill. 33. Rot. 685.

(27)

2 Rol. 10. 66.

Post. 269.

E Jectiōe firmæ of a House and Garden in London, of the Lease of one Rice: it was found by special Verdict that J. Warren was thereof seised in Fee, and held it in Burgage, and by his Will devised it to Margaret his Wife for life, and dieth; M. taketh Rice to Husband, who made the Lease; but they further found that the said J. W. before the making of his Will, made a Deed of Feoffment to G. W. his Son, Habendum after the death of the said J. W. the Feoffor to the said G. W. in taile, and made Livery of seisin secundum formam chartæ. And if any thing passed by this, they prayed, &c. G. Wray of Lincolnes Inn argued for the Plaintiff, that this Feoffment was void and nothing passed, and then the Will made afterwards was good; for when no Estate is expressed in

in the beginning of a Deed, but only an implied estate for life as here, and by the Habendum an express estate is limited; this doth control the implied limitation; and if this be void and repugnant in Law as it is here being after the death of the feoffor, all is void; but if there be an express limitation in the beginning, if the Habendum be repugnant, it is void, and the first is good; and although livery be made, yet it is tied secundum formam cartæ, which is void, and so all is void, for it is but the execution of a void Deed. And this very point was ruled accordingly in Mayns case in the Court of Wards. Dalton contra, that an estate for life doth pass by the premises, and the Habendum void; but all the Justices resolved the contrary, for it appeareth to be the intent of the feoffor that no Estate shall pass but in futuro, viz. after his death, which is against Law; and it being all the purport of the Deed, nothing shall pass in any other manner, for nothing shall pass by the premises but according to his intent, which is nothing, for he intended not to pass the Freehold immediately. But if one grant a term by Deed hab. after his death, this doth pass by the premises, for the premises are sufficient to carry it, and the Habendum shall not utterly destroy it; but it is otherwise here, where it is to take effect by limitation of the party, which is void, and the livery is also void to execute a void Deed. And without further argument it was adjudged for the Plaintiff, 2 Co. 55. b. Co. Littleton 48. b.

Ant. 29.
2 Cr. 376.
Co. Lit. 48. b.
2 Co. 55. b.
Hob. 171.
Post. 585.
Co. 2. 23. b.

Emott *versus* Cole, P. 33. Rot. 337.

DEbt upon an obligation made ult^o Martii 29 Eliz. the condition was to perform all Covenants, Conditions, Articles, Agreements and Clauses in an Ind. bearing the same date; the Defendant pleads the Indenture, which was a Lease for years of certain Lands and stock of Cattel to the Defendant, and to Tolfry, rendring twenty pound Rent per annum, and all the Covenants and other Clauses in it were concerning the Land, and pleads that long time before the lessor had any thing in it, one C. was seised of the Land in Fee, and acknowledged a Statute to I.S. and that after the Lease made, viz. 29. May 29 Eliz. the Counlee sued execution, and all the Land was delivered in Execution (so they were thereof evicted) and that after the date of the Ind. until Execution sued, he and T. had performed all the Covenants, Conditions, Agreements and Clauses in the said Indenture. And upon this Plea it was demurred in Law. Buckley for the Plaintiff took two exceptions to the Plea in Bar. 1. The condition was, if the Defendant and T. and their Assignees perform, &c. and he pleads that he and T. had performed, &c. but saith not that he and T. and their Assignees had performed, &c. and it may be, they had assigned it over. 2. The condition was, if they perform all the Covenants, Conditions, Agreements, Articles, &c. and when he recited them, he said not which are all the Covenants, Conditions, Agreements and Clauses in the Indenture, but leaveth out (Articles) so hath not pleaded performance of the Condition. The matter in Law was, if a lease be made of lands and goods rendring rent, if the land be evicted whether all the rent shall be gone, or there shall be an apportionment in regard

(28)

Post. 607.

regard of the goods; and so the not payment of the portion for the rent, be a forfeiture of the Bond; and he said there shall be an apportionment, 12 H. 8. 11. 35 H. 8. Dy. 56. if the goods be evicted, there shall be an apportionment, and so e converso: curia contra in omnibus. 1. Exception is not material, for it appeareth not there is any Assignee, and it shall not be intended except it be specially shewn, and a bar is good to a common intent. 2. Exception (Agreements) is all one with (Articles) and if many words contain one thing in signification; if he answers to them in substance, it is good; for the matter in Law, there shall be no apportionment, for the Rent issueth out of the Land, and follows it; and so Wray said it hath been heretofore adjudged. And it was here adjudged the Plaintiff shall be barred. V. 4. Eliz. Dy. 212. & 361. 9 Ed. 4. 1. 21 Ed. 4. 28, & 29.

Hasset *versus* Payne.

(29)

Ant. 222.

Attaint. Coke sheweth to the Court that in the first Ven. of the petit Jury one George Ellinger was returned, and upon the diltringas, Gregory Ellinger was returned and appeared in the lieu of George Ell. and was sworn and tried the matter, so the Tryal was by eleven, and then no Attaint lieth; and of this opinion was the whole Court, and for this cause the Attaint was staid.

Bright *versus* Metcalfe.

(30)

2. Cr. 316.

DEbt upon a Bill of five pound, which had these words, To be paid as I pay my other Creditors; the Plaintiff declared generally that he was indebted to him in five pound solvendum upon request; the Defendant demanded Oyer of the Bill, and it was entred in hæc verba, and pleads an insufficient matter, upon which it was demurred, and this exception was to the Declaration for variance from the Bill; for he ought to declare specially according to the Bill; and of this opinion was the whole Court, except Fenner, who was of opinion that the words, To be paid as he paid his other Creditors were void, and it is payable immediately upon request, as 4 Ed. 4. Solvend' to a stranger is void; but the others held e contra; and it was adjudged for the Defendant.

Penred *versus* Chambers, Hill. 33. Rot. 24.

(31)

2 Cr. 313.

Error of a Judgment given in debt in the Court of Pypowders in Canterbury, and the Error assigned was, that the Plaintiff in his replication hath not averred his Plea, nor in the end of it demanded his debt and damages, and for these causes the Judgment was reversed by Clench and Fenner (Wray and Gawdy absentibus) and they said a Court of Pypowders may be held, though not in pleno mercatu or feria; but this is to be by prescription, and the prescription must be in the stile of the Court.

Morris versus Thomas, Hill. 33. Eliz. Rot. 92.

Error of a Judgment in Anglesey in Ejectione firmæ, and the Error assigned was, that the Venire facias was quorum quilibet habeat four pound; whereas the Statute of 27 Eliz. cap. 6. extends not to Wales; for it is only of the Courts at Westminster, and the Assizes. To which it was answered, that this is no fault at Common Law; for it is for the benefit of the parties to have the better Trial; and if it be, it is helped by the Statute of Jeofail's of 32. H. 8. for that extends to all Courts of Record; and this Judgment was at the Grand Sessions there in Ejectione firmæ. And of this opinion was the Court, and affirmed the Judgment. (32)
27. El. c. 6.
2 Cr. 672.

Calthorp versus Woodward, Trin. 32. Eliz. Rot. 1115.

Error of a Judgment in Debt; Error assigned was, that the Venire facias was awarded upon the Roll. Trin. 28. Eliz. Return. Mich. 28. & 29. Eliz. And the Cryal was by Nisi prius, 4 July, before the return of it; which is a calling of the Jury without Warrant. And the Court held, that if the Venire facias hath an ill teste, or an ill return, or is wanting, this is aided by the Statute after Verdict; but here it is not wanting, but the Jury is taken before the return of it, and so without Warrant: And for this cause it is ill, and not helped by the Statute. (33)
Post. 259.

Savery versus Tey, Pasch. 33. Eliz. Rot. 102.

Error upon a Judgment in Debt in Norwich, upon the Statute of 33. H. 8. for buying of Titles. First Error, for that the Defendant pleads not guilty, which is no Plea in this Action; but all the Court held it good, when the Action is grounded upon a penal Statute. Second Error, the Plaintiff demands fifty pound for the value of the Land, and the Jury find the value twenty pound; upon which the Plaintiff had Judgment to recover one moiety, and the Queen the other moiety; and no Judgment was for the residue of the fifty pound, viz. that the Plaintiff Sit in misericordia pro falso clamore suo. And for this cause the Judgment was reversed; but in Trespas or other Actions wherein the Plaintiff declares ad damnum, if less be found then he declares; yet the Plaintiff shall not be amerced, because the Action is grounded upon an uncertainty. (34)
Post. 621.
Co. 8. 61. a.
Post. 699.

Griffin versus Bover.

Error to reverse an Attlay upon Judgment; the Error was, that the original was Griffin, and the Cap. Giffin; and for this cause it was reversed. (35)
Ant. 50. 85.
104.

Haselip versus Chaplen, Pasch. 33. Eliz. Rot. 292

Error upon a Judgment in the Common Bench in Replevin, where the Defendant avowed for an Estray: Error assigned was, for that the Defendant had Return awarded to him with Costs and Damages, whereas no Costs or Damages are given in this case, neither by the Statute of 7 H. 8. or 21 H. 8. for they are
L I only (36)
Jones 434.
21 H. 8. 19.

Post. 329.

only in Abowries for Rents, Services, Customes, and Damage-felant, so this is out of the Statutes; but it was answered, the Statutes are to be expounded, that the Abowant shall have Costs and Damages as well in other cases, as in those recited; for they are recited only by way of example. But the Court doubted, for damages are penal, and shall not be taken by equity; and they conceived it Error, but would advise, Et adjournatur V. Trin. 36 Eliz. Plac. 4. B. R.

Ramsley *versus* Bird Senior, & Bird Junior.

(37)

A Sumpfit; after Verdict for the Plaintiff, it was alledged in Arrest of Judgment, that the Declaration upon the File supposeth the promise to be made by B. senior only; but the Roll and the Record of Nisi prius, and all the proceedings afterwards were well laid to be by both; and by Examination it appeared, that the Paper-copy under the hand of the Counsellor (which is the first thing that is put into Court) was, that the promise was made by both; and the question was, if it might be amended; and it was strongly urged, that it ought not; for the File is as the original, and is the warrant of the Roll, and of all the proceedings; so that if the Roll be ill, it may be amended by the File, but the File is not to be amended: And it was said, it was so adjudged in this Court, Trin. 31 Eliz. Rot. 774. inter Greenway and Elmes. But the Court (except Fenner) held the contrary, that it might be well amended; for as Brian saith, 10 H. 7. 25. Papers are now as Records. So that when it appeareth that the Paper Declaration is good, that the Promise was by both, it is the Fault of the Clerk to enter it upon the File, to be by one; and so it was adjudged to be amended, and the Plaintiff had judgment to recover.

Co. 8. 159. a.
161. b.

Denner *versus* Shacroft.

(38)

A Ction sur trover; in the Distringas jurat' the Defendant was named Shacroft, but in the Venire facias, and all the other proceedings, he was truly named: And this Misnomer was alledged in Arrest of Judgment. Wray, the difference here is little, and in some Countries (a) is sounded for (o) and so is not material, and it was awarded to be amended, and the Plaintiff had Judgment.

Ant. 222.
Ant. 57.

Cottons Case.

(39)
Ante 222.

A Ction for words: In the Venire facias a Juroz was returned by the name of J. S. of Abbotlan, and in the Distringas he was returned by the name of J. S. of Abbatlan; and it was awarded to be amended: So in this Term between Mortimer and Oger, a Juroz in the Venire facias was named De Hufst; and in the Distringas, De Hurst: And this was alledged in Arrest of Judgment, and awarded good, and the Plaintiff had Judgment.

(40)

Cottingham *versus* Griffith & Snow, Sheriffs of Bristol. **D** Ebt upon an Escape; Issue was Nihil debent, the Venire facias and Distringas was, Quandam Juratam in placito transgressionis; and this after Verdict was alledged in arrest of Judgment: And for this cause the Judgment was sta'd, for it is not aided by the Statute of Jeofail's; but if the Venire facias or Distringas had been right, it had been otherwise.

Post. 622.

2 Cr. 278.

Gurney

Gurney & K. Uxor *versus* Sir Ed. Clere.
Intrat. Trin. 33 Eliz. Rot.

DEbt upon an Obligation made to one P. and to the said K. Dum sola fuit, after Verdict it was moved in Arrest of Judgment, That the Defendant did plead, That whereas the Condition of the Obligation was, that whereas he had by his Deed bearing date at B. &c. granted a Rent of forty Marks per annum to the said P. and K. for their lives, payable at two Feasts, &c. If he accordingly paid the Rent, that then, &c. and alledgeth, that he always paid it to the said P. and K. during the life of P. and to K. after his death, until the four and twentieth day of January last past; at which day G. the Plaintiff having intermarried with the said K. granted the Rent to J. S. &c. and issue was taken upon it, Quod non concessit, and found against the Defendant, and this was alledged to be no issue; for a grant of a Rent is pleaded, but no Attornment alledged, then the Grant is void, and an issue cannot be taken of that which is not; and Warners Case was cited to be adjudged in this Court, when in an Abowry the Defendant prescribed to have Common to One Hundred Acres of Land; the Plaintiff traversed, that he had not Common to One Hundred Acres of Pasture: And upon this issue was joyned, and after Verdict it was adjudged to be no issue. Second Exception, the Venire facias was of a wrong Village; for the Grant is supposed to be made at B. of a Rent issuing out of the Mannor of B. and the Venire facias was of B. where it ought to be of the Mannor of B. Sed non allocatur; for the issue being upon the Grant, the Venire facias shall be of the place where the Grant is supposed to be made. Third Exception, the Jury assessed Damages to Baron and Feme, Ratione detentionis debiti, where it ought to be only to the Baron, Sed non allocatur; for the Damages shall be to both: But the Court doubted of the first Exception, and it being moved again, Gawdy said it is aided by the Statute of Jeofails, for it is an insufficient pleading: As if a man pleads a Surrender, and pleadeth not an Agreement, this is insufficient: But if issue be taken upon the Surrender, and the Verdict find it, it is helped; so to plead a Devise of a Term, and sheweth not the Entry by assent of the Executor, yet if issue be taken upon the Devise, and the Jury find it, this is aided by the Statute; and it was adjudged for the Plaintiff. And Coke said it was adjudged in Panniers case in this Court, where one pleaded a Concord, but pleads not Satisfaction; and issue is joyned, and Verdict against the Defendant; and it was adjudged good, and aided by the Statute.

(42)

Post. 565.
Co. 7. 2. a
Ant. 116.

Ant. 228.
Post. 455.

Welsh *versus* Upton.

TRespass. It was moved in Arrest of Judgment after Verdict, that the Venire facias and the Pannel were wanting; but the Distingas jurat and the Pannel annexed to it remained: And this was adjudged to be helped by the Statute.

(43)

Ant. 215. 257.

Andrews *versus* Kirke.

- (44) **D**ebt upon a Bond. The Condition was to deliver fifty quarters of Wheat, the Defendant pleaded in Bar, that he had delivered thirty quarters of Wheat pending the Bill, which the Plaintiff had accepted, but shewed no Deed, &c. And upon this issue was taken, that he had not accepted, &c. and found for the Plaintiff: and it was moved, that it was no Plea, so no issue; but it was resolved, that it was helped by the Statute; and the Plaintiff had Judgment.

Ant. 235.

Wood *versus* Butts.

- (45) **E**jectione firmæ. The Defendant pleaded a Surrender of a Copyhold, by the hand of Fossef then Steward of the Mannor. Issue was joyned Absque hoc, that he was Steward; and all the Court held this no issue: For the Traverse ought to be general, that he did not Surrender; for if he were not Steward, the Surrender is void; so of a Surrender pleaded into the hand of the Tenants of the Mannor: And it was held by the Court, that where issue is taken upon a Surrender, it shall be tried where it was alleged to be done, and not where the Mannor is, of which the Copyhold is holden; and in the principal case, a Repleader was awarded.

Bradish *versus* Bishop.

- (46) **A**ssumpsit. The Plaintiff shewed, that whereas the Defendant at London in Warda de Cheap, was obliged to J. S. the Defendant in consideration that the Plaintiff would give, &c. at London, in Warda prædicta, super se Assumpsit; and upon Non Assumpsit pleaded, the Venue was de Parochia de Arcubus in Warda de Cheap; whereas there was no Parish mentioned before in the Count: And this matter was alleged in Arrest of Judgment, and Exception taken to the Count, that the Promise was laid in Warda, and not in a Parish within the Ward, as it ought to be, 7 Hen. 6. 36. Wards in London are as Hundreds in the Countrey, and the Parish as the Town: And as an Act cannot be laid to be done in the Hundred, so it cannot be in a Ward. Wray, An Assumpsit or other matter is used to be laid in a Parish, and it hath been ruled, if the Tryal be in another Parish, it is ill: Gawdy agreed, 7 Hen. 4. 13. a Venire facias may be of a Town, Parish, Mannor, or other place known, but not of a City, County, or Ward: And this is not helped by the Statute of 18 Eliz. and so was the opinion of the whole Court, and that the Plaintiff cannot have a Venire facias de novo, but must begin again; for the fault was in his Count, and not by the award of the Court only.

1 Cr. 165.

Horseman *versus* Johnson.

- (47) **T**respas. The issue was, if the Mannors of Perton and great Hasely, were holden of the Honor of Ewelme; and the Venire facias was of one Mannor only: And for this cause it was ruled to be ill; and the Plaintiff taketh a Venire facias de novo of both the Mannors,

Hannors, and the issue was tried for him. And Coke and Tansfield alledged in Arrest of Judgment, that the *Venire facias* was not well awarded, but that Judgment ought to be given *Quod querens nihil capiat per Billam*; for it is a mis-trial, and a *Venire facias de novo* was not to be awarded, but for the same Jury, or where the Verdict is not well examined; and the first Verdict is here entred, and the Writ filed; so there shall be two Verdicts of Record for the same thing, and both full: But it being moved again, the Court held it to be good, and the Plaintiff had Judgment.

Ford versus Brooke.

Action for words; for calling him a Perjured Person at D. in Essex; the Defendant justified, for that the Plaintiff was perjured in his answer in Chancery, at Westminster in the County of Middlesex, and so justified the words at D. The Plaintiff replied, *De injuria sua propria*; and the *Venire facias* by the Award of the Court was directed to the Sheriffs of Middlesex; for the justification ariseth there, and the words were confessed. (48) Post. 468.

The Queen versus Harris.

Information upon the Statute of 5 Edw. 6. cap. 7. for buying of Wools contrary to that Statute: The Defendant pleaded as to all, except fifty stone of Wool, not guilty; and as to the fifty stone he pleads, that there is an Information depending against him for it in the Common Bench at the Suit of Lewis, and avers, That they are for the same offence, and demands Judgment, if as to them he shall be put to answer. And upon this it was demurred in Law; and it was argued by Godfrey and Atkinson for the Queen, that it is no Plea; for it is not alledged, that any Writ or Process is sued out upon the Information, and then it cannot be said to be depending, 7 H. 6. 6. 10 Ed. 4. 13. 2. The Information here supposeth the buying of the Wool to be the twentieth of November, 31 Eliz. and the selling to be the sixth of May, the same year; and the Information in the Common Bench supposeth the selling to be the sixth of July, 31 Eliz. so cannot be intended the same offence: And although the Defendant hath averred it to the Court, to be for the same offence, yet the Averment is not material when it appeareth to the Court it cannot be so, being at several days. But all the Court (except Gawdy) held the Plea good; for they said, that immediately when the Information is brought into Court, it is entred upon Record: And this containeth all the substance of the matter, and in this point is not like other Writs; and therefore shall be said to be immediately depending, although no Writ or Process is sued upon it; and this appeareth by the express words of the Statute of 18 Eliz. Secondly it is a good Plea with an Averment; for otherwise by the false supposal of the day, when the offence is committed, the Defendant shall be put to double trouble. But Gawdy doubted of these matters; yet at another day it being again moved, the Plea was adjudged sufficient, and it was adjudged for the Defendant. (49) Post. 325. 2 Cr. 482.

Rockwood *versus* Feasar.

(50)

Action sur trover in London: The Defendant pleaded, that long time before the Conversion supposed to be, J. S. was possessed of these Goods, as of his own Goods, at B. in Norfolk, and that he before the Conversion supposed, did casually lose them, and they came to the hand of Jo. Palmer by Trover, who gave them to the Plaintiff who lost them in London; and the Defendant found them, and afterward did convert them to his own use by the command of the said J. S. as it was lawful for him to do; and it was moved, that this is no Plea, for it amounts to the General Issue. But all the Justices held it a good Plea; for it confesseth the possession and property in the Plaintiff, against all but the lawful Owner. Nota, this Plea was devised by Coke to alter the tryal.

Wood *versus* Hamstead.

(51)

TRESPASS for taking the Cattel of the Plaintiff; the Defendant pleaded, that he was seised of the Land in which, &c. and let it to A. rendring Rent at the Feast of Easter; and if it be arrear at the said Feast and ten days after, that he might re-enter; and saith at the Feast of Easter, in the year of, &c. the Rent was behind, and by the space of ten days after; and thereupon he re-entered and distrained the Cattel Damage-Feasant. And upon this it was demurred; First, That he saith he let to A. but saith not *virtute cujus* he entred and was possessed; for it may be the Lessor did not wabe the Possession, and then no Rent is due: Secondly, That he saith the Rent was behind by the space of ten days, where it should be after the space of ten dayes; as in Browning and Bestons Case, Comment. f. 3. there is no mention of the day and year of the Lease, but spaces left for them: And for these Causes, and principally for the second, it was adjudged for the Plaintiff.

Ant. 88.

Dr. Hunts Case.

(52)
Ant. 201.

HE was indicted, that whereas by the Law of the Land no person is to be cited into the Spiritual Court, to take any oath, but in cases of Matrimony and Testamentary; that he being Commissary of the Archdeacon of Norfolk, had caused J. Bodinley to be summoned to appear before him at a place, &c. to compel him to take an Oath concerning Incontinency, which touched himself, against his will. Wray, this cause was referred to the Lord Anderson, and the Lord Chief Baron, and to my self, to certifie if the ministering of this Oath be against the Law. And we certified in this manner; Where the knowledge of the matter did belong to the Court Christian, they may proceed according to the Civil Law. Gawdy, the Oath cannot be ministered to the party, but where the offence is presented first by two men, *Quod fuit concessum*, and it was said, it was so in this case.

Termino

Termino Michaelis, 33 & 34 Eliz. in Communi Banco.
Elmer & Uxor *versus* Thacker.

Quod ei deforceat of Lands, of which the Wife was Tenant in Dower. The Defendant pleaded a Recovery against the Wife, *Dum sola fuit*, in a Writ of Waste by *Nihil dicit*, and that he released the Damages, and had Judgment to recover the Land. The Demandants replied *Null Waste fait*, and so would avoid the Recovery, and thereupon the Tenant demurred. And after Argument by the Serjeants, all the Justices did deliver their opinions, that this Writ lieth not upon a Recovery by *Nihil dicit*; for the Statute doth not give this Writ but upon a Recovery by default, which is intended before Appearance; but this is upon a *Nihil dicit*, which is no Default, but as a departure in contempt of Court, or rather a Confession of the Action, and a not Denying of the Waste; for in this case the Waste is confessed, and no Writ shall be awarded to enquire of the Waste, but only of the Damages: And this Judgment is quasi by her own assent, for that she will not plead; and the Court takes it as her acknowledgment, that she hath nothing to plead against it; and the Statute that is made only for her benefit, and to relieve her against her Default, shall not relieve her against her contempt, or rather her own act. And whereas it was said, that a *Nihil dicit* is taken as a default, for a Receipt shall be by a Termor or Feme Covert after a *Nihil dicit*, as 9 Ed. 4. cap. 37. is. And that a Receipt shall be by a Feme after a Writ of Inquiry of Waste, and returned, and the Waste inquired, that it is not like to this case; for the Statute that giveth receipt is for the benefit of a stranger, that they shall not lose their Right by the default or negligence of the party that was to plead; and so a *Nihil dicit*, or Default, is all one to them: But here this Statute is for the relief of the party against whom Judgment is given by default, and so are not like. And this is not a Judgment by default, but rather a departure in contempt of Court, or a *Nient dedire* or quasi a confession of the Action; which is proved as Periam said, by the Cases in Comment' & Dyer, that in a debt against the Heir, if Judgment be upon a *Nihil dicit* against him, Execution shall be against him of his own Land: For in a manner he confesseth, that he is chargeable, and hath Assets. And Anderson and Periam held strongly, that if Judgment had been given by default in Waste, that upon such Recovery a *Quod ei deforceat* did lie, especially in this case, when the damages are released; and so the Waste is not found by Inquest. Windham *e contra*, as to this point; but in the principal Cause, they all resolved *ut supra*; and it was thereupon adjudged for the Defendant. Vid. 15 Ed. 3. *Quod ei deforceat*. 9. Vide Cookes Littleton, fol. 355. a. b.

(1)

2 Inst. 351.
W. 2. c. 4.

Ante 18.

The Sheriffs of Glocesters Case.

Information upon the Statute of 29 Eliz. against them, for taking above twelve pence in the pound, for executing Process upon a Judgment in the Common Bench. The Defendants pleaded the

(2)

Proviso 29. El.
c. 4.

1 Cr. 287.

the Proviso in the Statute wherein all Cities and Corporations and their Officers are excepted. Upon which it was demurred; for Owen Serjeant moved, that this Proviso extended only for serving of Executions upon Judgments in their Courts, but not upon Executions of Judgments in other Courts; and so it may be collected by the preamble and body of the Act. But all the Court contra; for it shall be expounded as well for serving Executions upon Judgments in other Courts, as in their own Courts. And whereas it was objected, that the County of the City of Gloucester extends four or five miles further than the City, and that this Execution was not in the City, but within the County of the City, and so it is not within the Proviso. The Court said, if it had been so pleaded, peradventure it should be otherwise; but as it is pleaded, it appears not to the Court; and thereupon it was adjudged for the Defendant.

Bush versus Redgeley.

(3)

Co. 5. 24. a.
Post. 369.
Ant. 53.

DEbt upon an Obligation; the Condition was, to save the Plaintiff harmless against J. Robinson of one Obligation; the Defendant pleaded Non damnificatus; Plaintiff replieth, that Robinson had sued him to the Exigent, and then he appeared, and the said Robinson had Judgment to recover against him. Upon the Obligation, Et issint damnificatus; the Defendant rejoyns, that he himself had retained an Attorney for the Plaintiff on the said Suit, and the Plaintiff was at no Expences, nor was arrested upon it, nor his Goods or Lands seised; and that after the Judgment, he was not damnified; And upon this the Plaintiff demurred; and all the Court resolved for the Plaintiff, for that immediately upon the Judgment given, he was damnified; for his Body, Goods, and Land, are liable to the Execution; And if he afterwards alieneth his Land, he cannot by reason of this Judgment warrant it to be free of Incumbrances; so that by the very Judgment he is damnified; and if the Defendant after the Judgment had paid the debt, it would not serve, for he was damnified before.

Brewster versus Sir Thomas Parrot.

(4)
Post. 488, 523.

The Case was; Lessee for life makes a Lease for years, rendering Rent, and after Surrenders to the Lessor upon Condition; the Lessee for years takes a new Lease for years of the Lessor; the Lessee for life performeth the Condition, and puts out the Lessee for years; who re-enters; and the Lessee for life brings debt for the first Rent reserved, and ruled it doth not lie; for the Lease out of which it was reserved is gone and determined.

Offely versus Bat, Pasc. 33. Eliz. Rot. 403.

(5)
Post. 354.

The Case was, Conusee of a Fine of a Reversion before Attornment, ousts the Lessee, and makes a Feoment; the Lessee re-enters, and the Feoffee distrains for the Rent. Periam and Windham held, that he could not distrain no more than the Feoffor himself before Attornment, Vid. Co. 113. a.

Screver

Scriven *versus* Prince.

FOrmedon of Three Messuages and certain Acres of Land; for part of the Acres of Land they were at Issue; and found for the Demandant; and as to the residue of the Acres the Tenant vouched; and for the Messuages they were at Issue upon a non-tenure pleaded; and the Jury found he was Tenant of one of the Messuages, and not of the other; but sheweth not of which in certain. And the Court held that for the Acres, and the house of which the Verdict is found, the Plaintiff may have Judgment; and a writ to the Sheriff to deliver seisin; and the Plaintiff at his peril is to shew to the Sheriff what Messuage it was the Jury did intend, for the Jury is not tied to set bounds to it, and he need not stay for his Judgment till the voucher be determined. (6)

2 Cr. 113.
Post 465.

The Queen against Fairclough.

Information in nature of an Action of Trespass, for taking and cutting certain Trees of which the Queen was possessed. The Case upon special Verdict was this. Andreas de Lowe, and twelve others were possessed of divers trees by the grant of the owner of the Soil; and the said Andreas for and in satisfaction of a Debt which he did owe to the Queen, assigned to her by Deed enrolled all the Trees; and the question was if the Queen should have by this Assignment all the trees, 8 Ed. 4. 24. 19 H. 6. 47. Comment 243. & 323. Coke for the Defendant did agree, that where the Queen came to an entire thing by Act in Law, as attainder or other Act in Law, she by her Prerogative shall have the whole; but where she cometh to have part of the Chattel by the grant of a common person, he by his grant shall not prejudice his Companion; and therefore in that Case the Queen shall not have her Prerogative; quære of this difference; the Barons did not speak to the Case, but they said it was a strong against the Defendant; and they gave him day to take advice, if he could say any other matter. (7)

The Queen *versus* Wall and Green.

Scire facias; The Case was, J. S. was bound to Green in a Statute of four hundred pound, and his Land extended for this Debt, and delivered in Execution at the value of five pound per annum; and he was also bound in a Statute to J. D. who assigned it to the Queen for his Debt, and thereupon an *extendi facias* being awarded, it was found that the Land delivered to Green in extent was worth twelve pound per annum; and thereupon a *Scire facias* was awarded against them to answer the surplusage of the profits above the said five pound to the Queen; and the question was, if it were duly awarded. Manwood and all the Barons held it was, for it being found that there was a surplusage above that which would serve a common person, the Queen shall have it by her prerogative. Glanvil Serjeant, I will plead this at all peril. Curia, and you shall have a short rule. Nota, afterwards all this matter was pleaded upon the *Scire facias*. And the Case was this, A Recognizance of One thousand pound was acknowledged by J. S. to Comb. 20 Eliz. and afterwards 26 Eliz. the said J. S. was bound in a Recognizance

(8)

M m to

to Mabb. in one thousand pound, 27 Eliz. Wall and Green Executors of Combe sued execution of the first Recognizance, and the Land of the Conusor was extended at 20 l. per annum, afterwards Mabb. was outlawed, by which the Recognizance to him came to the Queen; and Process of extent issued for the Queen, and it was found that the Conusor had nothing but the Land extended by Wall and Green; and that it was worth (above the twenty pound it was extended at) Forty pound per annum; and hereupon Scire facias was awarded against W. and G. to answer the Queen for the surplusage above the yearly value that the extent was; and they pleaded their first extent by inquisition; and that they were not yet satisfied; and hereupon it was demurred, which did depend till Mich. 38 & 39 Eliz. And then it being moved by Kingmill Serjeant, Periam chief Baron, and Ewins puisne Baron held clearly that the Queen shall not have any surplusage, for by the extent they had an Interest and Term in the Land, which shall not be divested by the finding of the surplusage afterwards, and the value is not material; for though it be now of so great a value, yet it may be before the time of the extent incurred, it will be of a lesser value; and the Conusor is to bear the hazard: and the Queen hath no such Prerogative to divest it from the Subject, it being lawfully vested in him, especially this Debt accruing to the Queen by a common person. But Clerke second Baron held strongly the contrary, for it is the Queens Prerogative to be satisfied her Debt by any means, and it is no mischief to the Conusor, for he shall have as much answered to him, as the Land is extended at; but Judgment was given for the Defendants that they should be discharged.

Termino Hillarii,

Tricesimo quarto ELIZABETHÆ,
in Banco Reginae.

Pollard *versus* Lock, Trin. 31 Eliz. Rot. 810.

Information upon the Statute of 5 Eliz. for perjury; and declares (1)
that whereas J. R. brought Trespass against him, and he
pleaded not guilty, and the Plaintiff entituled himself by a
Feoffment of the Land; he shewed a Court-Roll held before
J. Locke, Gent. which proved it was Copyhold, prædict' Jo.
Locke also deposuit, that he was not Steward at that time, ubi revera
he was then Steward, whereby the verdict passed against him, &c.
after verdict, it was alledged in arrest of Judgment, that the De-
claration is insufficient, for here are two J. L. mentioned, viz. the Ante 127.
Defendant, and J. L. Steward, and so may be intended another
man; and when it is said prædict' J. L. deposuit, this shall be intended
to refer to him that was last named, and not to the Defendant; and
every Declaration ought to be certain, and shall not be taken by
intendment; and for this cause it was adjudged for the Defendant.
V. 10 H. 7. 5. B. 5 H. 5. 8. 6 Ed. 6. D. 70. 21 H. 7. 30. B.

Wing *versus* Earle, Cujus principium Antea, Hillar. 33.
B. R. Placito tertio.

The Case was again moved, Cawdy said, the Statute is private, (2)
and not being pleaded the Court is to take no notice of it; and
so the other matter came not in question; yet he held that a mile
shall be accounted according to the English form, and not according Post. 476.
to the Geometrical computation. And if one sells Land, and is ob-
liged that it containeth twenty Acres, this shall be according to the
Law, and not according to the custom of the Country. Fenner, if
the question had been upon the Statute, the miles shall be con-
strued according to the usual ways for carriages; but upon the con-
dition, if it be within four miles any way, the condition is broken,
wherefore it was adjudged for the Plaintiff.

Pendlebury *versus* Elmott.

- (3) **T** Respals for Assault, Battery and Wounding; the Defendant said he was Constable of D. and for such a misdemeanour of the Plaintiff, he laid his hands on him, and carried him to the stocks, quæ est eadem transgressio: And upon this it was demurred, and adjudged for the Plaintiff; for the Defendant did not plead not guilty to the Wounding, nor justified it; but if one pleads that the hurt which the Plaintiff had was of his own assault, this is a good answer to all; and the Plaintiff had Judgment.

Ante 94.

Browne *versus* Pendlebury, Trin. 32 Eliz. Rot. 154.

- (4) **D**ebt; for that the Defendant 4. Aug. 32 Eliz. granted to him an Annuity of five pound per annum for two years, payable at Mich. or within sixteen days after; and declareth that it was behind at Michaelmas & adhuc aretro existit, and upon this Declaration it was demurred. 1. Because it is not averred that it was arere sixteen days after Mich. Sed non allocatur, for it being alledged that adhuc aretro existit, which is long time after the sixteen days passed, it is well enough. 2. That Debt lieth not for this Annuity during the two years, but a Writ of Annuity. Curia cont^r, that Debt lieth, being a grant for years, for it is by the Deed as a Contract.

Ante 3.

Fowler *versus* Aston.

- (5) **A**ction for these words, I am put out of the Parsonage-house by Fowler the Patron, who is neither the Queens Friend, nor a true Subject. After Verdict it was alledged in Arrest of Judgment, that the words were not actionable; and so it was adjudged 16 Eliz. between Bursted and Peck, that these words, He is not the Queens Friend will not bear an Action. And afterwards in this Term it was adjudged for the Defendant, that the words are not Actionable.

Ante 192:

Ante 193.

Stanley *versus* Osbaston.

- (6) **A**ction for these words, He was a Bankrupt, and alledged he was a Shoemaker, and used buying and selling of Leather; And it was adjudged that the Action did lie, although the Plaintiff was not a Merchant, but he got his living by buying and selling.

1 Cr. 31.

2 Cr. 345.

Seyman *versus* Okeley, Pasch. 33 Eliz. Rot. 443. vel 93.

- (7) **T** Respals. The Defendant pleaded that Frier was seised in Fee, and let to him at Will; and afterwards released to him all accomps, suits, and demands, ab initio mundi, until the day of the date, by which he was seised for life, &c. the question was, if the Estate of the Lessee at will was encreased; and upon motion resolved by the whole Court, that the Estate is not enlarged; and the Plaintiff had Judgment.

Co. Lit. Sect.
508.

Underhay versus Underhay, Trin. 31 Eliz. Rot. 669.

Ejectione firmæ, It was found by special verdict, that J. S. made a Lease for three lives; and after let the Land to Willimot, Habendum to him for his life, which said term to begin and have his being after the death, surrender or forfeiture of the three lives. And Libery was made maintainant: the question was if this were a good Lease, because the words, which said term appoints that nothing shall begin till after the death, &c. And it was adjudged that for as much as the Estate was fully limited before the words (which said Term) those words are vain and idle; for utile per inutile non vitiatur. (8)
2 Rol. 66.
Hob. 171.
Ante 254.
Hob. 171.

Perkins versus Perkins, Hill. 33. Rot. 520.

The Case upon special verdict was, The Father was Tenant for life, the remainder to Th. and Drew his sons for their lives, Drew purchased the reversion in Fee, the Father and Th. surrender to him without Deed; the question was if this be a good surrender. Fenner, the surrender is void, for if it be good, it must first be the surrender of him in the remainder, which cannot be without Deed; and it cannot be the surrender of the first Tenant for life to him in the Remainder, for there is no word of surrender between them. (9)
Co. Lit. 338.a.

Wigford versus Gill.

Trespas; The Case was, J. S. erected a Mill-dam part upon his own Land, and part upon the Land adjoyning, the owner of the Land adjoyning pulls down the Dam upon his Land, by which all the Dam falls down; and the water did run out. All the Court held it was justifiable. So if one erects a Wall upon his own lands, and the land of his neighbour, and the neighbour pulls down the Wall upon his land, and thereupon all the Wall falleth down; this is lawful. (10)
Co. 5.101. a.b.
Ante 118.

The Lord Vaux Case.

The Lord Vaux levied a Fine to the use of himself for life, and after his death to the use of his two Daughters, till Ambrose his son returned from beyond the sea, and came to his full age, or died, which of the said times, days or hours, came first, and then it should remain to Ambrose; he returned from beyond the sea; the question was, if this remainder be good; and if it be, when it should commence in him, if before his full age. And by all the Justices the remainder is good, for although his coming to his full age, or from beyond sea, be uncertain, yet his death is certain, and so it doth not meerly depend upon uncertainties. 4 Mar. Dyer 142. A. deviseeth to Avice his Wife for life; si tam diu sola vixerit, and after her marriage or death, the remainder over, it is admitted a good remainder, 13 Eliz. 300. And they agreed the Daughters had an Estate for their lives conditionally, 3 Ass. 9. 11 Ass. 8. And Wray chief Justice said that the words disjunctive (or die) being in the end of the sentence, make the copulatives before to be disjunctives; so that if one of them be accomplished, the remainder doth vest; and he was induced to it, by Truepennies Case in the Common place. (11)
Co. Lit. 225.a.
Mo. 239.

place, 31 Eliz. where the Case was, the Husband made a Lease for years, if he and his Wife or any Child of their bodies shall so long live, the Wife dieth, and it was adjudged that the Lease continued; for the disjunctive that came last made the two copulatives before, to be of the same nature; and judgment was given in the principal case accordingly. And afterwards a Writ of Error was brought in the Erchequer-Chamber; and it was ended by composition. Nota, Gawdy said that if a Lease be made to one until A. cometh to his age of twenty one years, and then it shall remain over to another, this is a void remainder; and it is not like a Lease for years, the remainder over; But Fenner and the other Justices were of the contrary opinion in that Case. Nota, the Case of Trupenny cited before, was between Baldwin and Coke, and it was thus: A. having an intent to marry B. one of the friends of A. and for the preferment of B. made a Lease to A. and B. for sixty years if A. and B. or any Issue of their bodies so long live, and it was adjudged that the Lease doth continue as long as any of them live, for so was the intent of the parties; and Anderson commanded Nelson the Protonotary to enter upon the Record, that the Lease continued so long as any of them live. V. Co. Littleton 225. a.


Owen 52.
Co. Lit. 225. a.
3 Leon. 74.
1 And. 161.
Moor 239.
Goldsb. 71.

Ridgeley *versus* the Hundred of Warrington.

(12)

Action upon the Statute of Hue and Cry; upon the evidence it was held by Anderson and all the Justices, that whereas the Statute speaks of Robberies done in the day before night, yet if a Robbery be committed in the morning before day, or in the evening after the day; in any time of the night in which men use commonly to travel, that the hundred is answerable for it, but if it be at twelve or one of the Clock in the night, at which time every one is intended to be in bed, the hundred is not answerable for the Robbery.

2 Cr. 106.
Co. 7. 6. b.

Post. 954: 

Ognell's Case.

(13)

Trespas; The Case was upon special verdict. A Termor being outlawed for Felony, granted his Term and Interest to the Plaintiff, who is put out by J. S. and after the Outlary is reversed; and the Plaintiff brought Trespas for the profits taken between the Outlary reversed, and the assignment; and the question was if the action did lie, for that during that time the Queen had the Interest, and the Assignee had no right, and it was adjudged for the Plaintiff; for by the reversal, it is as if no Outlary had been; and there is no Record of it.

Post. 278.
Co. 8. 143. a.

Johns. *versus* Philips, Mich. 33 & 34 Eliz. Rot. 2101.

(14)

Second deliberance. The Case was, A woman made a Lease for life, and afterwards granted the reversion for 1000 years, and before Attornment she takes J. S. to husband, and afterwards the Tenant attorned to the Grantee; the Court resolved, and agreed, that the attornment came too late, but for some faults in the pleading no Judgment was given.

Co. Lit. 310. b.

William Richbell *versus* Edward Goddard, Int. Trin.
33 Eliz. Rot.

Action upon the Case against the Defendant, Sheriff of the County of Southampton, that whereas J. Gold was indebted to him by two several Obligations, one payable, 21. Novemb. 33 Eliz. he 17. Novemb. 33 Eliz. procured a latitat out of the Queens Bench returnable octabis Hillarii, intending to declare against Gold upon these two Bonds, which Writ was delivered to the Defendant, 20. Novemb. 33 Eliz. apud S. and the Defendant by force thereof 4. Decemb. 33 Eliz. did arrest G. at S. and afterwards 14. Decemb. 33 Eliz. suffered him to escape at London, by which the Plaintiff lost his Debt; upon not guilty pleaded it was found for the Plaintiff. And it was alledged in Arrest of Judgment. 1. That this Process was taken out before the Debt was due upon one of the Obligations; and then the Plaintiff had no cause of Action for it; and so being an entire suit, it shall abate in all, Sed non allocatur; because the Arrest was after the Debt was due, and this (if a good plea) was to be pleaded by the party himself, and not by the Sheriff, for he must answer his own tort. 2. It was alleged that there was a mis-trial, being tried in London, whereas the Issue (not guilty) refers to the whole matter; and the Arrest which was the principal was at S. and without it there can be no escape, and the trial should be of S. Sed non allocatur; for the escape is the matter upon which the Action is grounded, which was alledged to be at London; and the visne shall be of the place where the escape was, and not of the place where the Arrest was; and it was adjudged for the Plaintiff. (1)

Ante 165.

Co. 7. 2. d.
Post. 625.

Termino Hillarii, 34 Eliz. in Camera Scaccarii.

Smalbroke *versus* Dabridgcourt; Cujus principium antea, Paschæ 32. placito 9.

Error of a Judgment in the Queens Bench; the Errors were assigned by Godfrey. 1. That there was no consideration, for it was no benefit to the Plaintiff to take the body of Lane, and it was the Sheriffs duty to execute the Process. Sed non allocatur, for he being an Officer appointed by S. the now Plaintiff, it is no reason the Sheriff should be at any loss by his appointment; and therefore it was a good consideration. 2. Error, this assumpsit cannot discharge a future escape. Sed non allocatur. 3. Error, the escape is alledged to be 8. Novemb. 29 Eliz. and the Defendant answered to an escape, 30. Decemb. 30 Eliz. Sed non allocatur, for the Plaintiff may alledge it at any day, and the Defendant may answer to it according as the truth is. 4. Error, that this assumpsit is in nature of a Bond, and so against the Statute of 23 H. 6. Sed non allocatur, for as the party may discharge a Prisoner in execution, so he may foreclose himself from the benefit, if the Prisoner escapes, and the Statute never intended to help him that forecloseth himself. 5. Error, that there was no Venire facias. Sed non allocatur, for that is to be alledged by way of diminution; and the Venire facias is never certified; and this is after verdict, and so cannot be alledged. And the Judgment was affirmed. (2)

Ante 178.

Ante 178.

Ante 84.

Tenacy

Tenancy *versus* Browne.

- (3) **E**RROR of a Judgment in the Queens Bench, upon a promise.
1. Error, that the Plaintiff in the Action declared that whereas the Defendant was indebted to him in ten pound, he did assume that if the Plaintiff would forbear him one week, that he would pay it; and alledges that he did forbear him for one week, but saith not for one week following. Sed non allocatur, for it cannot be otherwise intended. 2. Error, for that the Plaintiff being an Alien, the trial was per medietatem linguæ, and the Venire facias was quorum quilibet habet four pound Land, whereas an Alien can have no Land. Sed non allocatur, for it shall be referred only to the English. And the Judgment was affirmed.

Post. 841.

Termino

Termino Paschæ,

Tricesimo quarto ELIZABETHÆ,
in Banco Reginæ.

Jordan *versus* Lyfter.

Action for words, What art thou? a Bankrupt; and wast a Bankrupt. After Aldric Coke moved in Arrest of Judgment, that the Declaration was, quod cum fuit mercator per magnum tempus, &c. but saith not he was a Merchant at the time of the speaking the words, and therefore the Declaration is insufficient; and the words here are interrogative and not direct; but the Court held the Declaration to be good, being alledged that he was per magnum tempus a Merchant, &c. And that his answer to the interrogation is a direct affirmance, but they would advise, &c.

1 Cr. 28
2 Cr. 22

Marthes Cafe, Principium antea, Pasch. 33. Pl. 10.

The Case was argued by Altham, that the Writ of Error lieth by the Executors, for the loss of the goods which they shall otherwise have; for it may be he had no Lands, nor any loss to any other then the Executor; and so it is reason that they should have the suit to reverse the Outlary, and to be restored to the goods, and for that, vouched 43 Aff. 41. & 49. 34 H. 6. 32. 15 Ed. 3. Error, where two may have several Writs of Error or attainst for several losses, and 43 E. 3. 32. 46 Ed. 3. 25. 19 Ed. 4. 5. & 6. where Executors shall have a Scire facias for the damages recovered, and the heir for the Land; and he shewed two presidents, Mich. 11 H. 8. Rot. 13. where one Sudely was endicted for robbery and outlawed, the Executor brought a Writ of Error, and one Error was assigned that no Proclamation was awarded. 2. Error, for that there was not five months between the date of the Exigent and the return of it; and there a Scire facias was awarded against the Lords of the Fee, and it was returned there were no Ter-tenants; and the Outlary was reversed; the other precedent was Tr. 18 H. 7. Rot. 3. where one was endicted of Murder and outlawed, and the Administrator brought Error, and the Error assigned was because the Endictment was contra pacem Domini Regis, whereas the offence was in the time of R. 3. Coke argued *à contra*; for that the Outlary trencheth in the realty, and the Lands and Goods are forfeited, and the blood is corrupted, and therefore the Executor shall not have Error, quia de minimis non curat lex; and for that reason, at the Common Law Tenant for years shall not falsifie a recovery which binds the Land in the

(2)
Ante 225.
1 Rol. 558.
Ante 225.

R n

realty.

Co. Lit. 256. b.

realty, 39 H. 6. falsifie Recovery 19. So at the Common Law, a traverse shall not be of an office which finds a Wardship, &c. for the King (for they were but chattels) until the Statutes of 38 Ed. 3. & 2 Ed. 6. And for the presidents cited, he said the Errors were such as were apparent faults which were reversible by motion; and although the Books of 19 H. 6. 2. and 2 R. 3. 21. are that an Outlary erroneous in this Court is not reversible by plea, but by Writ of Error, yet he said the Law is otherwise. But the Justices held that an Outlary here cannot be reversed by Plea, but ought to be by Writ of Error, and the Clerks said so was the course always. But for the matter they would advise, Nota 5. Coke f. 111. This Case is cited, to be resolved that the Writ of Error was well brought by the Executor, and that it was reversed at his Suit. V. Pasch. 39. Placito 14. fol. 558.

Pet versus Bafeden, P. 33. Rot. 392.

(3)

Co. Lit. 204. a.
Co. 10. 42. a.

PROHIBITION: The Plaintiff declared that whereas M. Pett was seised in fee of divers Lands, and being so seised made his Will, and made the Plaintiff his Executor and devised part of his Land to his eldest son in fee, and that he should have it when he came to his age of twenty one years, and that in the mean time the Executors should take the profits for payment of Debts and Legacies, and devised a hundred pound to Rose his Wife pro &c in exoneratione of her Dower in the said Land, to be paid by his Executor within one year after his death, and that he died, and the Defendant married Rose: and further alledged that the Defendant in consideration that the Plaintiff promised to pay him the hundred pound within one year after the death of the Testator, did agree and promise to the Plaintiff to make him a reasonable discharge of the hundred pound, and also to the Plaintiff and the son a reasonable discharge of the Dower of R. and alledged in fact that he offered the payment of the hundred pound to the Defendant, and required a discharge of the said hundred pound, and of the Dower; yet he intending to have the said hundred pound, and after to recover the Dower of the Land, sued for this Legacy in the Court Christian; and although he offered there the hundred pound so as the Defendant would make a discharge of Dower, &c. yet they refused to accept this offer, and thereupon he sued a Prohibition, and upon this Declaration it was demurred in Law. 1. Because this Legacy is properly suable and recoverable in Court Christian. 2. This agreement is no cause to draw it out of the Spiritual Court. 3. He had not shewed performance of the agreement; for he saith he offered it, but saith not that he paid it, nor that the Defendant refused it. 4. He sheweth not the time he offered it. But the Court upon motion were of opinion that the Prohibition did lie, for here the words pro &c in exoneratione make a condition, that he shall not have the hundred pound until he make a discharge of dower, &c. then when he alledged that he would have paid it, if the other would have discharged, &c. it is good enough, and the agreement between them is a cause of an Action upon the Case at Common Law, and this Plea being minisred in the Spiritual Court, and they refused, is a good cause of Prohibition.

Wyngate *versus* Marke.

IT was held upon evidence, that if the Lessee for years of the Queen be ousted by a stranger, yet although he be out of possession, he may assign over his term; for the reversion being in the Queen, he cannot be out of possession, but at his pleasure; And it was held that where an Action, was brought by an alien as Administrator of J. S. who was English, the parties being at Issue, the trial being per medietatem linguæ, that it was not well tried, and the Judgment was staied; for when the Plaintiff brings an Action not in his own right but as Administrator, the trial shall be by English only; and so was it held 23 Eliz. in Dr. Julios case; but if it had been averred that the Intestate had been an alien, it would be otherwise.

(4)
Ante 15.Argenton *versus* Westover & Lucas
Pasch. 33. Rot. 1680.

Error to reverse a Fine. 1. Error, it appeareth by the Record that the caption of the Conusans of the Fine was before Sir Roger Manwood Ch. Baron, 27. Martii 27 Eliz. and the Writ of Covenant and dedimus potestatem bore teste 9. Aprilis, so the Conusans taken without Warrant; and by the Statute of 23 Eliz. the day of the caption is always to be certified; but the Court over-ruled it, and would not hear it argued, for they said it is good enough, and otherwise they should reverse divers fines. 2. Error, the Writ of Covenant was de Manerio de Corthuther, and the ded. potest. was de Manerio de Cortheder, and for this variance there is no Conusans upon the Writ; but it being with an alias Corthuther, it was held good. And afterwards in P. 35. it was moved again, and other Errors assigned. 1. That by the caption of the Fine upon the dedimus potestatem, the Land was given to Westover and his Wife, and to the Heirs of the body of the Baron of the body of the Feme begotten; and the Fine engrossed was, to the Heirs of the body of the Baron upon the Wife begotten, so is variant. But all the Justices conceived that it was not material, for in both cases the Feme had but an estate for life, and the Baron an estate tail, and the words are of the same sence. 2. Popham Chief Justice took an exception that the Writ of Covenant, and the caption was de Manerio & tenement. and five shillings Rent, and the Fine engrossed was de Manerio & tenementis; but it was said and agreed, that the course of fines is, that if the Rent be under five pound, that they use not to mention it in the Fine engrossed. 3. Error assigned was, for that the Caption was, si contingat the Baron to die without Issue, that it should remain over, and the Fine engrossed was si contingat that the Baron and Feme die without Issue, that it shall remain over; so it is variant; but it was held all one, for the estate in remainder is always limited upon the more long estate which is the estate tail, yet it was all of one sence. And afterwards the Fine was affirmed.

(5)

Post. 677.7403

Foxe *versus* Goodson.

- (4) **A**ssumpfit: That whereas the Plaintiff had sued such an Action against the Defendant, and being at Issue had sued out a Nisi prius upon it, the Defendant in consideration the Plaintiff would surceale his Suit, promised to assign such a Lease to him, and to pay his costs of Suit, and alledges he had surceased, and the Defendant had not assigned the Lease nor paid his costs of Suit; and upon non assumpfit pleaded, it was found for the Plaintiff. It was alledged in Arrest of Judgment, that the Declaration was not good, because he did not alledge what costs he had expended; And all the Justices were of opinion it was not good for that cause, and the Defendant might have demurred upon it; but he not demurring, but taking issue, he shall not now have advantage of it; and thereupon it was adjudged for the Plaintiff.

Wroth *versus* Wiggs.

- (5) **A**ppeal of Murder; the Defendant pleaded not guilty, and being arraigned by a substantial Jury of Middlesex, the evidence was pregnant that he was guilty of Man-slaughter, but for the murder was doubtful; the Jury found he was not guilty of murder, and being demanded if he was guilty of Man-slaughter, they answered they had nothing to do to enquire of it; and upon this the Court being in doubt sent Finner Justice to the Common Place to know their opinion, who conceived that by the Law the Jury are not compellable to enquire of the Man-slaughter, and thereupon they gave their Verdict as before, and the prisoner was discharged, 9 Eliz. Dy. 261. a.
- Co. 4. 43. b.
Co. 4. 47. b.
Post. 296. 465.

Green *versus* Piper.

- (6) **I**t was held by the Justices, that a House in London which was part of the possessions of a Priory that was discharged of paying Tithes of their possessions, yet by the Statute of 37 H. 8. 2. shall be charged for Tithes according to the Ordinance there; for before that Statute no dwelling House was chargeable for Tithes, because no profit ariseth of it; and only Noblemens Houses are excepted, and P. 35. it was adjudged accordingly, and a consultation was granted.
- Co. 11. 16. a.

Scory *versus* Baber.

- (7) **P**rohibition against the Proprietor of the Church of Southkirby in the County of York, who sued for Tithes of Hay, and surmised that time out of mind the owners of these Lands had found straw for the body of the Church in discharge of all Tithes of Hay. Coke moved that this is no cause of discharge for the Parson was not chargeable with it, nor had any benefit by it; and in Hill. 30 Eliz. it was ruled that where one prescribed that he had used to pay the Parish Clerk his wages in satisfaction of Tithes-hay, this was no
- Ante 71.

no discharge; and of that opinion was the whole Court; but if he had alledged that he gave the straw to the Parson, and he bestowed it in the body of the Church, or that the Parson had a seat in the body of the Church, it had been otherwise; and thereupon consultation was granted.

Termino Paschæ, 34 Eliz. in Communi Banco.

Lyfs versus Watts.

PROhibition upon a Libel for Tithes of Slate-stones; the Defendant prayed a consultation, for that heretofore the Plaintiff sued a Prohibition for the same cause in Chancery, and upon the same Libel, and there a consultation was granted; for otherwise he shall be infinitely vered, that when one Court grants a consultation, he shall sue a Prohibition in another Court. And of this opinion was all the Court, that he shall have a consultation, if before a consultation was granted in another Court upon the same cause. And it was here held by the Justices, that no Tithes are due of a Quarry of Slate or Stone, for the person may have Tithes of the Grass or Corn which groweth upon the surface of the Land in which the Quarry is. (8)

Post. 736.

2 Inst. 651.

1 Rol. 637.

Tropp versus Bedingfield.

DEBT upon an Obligation; The condition was, that if J. S. perform the Arbitrement of J. N. if any be made, before the Feast of Easter, and if none be made, if the said J. S. came to the Guild-hall in Norwich at the Feast of Pentecost, and there suffers himself to be arrested at such a suit, and doth not remove himself, if such suit be commenced, but shall answer to the Action without delay, or pay to the Plaintiff at the Feast of Michaelmas ten pound, that then, &c. the Defendant pleads that no Arbitrement was made before the Feast of Easter, that J. S. died before Pentecost, and answered nothing to the residue of the condition; and the question was if it were a good Plea. And the Justices upon the first motion conceived it was, because that by the act of God he is deprived of his appearance, and so his Bond is saved although he pay not the ten pound, for he had election to do the one or the other; but they would advise. (9)

Moor 357.

Post. 399.

Ante 10. 11.

Mason versus Nevill.

TRESPASS; The Defendant pleads that Alex. Nevill. his Ancestor was seised and died seised, and the Land descended to him as Son and Heir, &c. the Plaintiff replied that long time before A. Nevill had any thing in the Land, J. S. was seised in fee and infeoffed four others to the use of himself and his Wife for their lives, and after to the use of W. his Son for life, and after his decease that they shall be seised ut in eorum pristino statu, upon condition that they shall receive the profits, and pay to B. the Wife of W. twenty pound per annum during her life, and after they shall be seised to the use of the Heirs Males of the body of W. That the Baron and Feme died, that W. entred and infeoffed the said Al. N. and died, who entred and devised (10)

devised it by his Will in writing to his younger son for life, and afterwards A. the Wife of W. died, and Nich. as son and heir of the body of W. entred and let to the Plaintiff; and upon this it was demurred in Law. 1. Because he did not traverse the descent. 2. Because as this case is the Heir male of W. cannot enter, for by the feoffment the estate tail is discontinued, and none can enter except the Feoffees enter and revive the use; but after motion of the case by the Serjeants, without any great argument, the Court gave judgment for the Plaintiff; for the descent is not traversable, but the dying seised, which is confessed and avoided by the devise. And Periam said the descent in any case is not traversable, but where both parties claim by the same person; and that this Feoffment was no discontinuance nor barred the entry of the Heirs; quære the reason, for the Court did not shew any reason of their judgment, 14 H. 8. 23. 19 H. 8. 6. 21 Eliz. Dy. 366.

Ante 30.
2 Cr. 221.

Eyre *versus* Woodfine, Pasch. 33 Eliz. Rot. 818.

(3)

Ejectione firmæ: The Case upon special Verdict was this, A Termor for years being outlawed upon the Statute of Recusancy, by which his term was forfeited to the Queen, the Lord Treasurer, and Barons of the Exchequer, sold it for ten pound to Fr. Michel and afterward the Outlary was reversed; the question was, if the Termor shall have again his Term; and after argument by Glanville of the one part, and Beaumont of the other part; Anderson and Walmisly conceived the Termor shall have again his term, and not the money for which it was sold, and in whose soever hands the Lands came, and by whatsoever consideration; the party shall be restored; for the Outlary being reversed, it is as if there were no Record, and the Queens interest was but conditional, viz. it is good if the Outlary be good; and therefore the term being sold, it is tied with the condition into whomsoever hands it cometh, that if the Outlary be reversed, the term is reduced to the owner. And it is not like a sale made by the Sheriff, for the Sheriff sells it by Authority of Law to levy the money; and there if the Judgment be reversed, the party shall be restored only to the money, and not to the term, for he lost it not by the Judgment: But Periam doubted and said that although by the Book of 11 H. 4. 65. that upon the reversal of the Outlary, the party shall have restitution; yet the Book speaks not if it be sold before. And here it is mischievous of both sides, if the party that bought it lawfully shall lose it; and of the other side, if the other shall not be restored to it, he shall have nothing, for it will be hard to be restored to the money out of the Queens Coffers; but afterwards, Trin. 34 Eliz. Anderson and Walmisly gave Judgment for the Plaintiff, Periam not being resolved in it. V. 20 Eliz. Dy. 363.

Moor 270.

Co. 5. 90. b.
Ante 278.
Co. 8. 143. a.

Co. 5. 90. b.

Loftus Case.

(5)

NOta: Puckering demanded the opinion of the Justices in this case, Loftus being possessed of a term for eighteen years, and of another term in the same Land in reversion for forty years, died intestate: his Wife takes Administration and enters, and marrieth J. S. who let it to J. D. for twenty one years rendering Rent
and

and makes his Executor and dieth; the question was if his Wife or Executor shall have the rent, Periam, during the first term for years the Executor shall have it; for the Baron had given away all that term, and no interest remained in the Feme, and the rent by the Indenture shall go to the Executor; but for the residue of the term of twenty one years, which is derived out of the Lease for forty, the Wife shall have it as annexed to the reversion or term which the Wife had; quære, for the other Justices delivered no opinion.

Co. Lit. 46. b.
Ante 33.

Co. Lit. 46. b.

Bayly *versus* Churington.

Action for these words, Thou art a false Knave, thou wast arraigned for two Bullocks; adjudged that the words were not actionable; for he saith not he was arraigned for stealing two Bullocks; and if the words had been so, yet the words had not been actionable; for a man may be arraigned for Felony, and yet be no Felon.

(6)

2 Cr. 268. 9.

Charnel's Case.

Action for words against Husband and Wife, because the Wife said, My Turkies are stoln, and Ch. hath stoln them. It was moved that an Action lay not; for it appears the Feme could have no Turkeys, for they are the Barons, so could not be true, and then no discredit. Curia contra, because she had charged him with stealing; and if one which had no Horse, saith J. S. hath stoln my Horse, this is as great discredit as if he had had one, for every one knoweth not whether he had a Horse or not.

(7)

2 Cr. 606.

Blitheman *versus* Blitheman.

Dower: The Defendant pleads, ne unques seise per Dower, &c. and upon this they were at Issue, the Jury found a special Verdict, that J. Blitheman the Husband of the Demandant, and Father of the Tenant, was seised of the Land in tail, and in consideration of a marriage of the Tenant his eldest son, covenanted by Indenture that this Land after his death shall descend, remain, or shall be to the Son and his Heirs, and afterwards he taketh the Demandant to wife and dieth; and if he was seised of such an estate of which he was dowable was the question. And the Court resolved for the Demandant; for by the Indenture no estate was altered in the Baron, but he remained Tenant in tail as before, and this for two causes. 1. Because it is only a covenant and executory, for which an Action of Covenant lieth if he perform it not; for it is not that he will stand seised to the use of himself for life, and after to the use of the Son, but only that it shall descend, remain, or be to the Son after his death, which may be by his permission that it shall descend, and be to the Son without any alteration of the estate. 2. If it were an express Covenant that he would stand seised to the use of himself

(8)

Co. 2. 52. 2.

Post. 471.

Post. 345.

for

Foll. 471.

for life and after to his Son, this had been void to alter the use to the Son; for he being Tenant in tail, and reserving to himself an estate for his own life, in that he reserved all that he might lawfully dispose, and then by the Covenant he can dispose of no more then he can lawfully do, and so the limitation after his death is meerly void, and the estate remained in him as before; for both which clauses, but principally for the first, they held the Demandant should have Judgment, and it was given accordingly. V. 2 Co. f. 52.

Termino

Termino Trinitatis,
Tricesimo quarto ELIZABETHÆ,
in Banco Reginae.

Fox *versus* Lee, Trin. 33 Eliz. Rot. 555.

Error of a Judgment in Ludlow, in Debt upon an Obligation; the Condition was for payment of seventy pound, scil. thirty five pound at one day in the Temple-Church, London; and thirty five pound at another day. The Defendant pleads payment of the seventy pound at Ludlow, Secundum formam & effectum conditionis prædictæ, and issue taken upon it, and found against him, and Judgment given for the Plaintiff: And two errors were assigned, first, That he alledged payment of the seventy pound according to the Condition, where he ought to plead several payments, of thirty five pound at one day, and of the other thirty five pound at the other day, and not to couple them together. But the Court held it good enough; for when he pleads payment, Secundum formam & effectum conditionis prædictæ, this Reddendo singula singulis is as if he had pleaded he had paid them severally at the several days. Second Error, For that the names of the Jurors did not appear of Record, but it was held good enough, for that never appeareth where the Jury is full of the principal Pannel, but where the Inquest is part of the principal Pannel, and part by Tales de circumstantibus, there the names of both shall be entred upon Record: and the Judgment was affirmed. (1)

Yates *versus* Windham. Quod vide antea Mich.
31 & 32 Eliz. B. R. Placito 38.

It was moved this Term. Coke shewed, that upon the second Writ, Quod coram vobis. relidet, the Plaintiff assigned new Errors, scil. A Discontinuance; and that the Judgment was, that the Defendant sit in misericordia; whereas it appeareth, that the Defendant did appear upon the Summons: To which the Defendant in the Writ of Error appeared and pleaded, That heretofore the Plaintiff brought a Writ of Error upon this Judgment, and shewed all the proceeding in it, and that this is discontinued, in which none of these Errors were assigned: and upon this the Plaintiff demurred in Law, and Coke argued, That this Writ of Error, and the Errors assigned upon it, cannot be maintained. 1. The Plaintiff cannot alledge diminution to Reverse a Record, after Errors assigned, and Scire facias sued upon it; nor can the Defendant alledge it after In nullo est Erratum pleaded, for by it the Record is affirmed, and so 28 H. 6. 7 Edw. 4. & 22 Edw. 4. 2. In a Writ of Error Coram vobis relidet, the Plaintiff shall not assign Errors. (2)

Ante 84. 155

D a

Errors

Errors but in the Record removed, and not in the Judicial Process; for the words of the Writ are, that there is Error In recordo quod coram vobis residet. So it is admitted, that this is all the Record. 3. Upon a Writ of Error, Quod coram vobis residet, the entry is Allegando errores prædicti in forma prædicti allegat. and so is the president, Trin. 20 H. 7. 88. But if these Errors be over-ruled, he may assign other Errors within the Record: But here is no mention of the former Errors. Also this is entered in another Roll, and not upon the same Roll, so that the Court might see all together, and so is the course; otherwise the Court shall not intend it to be the same cause, and the Court shall be compelled to infinite search, which the Law will not allow. But the Justices said, That in as much as the first Writ is discontinued, and this is a new Writ sued, the Plaintiff is not tied to the former Errors, but may assign other Errors at his pleasure; for it is now as if no Errors were assigned before, and he may assign other Errors in the Record, or other Errors out of the Record; and this removing of the residue of the Record in this manner is well allowable; and these Errors may be well assigned, and as to these points they were satisfied; but for the entry of it upon another Roll, they doubted, and would advise: And afterwards for this cause it was held a mis-entry, and the Plaintiff put to a new Writ of Error.

Beaucamp versus Neggin.

- (3) **E**rror of a Judgment in Assumpsit. First Error, For that N. the Plaintiff in the Assumpsit declared, That whereas the said B. in consideration that the said N. had paid for him, and at his request to C. at such a day (which was a year before the promise) ten pound, he assumed to repay it Cum inde requisitus esset; which consideration is not good, because it was for a thing past. Second Error, The Assumpsit was laid at Worcester In alta Warda ibidem, and the Venire facias was of the City of Worcester, whereas it should be De alta Warda, for by it, it is intended there be more Wards: Sed non allocantur. For as to the first, when the payment is laid to be at his request, the consideration doth continue, and so is the common course. And as to the second Error, it shall not be intended, that there be more Wards, except it be alleged.

Ante 42.

Brown versus Worsely, Trin. 33 Eliz. Rot. 683.

- (4) **E**rror of a Judgment in the Common Bench, in an Action for words, viz. Thou art a Whore and a Thief, for thou hast poisoned thy Husband. And upon not guilty pleaded, the Jury found against him, and assessed damages for the first words, six pound six shillings eight pence, and for the other words twenty marks. And these damages were severally assessed by the advice of the Lord Anderson, before whom it was tried; and thereupon several Judgments were given for the damages: And upon this Error was brought, for the words will not maintain an Action. For the first words, suit for them is to be in the Spiritual Court, and no remedy for them at Common Law: And as for the second words, although the words Thief will maintain an Action, yet the words subsequent will not maintain the former. But Mich. 34 & 35 Eliz. the Judgment was affirmed, that an Action lay for the last words: But for the

Co. 10. 130. b.
Post. 329.

Co. 4. 18. a.

2 Cr. 114.
1 Rol. 51.

the words, Thou art a Whore, no Action lay; and as to that, the Judgment was reversed.

Pyers versus Turner, Hill. 34 Eliz. Rot. 766.

A Sumpsit, As Administrator to Greenway, and declares, that where- (5)
as one Walter Turnor, the son of the Defendant, was bound by
Obligation of eighteen pound to the Intestate; which money was
not paid at the day, but the Son moved the Father to pay it for
him; the Defendant in consideration the Intestate would give him
a longer day, promised to pay it; and that the Intestate gave him
a longer day, scil. the sixth of day of May, &c. and upon Non Assumpsit
pleaded it was found for the Plaintiff. And it was now moved in
Arrest of Judgment; first, That he did not shew the place where
Administration was committed, as 35 H. 6. 31. is. Sed non allocatur;
for it is good in a Declaration, but not in a Bar. Secondly, It
was moved that here is no consideration, for the giving day to the
Father who was not indebted, is not material; otherwise, if he had
given day to the Son. Sed non allocatur; for by Gawdy, laying all the
matter together, that the Father required it upon the request of
the Son, and the other giving day, it is good; and a recovery in
this Action shall be a good Bar in debt upon the Bond against the Ante 240.
Son: And to this the Court agreed, and the Plaintiff had Judg-
ment. Nota, Trin. 37 Eliz. in the Exchequer Chamber this Judgment
was reversed, for it was no consideration. Ante 207.

Hassall versus Juxon.

TRESPASS, for breaking a house in such a Parish and Ward in (6)
London. Upon not guilty, the Jury found the Trespass, and
that the house was in the Parish, but not in the Ward; and it was
held, that this Verdict is for the Plaintiff; for the finding it was Ante 41.
not in the Ward, is superfluous, it being admitted by the parties, Post. 333.
and the Jury had not to meddle with it; and it was adjudged for
the Plaintiff.

Allens versus Andrews, Hill. 34 Eliz. Rot. 720.

The Plaintiff had brought debt as Administrator to George War- (7)
low, by reason of Administration committed to him by the
Archbishop of Canterbury against the Defendant, and had Judgment
to recover; and after the year brought a Scire facias upon the judgment;
the Defendant pleaded, that the Intestate died in London, and had
not Bona notabilia in divers Diocesses; and that after the Judgment,
the Bishop of London committed Administration to the Wife, and
upon this it was demurred. And Andrews himself moved, that he
might well plead this Plea; for it was a matter of puisne temps,
and he could not plead it before; But all the Justices held, he
came too late; for Popham said, if the Administration had been re-
pealed, he might well avoid the Judgment by this Plea, for it was Post. 315. 457.
of puisne temps: But this was a matter he might have pleaded be-
fore, and it is in annulling of the Record, which is not sufferable;
and the Plaintiff had Judgment.

Boyer *versus* Jennings, Pasch. 33 Eliz. Rot. 248, or 348.

- (8) **E**rror of a Judgment in Debt in the Common Bench, where the Defendant pleaded a good Bar, and the Plaintiff made an ill Replication; and the Defendant did not rejoyne, but Judgment was given against him upon a Nihil dicit; and now he would assign Error, for that the Replication was ill: so that it appeared upon his own shewing, that he had no cause of Action, and then no Judgment was to be given for him. But the Court held, he could not assign Error in it; for Judgment being given by Nihil dicit, it is all one as if no Bar or Replication had been made; for the Court without Issue or Demurrer, shall not adjudge upon the Replication: and although it was entered, yet when the Defendant doth not rejoyne, this is a waiver of all; and if it were in this Court, it is never entered until the Rejoinder be made; wherefore the Judgment was affirmed, 3 H. 6. 41. 38 H. 6. 39. 12 Ed. 3. Essoign 17.

Ante 62.

Co. 8. 133. b.

Termino Trinitatis, 34 Eliz. in Communi Banco.

Flower *versus* Rigden.

- (1) **R**eplevin. The Case was, a Disseisor infeoffed a stranger, and after the Disseisee brought an Assize against the Disseisor only; and the Feoffee pending the Assize, let the Land to the Plaintiff. The Disseisor pleads to the Assize Nul tort, nul disseisin, &c. and found against him, whereupon the Disseisee recovered: The question was, if the Termor for years shall falsifie his recovery, that is to say, that the Defendant in the Assize Ne disseise pas. And it was agreed by the Court, that he might; for the Termor here did not claim by him against whom the recovery was had; and there is no doubt, that the Freehold, out of which the Term is derived, is not recovered, and the Freehold is not bound by it: And the doubt at Common Law was, if the Termor might falsifie where the Recovery was against the Lessor, but it was never doubted, but that where a Recovery is not against the Reversioner, but against a stranger which had nothing in the Land, but that the Lessee might falsifie in point tried, and so is 1 H. 7. 19. And it is a rule, that every stranger to a recovery may falsifie, (for he cannot have Error or Attaint) if he came not in pending the Writ, by him against whom the recovery was, for then he is bound: And afterwards it was so adjudged, that he might falsifie in the point tried.

Co. Lit. 46. a.
Post. 718.

Farrar *versus* Johnson.

The Case was, A Feme Lessee for life, the Reversion to two Coparceners, the Feme and one of the Coparceners make a Lease for years of the whole, rending ten pound Rent per annum to the Feme, during her life, and after ten pound to the said Coparcener; and afterwards, the Feme and the two Coparceners joyn in a Fine, Sur conusans de droit come ceo, &c. to two strangers, which was to the use of Farrar, the Husband of the Coparcener that joyned

joyned in the Lease. Two questions were moved. 1. If he in the Reversion levy a Fine to the use of himself, if Attornment be needful, and resolved it was not; for he is in by the Statute of 27 H.8. Co.Lit. 309.b. So in every case of a Fine levied of a Seignior, or of a Reversion to an use. 2. If by this joyning in the Fine by Tenant for life with the Reversion, if the Estate for life be surrendered, and the Rent extinct, because the Reversion to which the Rent was incident, is gone? And the Court doubted, but inclined it was not; for every one granted what in him lay. And Periam said, if they had not levied a Fine, and Tenant for life died, the Lease was good but for a moiety of the Parcener that let, yet the Rent remained for all.

Termino Trin. 34 Eliz. in Scaccario.

Edward's Case.

Action upon the Case. For that the Plaintiff having a Cellar, (3) in which he put divers Hogsheads of Wine; and the Defendant having a Ware-house over the Cellar, maliciously laid into the Warehouse such a weight of Wares, Quod propter gravitatem ponderis, the Floor of the Ware-house fell down and spoiled all his Wines, by which, &c. The Defendant pleaded, that J. S. was possessed of the Ware-house, and of the Cellar; and let the Cellar to the Plaintiff, and the Ware-house to the Defendant; and that at the time of the Lease made, the Ware-house was much in decay and ruinous; and that there used to be laid in the Ware-house a thousand weight, and that he put in it but eight hundred weight, Et propter ruinositatem it fell down; and concluded his Plea, Et hoc paratus est verificare: And upon this, it was demurred in Law; and the principal cause of the Demurrer was, for that the Plaintiff laid to the Defendants charge, that he maliciously did over-charge the Ware-house with Wares, and that it fell Propter gravitatem ponderis; and the Defendant answered, that it was ruinous and fell Propter ruinositatem, and did not traverse that which was laid to his charge. And this case was argued by Atkinson and Fleming for the Plaintiff, and by Coke and Dalton for the Defendant; and after several Arguments at the Bar, Gent and Clark Barons held strongly; that the Plea was not good for want of a Traverse; for when a Malefeasans is laid to the Defendants charge, he ought expressly to traverse it, and not to answer it by Argument. But Manwood Chief Baron held strongly the contrary, that the Plea was good; for he confessed that it fell, but shewed how: As in Waste, the Defendant pleads that it was ruinous at the time, without answering expressly to the waste: So in an Action upon the Case against an Inn-keeper, it is a good Co. 8. 33. a. Plea, that the Plaintiff was robbed by one which came in company with him, without traversing, that it was by his default; but it was answered, that no Malefeasans is expressly supposed by these acts, but only a permission: But here an ill act is expressly supposed, which ought expressly to be traversed; and the two Barons said, that so was the opinion of other Judges, with whom they had conferred; wherefore against the opinion of Manwood, they gave Judgment for the Plaintiff.

Termino

Termino Trinitatis, 34 Eliz. in Camera Scaccarii.

Highgate *versus* Diggs.

- (1) **E**rror assigned was, that Diggs had brought a Writ of Covenant, and declared upon an Indenture; but in the Bill upon the File, there was no date of the Indenture, but spaces left for it; but the Declaration was perfect and compleat, and for that, the Bill upon the File is as an original Writ, which is the Warrant for the Declaration; and this not being perfect, the Declaration cannot aid it: For this cause the Judgment was reversed, and they said, if there be no Bill upon the File, this is a plain cause of Reversal, and that they had so adjudged it: And so it is here as if there were no Bill. *Wherefore, &c.*
- Ante 119.

Rawson *versus* Maynard.

- (2) **E**rror of a Judgment in the Queens Bench: The Error assigned was, for that in an Ejectione firmæ the Plaintiff did count of a Lease of the fourth part of a House in N. in four parts to be divided; by force of which, he entred in Tenementa prædict' and was inde possessionatus, until the Defendant did eject him De Tenementis prædict'; whereas he ought to suppose his Entry into the fourth part, and the Ejectionment of the fourth part. Sed non allocatur; for the Justices said, that the Entry and Ejectionment supposed De tenementis prædict' shall not be intended of the entire Tenement; but of the fourth part of the House, according to his Declaration; and the Judgment was affirmed.
- Ante 234.

Termino Trinitatis, 34 Eliz. in Curia Wardorum.

Jernengham & Cornwallis.

- (3) **T**he Case was; A man was seised of three Mannors, of two in Fee, and of the third in Tail, all being held in Capite, and he devised all of them to a stranger: The question was, for how much this Devise was good? which was referred to the two Chief Justices, and they conceived it was good for the whole two Mannors which he held in Fee, and void for the third; for he being Tenant in Tail of the third Mannor, and that descending to his Issue, is a sufficient performance of the Statute of 32 H. 8. and the intent of it is satisfied.
- 32 H. 8. 1.

Termino

Termino Michaelis,

Trices. quarto & Trices. quinto ELIZABETHÆ,
in Banco Reginae.

Beal *versus* Charter.

TRESPAS for false imprisonment; The Defendant justified as Constable of A. because the Plaintiff brought a child of the age of two months, and laid it in the Church-yard of A. to the intent to have destroyed it, or to charge the Parish with the keeping of it; for which he did arrest him, and put him in the Stocks; for which, &c. And upon this, it being demurred, it was held a good Justification, for it is an ill practice, and is good cause to stay the Plaintiff, and to imprison him; and afterwards in the same Term it was adjudged, that the Plaintiff nihil capiat per billam.

(1)
Poph. 12.
Moor 284.
Owen 98.
1 Leon. 327.

Ante 204.

Grute *versus* Locroft, Pasch. 33 Eliz. Rot. 211.

TRESPAS upon Demurrer; the case was, Baron and Feme Joynt-tenants, during the Coverture for sixty years; the Baron by Indenture let all the Land for seventy years, to commence immediately after his death; the Baron dieth, and the Feme survived; The question upon demurrer was, if this be a good Lease to charge the possession of the Feme. It was first moved, that it was a void Lease, because it was not to commence till after the death of the Baron; and it might be, that he might over-live the whole Term: And it is all one, as if he had granted the Term to commence after his death, which had been void. Second point, he dying before the Term commenced, the Interest is vested in the Feme: But it was adjudged a good Lease. For as to the first, it is not like the case put, for there nothing passed until his death; but here a good Term is created in Interest, although not in possession. For the second point, the Baron having an Interest to dispose of in his life, he might dispose of all the Term, and it should bind the Feme: So when he hath disposed by an Act executed in his life of the Interest of the Term, and hath created a Term in Interest; this is as good as if he had granted all the Term: And so it was adjudged, 1 Co. 155. a.

(2)
Moor 395.
Poph. 4.

Co. 1. 155. a.

Ante 152.

Co. Lit. 45. b.

Martidale versus Martin.

(3)
Co. 1. 25. b.
23 H. 8. C. 10.

Co. 1. 24. a.

Co. 1. 25. b.

Ejectione firmæ, by the Lessee of Sir Edw. Clere against the Lessee of Peacock, for certain Lands in Thetford. Upon special Verdict the case was, An Ancestor of Sir Ed. Clere devised certain Land to divers and their Heirs (under whom Peacock claimed) to the use of them and their Heirs: Upon this trust and confidence, that they out of the profits of it should erect a Free-School, and pay so much to the Master yearly, and so much to the Usher, and should give ten pound per annum to five poor men; and it was found, that the Land was not so employed, nor any School erected, &c. And if this were a Condition, for breach whereof Sir Ed. Clere might enter, was the question, There were two points in the case, first, If these uses were void by the Statute of 23 H. 8. cap. 10. Secondly, If it were a Condition. And after Argument, all the Justices held; first, that it was not restrained by the Statute of 23 H. 8. for that was only to restrain superstitious uses, and never intended to restrain uses that were in favour of Learning, and relief of the Poor. Vide 1 Co. Porters Case. Secondly, They resolved it was no Condition, for the words being upon trust and confidence, shew that he reposed trust in them, and would not have the Land return for not performance of it; and there can be no more apt words to shew his intent, and not to tie the Land with a Condition. And Popham cited Machins case (which was entred, Mich. 29 & 30 Eliz. Rot. 649.) where the Lessor devised his Land to his Lessee for years, for the same term he had before, and paying the same Rent, and at the same days, and upon the same Covenants which were in the first Lease; and the question was, If this were a Lease conditional, that his Lease should cease if he did not perform the Covenants, and adjudged it was not; for the first Covenants were only by way of Covenant, and not Conditional: And here it cannot be by way of Covenant, and therefore the Devise as to that was void, and stood for the residue; and afterwards it was adjudged for the Lessee of Peacock.

Justice Fenner versus Fisher.

(4)
Co. 6. 24. a.
Post. 754. 798.

1 Cr. 19.
Post. 395.
Post. 671.
Ante 64.

Trespas; The Defendant justified, for that Jo. Wright was seised in Fee, and let to him for years; that the Plaintiff claiming by colour of a Deed of Feoffment, where nothing passed, entred, &c. The Plaintiff replieth, by Protestation, that Wright was not seised in Fee, Pro placito saith Quod non demisit: And upon this Issue was joyned, and found for the Plaintiff. And it was now moved in Arrest of Judgment, that the Plaintiff hath not made any title to himself in his Replication: But all the Justices held it good enough; for in this Action a man need not make any title to himself, but otherwise in an Assize or other real Action: Also by the Defendants Plea, that the Plaintiff entred by colour of a Deed of Feoffment, in that he doth admit him to be Tenant at Will, which is not destroyed; and it was adjudged for the Plaintiff. V. 18 Ed. 4. 26. 3 Ed. 4. 18. 22 Ed. 4. Trespas 140.

Appleton *versus* Burr.

Error of a Judgment in the Common Bench, in an Action upon the Case against the Plaintiff, Sheriff of E. for suffering a prisoner to escape that was arrested by a Capias upon an Original Writ. 1. Error, it was alledged that the Sheriff directed his Warrant to the Bailly of the Franchise to arrest him, who arrested him, and delivered him to the Under-Sheriff in *ea parte* Authorizat', &c. and shewed no place where the Bailly delivered the prisoner, for it may be it was out of the County. 2. It was not shewn, that the prisoner did not appear at the day; and if he did appear, the Plaintiff was at no loss. *Sed non allocantur*; for the shewing of the place was but an inducement to the action; and when he pleaded not guilty, the escape is the matter material; and to the second, though he did appear, yet the tort is not purged, and the Judgment was affirmed. (5) Ante 158.

Charnock *versus* Sherrington.

Error, for that Sherrington recovered against one Worsely in Debt, and afterwards Worsely enfeoffed the Plaintiff of his Land; and then Sherrington sued an Elegit upon the Judgment, and the Plaintiff before Execution made, sued this Writ of Error, and would assign Error in the Judgment; and it was demurred in Law if the Writ did lie. *Curia*, it seemeth it did not. 1. That the Feoffee cannot have a Writ of Error, except it be for Error in suing the execution. 2. Till Execution sued he is not a party grieved, and this was the reason that he in the reversion or remainder shall not have Error in the life of the Tenant for life, upon a Judgment given against the Tenant for life, because he was not a party grieved, but he might have it after the death of the Tenant for life, before the Statute. But Egerton strongly urged the contrary, because the Land is liable to the execution. V. 18 Ed. 3. 25. 4 Dy. 1. 2 Ed. 4. 24. (6) Co. 3. 4. a: Post. 294.

Graves Case.

Action for these words, Mr. Wingfield you never thought well of me since Graves did steal my Lamb, adjudged actionable; although it was alledged in Arrest of Judgment, that it was not a direct affirmation that G. R. did steal it. (7)

Levets Case.

Action for words, and declared that the Plaintiff was an Inholder in D. the Defendant spake these words, Thy house is infected with the Pox, and thy Wife was laid of the Pox, adjudged actionable; for it shall be intended the great Pox, and if it were the small Pox, yet they were actionable; for it is a discredit to the Plaintiff, and Guests would not resort thither, and it was adjudged for the Plaintiff, and fifty pound Damages given. (8) Ante 214. Post. 582. Co. 4. 17. 3:

Baxter and his Wife *versus* Mounting.

- (9) **E**rror to reverse a Fine. The Error assigned was, that the Baron and Feme, and the Third person levied the Fine, and the Writ of Covenant was against the Baron and Feme, and the third person; and in the Summons the Feme was left out. Coke moved that for this Error the whole Fine shall be reversed, and it being ill in part, is ill in all. 2 Ed. 3. 39. 27 H. 6. 6. 10 Ed. 3. 1. 50. and so was the opinion of the Court, but they would advise.

Ante 124.

Warneford *versus* Haddock, Mich. 33 & 34 Eliz.
Rot. 47.

- (10) **E**rror to reverse a Judgment in an Action of Waste. 1. Error, for that in the Action of Waste the Defendant appeared upon the Distress, and after Declaration made no answer, but Judgment was given against him by nihil dicit; and upon the Writ awarded to enquire of the Waste and Damages, the Sheriff went not to the place wasted, but enquired of it at another place, and this was assigned for Error. Sed non allocatur, for when Judgment in Waste is given upon a Demurrer or nihil dicit the Waste is confessed, and the Writ shall be only to enquire of Damages, and although the Writ do command the Sheriff to go to the place; and this is but of form and nugation; but otherwise it is where Judgment is given by default before appearance; so is 3 Eliz. Dy. 204. 2. Error, he assigned the Waste in a house, and by his Title it appeared the Plaintiff had only two parts of the reversion of the house. Sed non allocatur, for although he hath but two parts, yet he shall punish the Defendant for Waste done, in that which was held of the Plaintiff; and the Mesuage being intire, he cannot assign the Waste otherwise, and he did count according to his Title. 3. Error, because it did appear the Defendant had the two parts by several demises; and therefore though the Plaintiff had the reversion in one hand, yet he ought to have several Actions. Sed non allocatur: for he having counted upon the whole matter, it is as several counts; and he may well joyn them in one Action. And Pasch. 35 Eliz. the Case was moved again; for that it doth appear by the Count, that the Defendant held one part of the demise of the Plaintiff; and the other of the demise of a stranger, which had granted his reversion to the Plaintiff, so he had the reversion by several Titles, he cannot maintain this Action; And although he hath declared specially how he held it, ex dimissione & assignatione, this will not aid him, but if he had made several Leases he might have had one Action of Waste, as 44 Ed. 3. is. But all the Justices held the contrary; for in as much as he hath shewn the truth of his Case in his Declaration, and he hath the reversion in one hand, he shall maintain this Action. 4. Error, that the Sheriff had taken an Inquest to inquire of the Waste, whereas the Judgment being by confession, it ought not to be enquired; but because divers presidents were so, it was awarded no Error; and the Judgment was affirmed.

Ante 234.

Termino Hillarii,
Tricesimo quinto ELIZABETHÆ,
in Banco Reginae.

Sharley *versus* Richardon, Int. Hill. 34. Rot. 462.

DEbt upon an Obligation of Fifty pound, the Condition (1)
was to perform the Arbitrement of Walter Bolton and
Ed. Price of all Actions, &c. The Defendant pleaded they
made no Arbitrement; the Plaintiff by replication
shewed that they made an Award, scilicet, that each of them
should give to the other within four days after the Award a general
release of all demands till the date of the Obligation, proviso semper
that if either of them disliked the award within twenty days after
the award; and should pay to the other within the said twenty days
ten shillings, that then the Arbitrement should be void, and it should
be lawful for them to sue their Actions, &c. one against the other.
And upon this it was demurred; and argued by Tanfield of the one
part, and Lewis of the other; and after argument it was adjudged
for the Plaintiff, for all the Justices held that the first part of the
award was good; and the proviso being repugnant and contrariant
to the premises is wholly void; and for the not performance of that
part which was good, the Action did lie; for when they awarded
that they should release each to other within four days, by not per-
formance of it the Bond was forfeited; then the proviso that upon
payment of ten shillings all should be void, this cannot save the
Bond, which was before forfeited And when one hath released to the
other, the other if the proviso be good might tender the ten shillings
to make the Arbitrement void, which would not avoid the release;
and it was adjudged for the Plaintiff.

Ridler *versus* Punter.

Ejectione firmæ. It was found upon special Verdict, that W. and his (2)
Wife being possessed in right of the Wife of a term which she
had as Administratrix to C. her first Husband; and W. being in- 3 H. 7. c. 4.
debted by contract, granted the term to Coleman, to the use of W.
pp 2 and

and his Wife for their lives, and after to the use of Coleman himself. W. is sued for this Debt, and recovery against him, and a Fieri facias being awarded to the Sheriff, he for this Debt of W. sold the Term to the Plaintiff; the question was if this sale were good. It was moved, that this grant of a Term, being but a Chattel, and to the use of the Grantor himself, is void by the Statute of 3 H. 7. Curia contra, for the preamble of the Statute is, where grants were made by fraud or covin, of Chattels to the use of the Grantors themselves, to defraud Creditors or others, that they shall be void; but this grant is not to avoid Creditors; for the term being in right of the Wife as Administratrix, if it had so continued in the hand of W. and had never been granted, this was not extendible for the Debt of W. and if W. himself had it as Executor, it was not extendible for his proper Debt, and fraud shall not be intended, except it be expressly found. And this grant is out of the Statute of 39 H. 7. 4. and all other Statutes of that nature, wherefore, &c.

Co. 10. 56. b.
Post. 816.

East *versus* Harding.

(3)
1 Rol. 508.
Ante 5.

Post 499.
1 Rol. 508.

TRESPASS for cutting of Trees; the question was, if it be a forfeiture by the Common Law for a Copyholder to cut Trees, without a special custom for it. Gawdy and Popham held it was, for it is to the Lords disinherittance; and is not allowable for a Copyholder to do it without a Custom; and if he did it, it was a forfeiture; but by Popham, if it be found that he did it for reparation of the House, by which it is made better, there peradventure it is otherwise.

Gregory *versus* Nevill.

(4)

ASSUMPSIT, That whereas M. the Lessee for life of Land, the reversion to the Defendant, had granted to the Plaintiff a Rent of Ten pound out of it, in consideration that the Plaintiff promised to relinquish the Rent, the Defendant promised to pay him Thirty pound, and alledged in fact that he did relinquish the Rent, and did not claim it, &c. and upon non Assumpsit it was found for the Plaintiff; and upon motion in Arrest of Judgment, it was resolved that the Declaration was not good, because he shewed not how he relinquished the Rent, for it might be by words, which was no discharge.

Bagnal *versus* Sachaverell.

(5)
Ante 133.

Ante 147.

ASSUMPSIT, For that whereas the Defendant was indebted to him in Fifty pound, he promised to pay it, the Jury found that quoad Forty seven pound, parcel of the said Fifty pound, he did assume to pay it, &c. quoad residuum non assumpsit; and it was moved, if upon this verdict the Plaintiff should have Judgment; and resolved he should not, because it was found that he did assume only for part, so the same Assumpsit was not found that the Plaintiff did declare upon; and although it was upon an indebitatus Assumpsit, it would not alter the Case.

Nedham *versus* S. Corfellis, an alien.

Action for words, for that whereas J. Cerke brought an Assumpſit (6)
 againſt the Defendant, and they being at Iſſue upon it, the
 Plaintiff being produced as a witneſs at the trial at Guildhall before
 Wray Chief Juſtice, for Clerke, and upon his Oath gave evidence to
 the Jury; the Defendant ſuper hoc immediate ſaid, thou haſt forſworn
 thy ſelf, innuendo in the ſaid Oath. And upon this Declaration the
 Defendant did demur. And it was adjudged that the Action lay
 upon theſe circumſtances; for it was ſuper hoc immediate, &c. after he
 took the Oath, and it is innuendo the ſaid Oath. And a Writ of en-
 quiry of damages was awarded; and it was held that upon this 28 E. 3. c. 13.
 Writ the Enqueſt ſhall be all of Engliſh, and no part of Aliens,
 for it is out of the Statute.

Sherwood *versus* Winchcombe.

Prohibition. The Plaintiff declared that whereas King H. 8. was (7)
 ſeiſed of the Mannor of D. of which a portion of Tithes of ſuch
 a place was parcel time out of mind, &c. conveyed it to him, and
 he was impleaded in the Court-Chriſtian for theſe Tithes, &c. and
 upon this Declaration it was demurred; for Tithes cannot be
 parcel of a Mannor, for they are things ſpiritual, for which at
 Common Law a Common perſon cannot ſue, and being of a
 diſtinct nature, cannot belong to a Mannor, 10 E. 3. 5. 9 H. 7. 46 Ed. 3.
 cattalla felonum cannot be parcel of a Mannor, and although the King
 may have Tithes, yet he hath them not as a lay fee. And of that
 opinion were all the Judges, that he cannot preſcribe for Tithes
 as parcel of a Mannor; but if he had preſcribed to have decimam
 partem granorum, this had been good, but not portionem decimarum, and
 a conſultation was granted. V. 2 Co. 45. b. Poſt. 599. 763.

Scavage *versus* Beauchampe.

Action upon the Caſe, by a Sheriff againſt the Defendant, be- (8)
 cauſe he was a priſoner and in execution, & violenter eſcaped.
 The Defendant pleaded, that before the time of the eſcape the
 Under-Sheriff carried him out of the priſon to ſuch a place, which
 was out of the juriſdiction, and afterwards brought him back
 again, and there he remained till the time of the eſcape ſuppoſed,
 and then he went out as it was lawful for him, and upon this it
 was demurred in Law. 1. It was moved that an Action did not
 lie for the Sheriff againſt a priſoner for an eſcape, for he ought to
 keep his priſon at his peril. Curia contra, and ſo it was ruled be- Ante 53.
 tween Holt and Hill; for the priſoner by Law is to remain in the
 place whereto he is committed. And as to the matter, the Juſtices
 conceived, if the priſoner be once by the Act of the Under-Sheriff
 carried out of priſon to another place out of his juriſdiction, al-
 though he be brought again to the priſon, he is not in execution,
 and need not tarry; but they would adviſe.

Levett versus Farrar.

(9)

2 E. 3. c. 4.

Post. 440.

False Imprisonment. The Defendant justified, for that a Writ upon the Statute of Northampton was awarded 30. July 32 Eliz. to the Sheriff, and the Justices of the Peace of the County of Norfolk to remove a force; and he being Under-Sheriff by the Commandment of the Sheriff went to the places, and found the force, and because he was not able to remove it, he made Proclamation that every one should depart and leave their Weapons, &c. and afterwards he enquired of the force; and it being found that the Defendant was one of them that made the force, the Defendant 6. August, afterwards by vertue of the said Writ did Arrest him, and committed him to Prison; and so justifieth. And upon this the Plaintiff demurred. 1. Because this is a Commission to the Sheriff, which the Under-Sheriff cannot execute. 2. He ought to commit him at the same time when the force was done; and cannot Arrest him afterwards, when the force is ended. 3. Because it is not averred that he was Under-Sheriff at the time of the Arrest. But the Court notwithstanding these and other exceptions held the Plea good. For when it is directed to the Sheriff, by the name of his Office, and not by a particular name, nor doth expressly command him to do it in person, the Under-Sheriff may do it, for it is a Writ grounded upon the Statute; and not a Commission, for then it had been otherwise. 2. The Arrest is lawful at another time; for if the force had been removed before his coming, yet if by enquiry it be found that a force was done, and who did it, he may Arrest them at another time; and it is not like the Statute, that the Auditors may commit the Accountant, for there he is before them. 3. It shall be intended he continued Under-Sheriff, when in the same Plea it is alledged he was Under-Sheriff; and the contrary is not shewn. And it was adjudged for the Defendant.

Termino Hillarii, 35 Eliz. in Camera Scaccarii.

Scroggs versus the Lord Mordant.

1 Cr. 142. 143.

Ante 289.

The Plaintiff as Administrator of Bridges brought a Writ of Error to reverse a Judgment in Scandalis magnatum in the Queens Bench. 1. The Defendant alledged that the Writ of Error lieth not: for this Writ of Error is given by the Statute of 27 Eliz. and the Statute is, that the party, Plaintiff or Defendant, shall have a Writ of Error, but speaketh not of the Heir, Executor, or Administrator. 2. That Execution was sued against the Testator by Elegit, and the Lands only were extended, but no goods delivered in Execution, so the Administrator had no loss; and when he had no loss he cannot be restored to any thing. But the Court resolved for both points, that the Writ of Error did well lie; for as to the first, it is within the intent of the Statute, for which the Statute did provide. And as to the second, he is privy to the Record; and may have loss by it in futuro. And in many Cases he that hath no loss nor can have loss, may maintain a Writ of Error; as the Tenant which makes a Feoffment pend-

ding the Writ against him; so in Trespass against two, and execution of the damages is had against one only; and the Plaintiff is satisfied, and he against whom the Execution was, died, yet the Survivor may sue a Writ of Error; and for this point ^{20 Ed. 3.} was cited, whereupon it was awarded that the Writ did lie; and that the Defendant should answer. V. 6 Co. 80. Nota also, that it may be that the execution of the Land may be avoided, and then the Administrator may be damnified.

Termino

Termino Paschæ,
Tricesimo quinto ELIZABETHÆ,
in Banco Regina.

Munday *versus* Cordal, Int. Hill. 35. Rot. 60.

- (1) **A**ction for these words, Thou art a Forger, and art sued in the Star-Chamber for going by one Sedge. It was after Verdict moved in arrest of Judgment, that an Action did not lie for those words, for it is not shewn what thing he forged, and how he was sued, for it might be, it was without cause. But the Court gave Judgment for the Plaintiff; for when he said, Thou art a Forger, this is intended of such a thing of which forgery might be, and to be spoken in the worse part; and when he said, He is sued in the Star-Chamber, this doth aggravate it, that he did such a Forgery, for which he is suable there.
- 1 Cr. 326.

Barley's Case.

- (2) **H**E was indicted for the Murder of Weatherhead, and being arraigned upon it, he pleaded that A. the wife of Weatherhead, brought an Appeal against him for this Murder; and he was arraigned upon it, and pleaded not guilty, and tried, and found by the Jury that he was not guilty of Murder, but that he was guilty of Man-slaughter; and thereupon he prayed his Clergy and had it, and demands Judgment if he shall be again put to answer this Felony; and thereupon it was demurred; and now this term it was judged a good Plea; and thereupon he was openly in Court discharged, but no special reason was given of the Judgment, quære, for the finding him guilty of Man-slaughter in the Appeal was more then needed, as it appeareth in the Case of Wroth and Wiggs Antea, and then the allowance of Clergy is to no purpose, &c.
- Ante 276.

More *versus* More and his Wife.

- (3) **A**ction for words against the Baron and Feme, for words spoken by the Feme, and also for words spoken by the Baron; the Defendants did confess the Action; and upon a writ of Enquiry of damages, the damages were entirely assessed, and held ill; and for this cause the Judgment was staid, for the damages ought to be severally assessed for the several words. V. 9 Ed. 4. f.
- Co. 10. 131. a.

Green versus Dancy.

Action for these words, Thou art falsly forsworn in Bell-Court, Innuendo, (4)
 a Court Baron held at Bell; and per Curiam, with this innu- Ante 135.
 endo the Action did lie, otherwise not. Post. 348.
 Post. 209.

Lee versus Secombe.

Action for these words, He was falsly forsworn in the Court of the Bi- (5)
 shop of Exon, at Exon. And it was moved in Arrest of Judgment,
 that it doth not appear he was sworn in any judicial Court, for it
 may be in the yard of the Bishop, which is called his Court. Fenner,
 it is known to us that every Bishop hath his Court, that is his Ante 185.
 consistory to determine causes, and it shall be intended he was for-
 sworn there, and the Plaintiff had judgment.

Levermore versus Martin.

Action for these words, Thou art forsworn and perjured; the Jury (6)
 found a special Verdict, that the Defendant said the Plaintiff
 was a forsworn Fellow, to whom the Plaintiff said, Will you say I am
 perjured, the Defendant said, Yes, if you will have it; and the Court
 conceived that upon this matter an Action did not lie, and it was
 adjudged for the Defendant.

Butler versus Paynter.

Action for words, for that whereas the Plaintiff was a Justice (7)
 of Peace, the Defendant said, You do openly maintain and counte- Yelv. 218
 nance the worst people against Gods Laws and the Queens. After Verdict it
 was moved that an Action did not lie for these words, for it is not
 shewn who these people are which he intended were the worst people,
 viz. Rogues, Hereticks, or the like, and it is not shewn that he did
 know them to be such persons, nor in what he did maintain them;
 and of that opinion were Fenner and Clench, but Popham Chief Justice
 contra, for they found to his discredit; and he said it was adjudged
 upon good deliberation, in a Case between Sir Hen. Portman and
 Stowell, that for these words, Thou maintainest such a Suit, an Action did
 lie, for maintainance is unlawful and odious, and it is here alledged
 to be spoken malitiosè, and cannot be intended but he maintained
 them in their naughtiness. And afterwards Mich. 35 & 36 Eliz. the
 case was moved again, and it was held by the whole Court that
 the Action did not lie, for the words are too general to maintain an
 Action.

More versus Roswell, Hill. 35 Rot. 22.

Debt upon an Obligation: The condition to perform Cove- (8.)
 nants of such an Indenture, and the breach assigned in this,
 that the Defendant did Covenant to assure such Land by such as-
 surance as by the Council of the Plaintiff should be devised, and
 alledges that the Plaintiff caused such an assurance to be drawn
 and ingrossed, and put War to it, and required the Defendant
 to execute it, and he refused; and upon this the Defendant did
 D. q demur.

demur. Harris Serjeant moved that no breach of the Covenant was shewn, for when he is to make such assurance as the Council of the Plaintiff shall devise, and the Plaintiff himself doth devise it; this is no breach, for he is not compellable to make it, 6 H. 7. 4. 26 H. 8. 17 Ed. 4. Gawdy, this clearly is no breach, for when it is referred to such an assurance as Council shall advise, this shall be intended, such assurance as shall be reasonably advised, and not in such manner as the party himself of his own head shall advise, which peradventure may be unreasonable; and afterwards being moved again at another day, all the Court was of the same opinion, for which the Plaintiff would have been non-suited, but he could not, because he appeared the same Term, and therefore he prayed advisement till the next Term, to the intent to be non-suited and to discontinue it. V. 5 Co. 19. b. V. Pasch. 38. placito 20. B. R. contra.

Ante 9.

Post. 465.

Stafford *versus* Bottorne, Hill. 35. Rot. 647.(9)
Co. 5. 19. b.

A Scumplit: For that the Defendant upon such consideration promised to make to the Plaintiff such assurance of the Rectory during their joynt lives, as shall be devised by the Council of the Plaintiff, and alledged in fact that one Jo. Morris was of his Council, and that he dedit his advise that the Defendant should make a Lease by Indenture, &c. and that the Plaintiff himself postea apud L. dedit notitiam to the Defendant of the advice of the said J. M. and required him to perform it, which he had not done. After Verdict Godfrey moved in Arrest of Judgment, that the Councelloz is to give notice of the advice to the Defendant, and not to the Plaintiff; for perhaps he will not speak it truly; and the Defendant is not bound to give credit to his report; and so is 11 H. 7. 21. Coke contra, for being the Councelloz of the Plaintiff, he is to give his advice to the Plaintiff; and he to notifie it to the Defendant, 11 H. 7. 23. 8 Ed. 4. 22. 14 H. 8. 21. and the Defendant is not at any mischief, for he is not to do it without notice; and if notice be given, he is to do it at his peril, if it stand with the agreement; and if the Plaintiff giveth notice to make such an assurance and he doth it, although it be not advised by Council, this shall excuse him; and if the Plaintiff shall afterwards say that the Council advised any other assurance, he need not make it, for the Plaintiff is not to vary from his first request. Popham, if the words were, that he shall make such an assurance as the Council of the Plaintiff shall advise the Defendant, it is no doubt, but the Council must notifie it to the Defendant; and if the words were, as the Council of the Plaintiff shall advise him, it is no doubt, that notice is only to be given to the Plaintiff; but the words here are, As by the Council of the Plaintiff shall be devised, which doth stand indifferent; and he conceived it is sufficient to be given to the Plaintiff, and he shall give notice thereof to the Defendant; for in the performance of every condition, every one is to perform that which lieth in his notice; and therefore if the promise be, that you shall make such assurance as my Council shall advise you, I ought to give notice who is of my Council; and it was ruled in a Wilshire Case, where one made a Lease for years, with a proviso, that if he tendered ten shillings at the Cathedral Church of Sarum, at any time during the term, that the Lease should be void; he was bound

Ante 9:

Co. 8. 92. a.

bound to give notice to the Lessee when he would be there to tender, for the time was uncertain (V. 18 Eliz. Dy. 354.) And so another case was ruled, that if one be obliged to another to pay so much to him, when he came next to Pauls, he ought to give notice when he would come next thither. So here it is to be expounded with reason, for the Counsel of the Plaintiff is not bound to travel to seek the Defendant; and if he give Counsel to the Plaintiff, and he give notice to the Defendant, this is sufficient, and there is no mischief to the Defendant; for if the Plaintiff doth report it to him falsely, yet if the Defendant doth perform it, it is sufficient, and he cannot vary from it, but hath dispensed with the Defendant for any other, and shall not say afterwards that the Defendant hath done it according to the advice; and this is the surest way, and of that opinion were Fenner and Clench (absente Gawdy) and it was afterwards adjudged for the Plaintiff. V. 5 Co. 19. b. Co. Lit. 211.2.

Okes *versus* Kirby.

A Stumpfit: In consideration the Plaintiff at the Defendants request would surcease such a suit, &c. the Defendant promised to seal him a Bond when required, &c. and alledged in fact that he did surcease the suit, and the Defendant licet sepius requisitus, such a day and place, had not sealed it. After Verdict it was alledged in Arrest of Judgment; first it is not alledged that he surceased at the request of the Defendant. 2. That the request to seal the Bond was not by the Plaintiff; Sed non allocantur: for as to the first it shall be intended, for it is for the Defendants benefit; and to the second, it shall be intended, if the contrary be not shewn that it was by the Plaintiff, or by his servant for him; wherefore it was adjudged for the Plaintiff. (10)

Lewes *versus* Hay, Mich. 33 & 34 Eliz. Rot. 448.

Error, for that the Judgment was, & Idem Jo. Lewes in misericordia; where it should be Th. Hay, it was amended by award. (11)

Bartlett *versus* Wright.

Ejectione firmæ: For a Messuage one Rod and two Acres of Land in Bridgenorth, of the Lease of Elburne; the Jury upon not guilty pleaded, find a special Verdict; that one Delborough was seised of the house and of two-yard land in B. and that the two Acres of Land were time out of mind parcel of the two yard-land, and that the said D. let to the said E. Lessor of the Plaintiff, all my house and two yard-land in B. in the possession of Gesse, and they found that the two Acres of Land were not in the possession of G. but all the residue were; and the question was if the two Acres do pass. And it was argued by Pudsey of the one part, and Herne of the other; Gawdy conceived it did pass; for when it is named my house, and two yard in B. this is sufficiently certain, and that which came after is not material, and it is good for all, though no part were in the possession of G. Popham accorded, for when the Law makes a certainty, that which cometh after and is repugnant is void; as if one grant the Mannor of D. in D. and this extends to D. and S. if he hath Demelns and Services in D. and S. this (12)

Ante 16.
Post. 474.

shall pass only that which is in D. for the words are supplied that a Mannor passeth; but if he hath Demesnes and Services only in D. then the whole shall pass, for otherwise the Grantee shall not have a Mannor; so here, for that the yard lands are intire, and he cannot have the yard land except he have two Acres, they shall also pass, and it shall not be restrained by the last clause. So if one hath five Acres called Blacklands, and he granteth all his Acres called Blacklands in the tenure of J.D. and J.D. hath but four of the Acres, yet the five shall pass: Clench & Fenner contra, for the intent of the parties was to pass, only that which was in the tenure of G. and a yard land is no such certainty, but when it is referred to another certainty, this shall be good, especially when the grant may be supplied by the Land in the tenure of G. but if no part were in his tenure, it is otherwise; & adjurnat. And afterwards, P. 35 Eliz. Popham being absent, it was again moved, and against the opinion of Gawdy it was adjudged for the Defendant.

Dell *versus* Babthorpe.

- (13) **T** Respafs. Upon special Verdict the case was, J.S. had a Close and a Wood adjoining to it, and time out of mind a way had been used over the Close to the Wood to carry and recarry; he granted the Close to one, and the Wood to another; the question was, if the Grantee of the Wood shall have the way, and it was adjudged he should not, for the Grantor by the grant of the Close had excluded himself of the way, because it was not saved to him, and he himself could not use it, no more can his Grantee. V.20 Ed.3. Admeasurement 8.

Clever *versus* Gyles, Trin. 34. Rot. 865.

- (14) **E** Jectione firmæ: It was found by special Verdict, that Knight sold to Onely certain Land by Deed indented, upon condition of re-entry upon payment of twenty pounds, and that all assurances shall then be to him and his Heirs, and covenants to make other assurances, and that they shall be to the use in the Indenture, afterwards he makes a Feoffment to the same Bargainee, to the use of him and his Heirs, and afterwards Levies a fine to him, which was to the uses in the Indenture; and if by this absolute Feoffment, and to the express use of the Bargainee, if his estate be conditional or not, was the question; and adjudged, that notwithstanding the absolute Feoffment, and to an express use; yet it being upon no new agreement, this is guided by the covenant, and it shall rule it, as well as an express limitation of the use.

Co. 2. 73. b.

Porter *versus* Gray.

- (15) **A** Vowry for an amercement in a Leet, for not doing suit, the Plaintiff was non-suited, for which the Defendant had a return, and he prayed his costs, but the opinion of the Court was, he should not have costs; for it is not such a thing for which the Statute doth give costs, for it extends only to customs and services.

Ante 245.
Post. 329.
2 Cr. 28.
Post. 329.

Bynde

Bynde *versus* Plaine. V. Antea, H. 73. C. B. placito 5.

ERror. Error assigned in the matter of Law, and for that the Plaintiff did averr that between the 11. day of Sept. and 14 days after Mich. no challenge or claim was made, and doth not answer to the residue of the 11. day of Sept. if claim was then made. But Popham and all the Court held it good, for it is good to a common intent, and we must not pinch so upon instances of time; and it shall not be presumed that challenge was made, if it were not specially alledged; and the Law presumeth all the day to be the day of the promise, and that no claim or challenge upon that day, if it be not shewn; and in any Plea or Declaration, it is sufficient to falsifie the common intendment. And it hath been adjudged that where an Arbitrement was the 12. of April, and the Arbitrator awarded that the party shall release all Actions until the making of the Award, in Debt upon an obligation for not performance of the Award, he pleaded a release of all Actions until the 12. of Ap. and it was adjudged a good Plea; for the instant of time is not to be respected; wherefore the Judgment was affirmed.

(16)
Ante 218.9.

Post: 858.

Termino

Termino Trinitatis;
Tricesimo quinto ELIZABETHÆ,
in Banco Reginae.

Hughes *versus* Ropotham Executor of J. S.

(1)

Assumpsit, That whereas the 14. Ap. &c. the Plaintiff was possessed of a Lease for years, and the Testator was possessed of the reversion for years, the Testator in consideration the Plaintiff would surrender to him all his estate, promised to give him thirty pounds, and alledges in fact, that 20. Ap. &c. he surrenders, &c. and upon non Assumpsit, it was found for the Plaintiff. Foster moved in Arrest of Judgment, 1. It was not alledged that he was possessed of the intire term at the time of the surrender; and it may be had assigned part of it before to another. 2. Both parties are Termors, one in possession and the other in reversion, and a Termor cannot surrender to a Termor, for one estate cannot drown in the other. As to the first all the Court held clearly that the Declaration is good, for it shall not be otherwise intended but that the estate did continue, and it being but an inducement, it need not be so precisely alledged. To the second, Popham said it is clear that he which hath an estate for ten years may surrender to him that hath an estate for twelve years, and the estate is drowned, and the other shall come in possession, and there is no doubt but a surrender to him that hath a greater estate for years is good, as to him that hath an estate for life, which Gawdy did expressly affirm; and here it standeth indifferent, if the reversion had a greater estate for years or not; but if one be Lessee for twenty years, and he let the Land for ten years, and he surrenders to him that hath the residue of the term, this is good to convey his Interest, but not to drown the Estate, but he shall have the twenty years as before; otherwise it is of a surrender to another man that hath the reversion for years. And Popham conceived that if the Testator had the Reversion for a less number of years, yet the surrender is good, and the estate shall drown in it. And if a man be Lessee for twenty years, and the reversion is granted for one year to another, which grants it to the Lessee for twenty years, this is a surrender of the first Lease for twenty years, and is as if he had taken a new Lease for a year of his Lessor: Quod Fenner Justice affirmed, and said the surrender was good, although the Reversion was for a less term for years, for here are several terms out of the Reversion, and one cannot

Ante 173.

C. L. 273. B. 4. it.

2 Vent. 326. 327.

cannot stand with the other, but coming together, one shall drown the other, and the number of years is not material; for as he may surrender to him which hath the reversion in Fee, so he may to him that hath the reversion for a lesser term; but when Lessee for twenty years maketh a Lease for ten years, who surrenders; this cannot drown in the other, because it was not to commence until the term expired; and it was adjudged accordingly for the Plaintiff. Ante 173.
V. Hill. 32. C. B. placito 1.

Termino

Termino Michaelis,
Tricesimo quinto & sexto ELIZABETHÆ,
in Banco Reginae.

Ad St. Albans.

Balston & A. his Wife Executrix of M. S. *versus* Baxter.

(1)

DEbt upon an Obligation made to the Testator to pay thirteen pound six shillings and eight pence, dated 29. Ap. 23 Eliz. the condition to pay ten pound at the Feast of St. Th. the Apostle then next ensuing at the Church Porch of Newton; The Defendant pleaded, that before the said Feast, viz. ult. Nov. 24 Eliz. the Testator did agree with him, that if he would provide for him six pound and pay it at his house in N. the 15. day of Decemb. next, and would promise that he would pay the four pound residue at the Feast of St. John Baptist ensuing, that he would accept it in full satisfaction of the said sum of ten pound, and alledgeth in fact that he paid the said six pound the said 15. day of Dec. and then promised he would pay the residue at the said Feast of St. John the Baptist; and the Testator did then accept the said promise in full satisfaction of the said ten pound, & hoc, &c. and upon this it was demurred. And this Term upon the first motion without any great deliberation, the Court did adjudge for the Plaintiff, for this is a concord pleaded, and is executory, and so can be no bar in Debt upon a Bond, no more then in a Trespass; and this promise to pay the residue is a thing in Action, and can be no bar of a Debt, which is certain; as in Debt upon an Obligation, it is no Plea that he accepted another Obligation in recompence of it, 11 H. 4. but by Gawdy, if he had pleaded payment of a lesser sum before the day, and at another place in satisfaction of a greater sum of money, and had relied upon it; this peradventure had been a good Plea; and they all resolved in the principal Case, that it was no good Plea to avoid a Bond upon such naked matter.

Co. 6. 44. a.
Post. 306.

Co. 5. 117. a.
Ante 46.
Post. 309.

Nevill *versus* Payne.

(2)

QUo Warranto sued by Nevill in the name of the Queen against the Defendant for claiming a Leet within the Bannor of Medburne; the Defendant pleaded that he was seised in Fee of the Bannor of Medburne, and claimed the Leet there by prescription, and the Venire facias (they being at Issue upon the Prescription) was awarded of the Bill. of Medburne, and tried against the Queen; and it was upon motion adjudged a mistrial, for the Prescription being that he had a Leet within the Bannor of

of M. and issue joyned upon it, the issue was to be of the Warrant of M. and not of the Writ of M. For there was no mention of a Writ in the Record, and the *Venire facias* might well be of the Warrant: And then it was prayed, that the *postea* might be certified; but because it was not tried, and so upon the matter no trial, and being against the Queen, it was ordered the *postea* should not be received; for if it should, the Defendant might exemplify the verdict, as duly tried, and it would be an evidence against the Queen, which shall not be suffered.

Doctor Cæsar versus Curseny.

Action for words, That whereas the Plaintiff was Judge of the Admiralty, and J. S. had a Suit against the Defendant, in which the Plaintiff gave sentence against the Defendant; the said Defendant said, that the said sentence given by the Plaintiff *Innuendo sententiam prædictâ*, &c. was corruptly given; the Defendant pleaded not guilty, and found against him, and two hundred pound damages assessed. And it was now moved in Arrest of Judgment, that an Action did not lie for those words; for it is not alledged, that the sentence was corruptly given by the Plaintiff; for it may be the Defendant did intend it was corruptly given by reason of the false testimony of false Witnesses, or corruption in them, and so touched not the Plaintiff; but the Court held, that the words can have no interpretation but in an ill sense; and to be intended of the Judge that gave the sentence; and so it is precisely alledged in the Declaration. Then it was moved, that a *tales* was awarded *De circumstantibus*, which was not to be awarded in this case, by the Statute of 35 Hen. 8. 6. for that is intended to be granted when the trial was all by English, and not when the trial is *per medietatem linguæ*; for peradventure it shall be all of English, there being none there but such. But all the Court held it within the intent of the Statute, and within the Letter of it; for it is, that in all Actions, &c. *tales* shall be awarded as in the Bench. But a question could not be, if it were in the Bench; and where it was objected, peradventure there shall be no stranger there; the Statute had regard to it, for then no *tales* can be served; for the Statute is, *tales* shall be awarded, *Quales*, &c. and so shall be of such persons as were of the former return. Thirdly, it was moved, that the *tales* was mis-awarded; for there are none returned but aliens, and not *De medietate*, &c. And the Court conceived it to be good: For in this it is sufficient to return so many only, which with the other might make a full Jury, but otherwise of *Tales* in Banco; wherefore here when aliens were only wanting, it was sufficient to return them. And it was adjudged for the Plaintiff.

Rayne versus Orton, Hill. 34 Eliz. Rot. 70.

Assumpsit for fifty shillings upon an *Indebitatus Assumpsit*; the Defendant pleaded, that after the Assumpsit there was a Concord between them, that he should give to the Plaintiff fifteen shillings, parcel of it, and the thirty five shillings residue, the Plaintiff should receive of him in Pats; and alledgeth the payment of

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Ante 304.

the fifteen shillings, and that he was always ready to pay the residue in hats. And upon this it was demurred, and without Argument it was adjudged for the Plaintiff; for it being a Concord executory in part, can be no Plea; for a Concord is always to be intirely executed, and not to be executory in any part; and it was adjudged for the Plaintiff. 6 Hen. 7. 9.

Sir Christopher Hilliard *versus* Constable.(5)
Post. 433.

Action for these words, Sir Christopher Hilliard is a Blood-sucker, and sucketh blood; but if any man will give him a Bribe, as Sheep, or a couple of Capons, he will take them. Upon Not guilty pleaded, it was found not guilty as to all the words, except he is Blood-sucker, and sucketh blood; and for them he was found guilty: And the opinion of the Court was, upon motion in Arrest of Judgment, that the last words not being found, an Action did not lie for the first: For though he alleged in his Declaration, that he was a Justice of Peace, and one of the Council in the North; yet the first words cannot be any slander, for it cannot be intended what blood he sucked. And by the advice of the greater part of all the Justices of England, it was adjudged for the Defendant. Vide Mich. 37 & 38. Eliz. Placito 41.

Burton & Estove *versus* Gowell. Trin. 35 Eliz. Rot. 92.(6)
2 Cr. 115. 497.

Trespas, upon special Verdict the Case was, J. S. was seised in Fee of Land, and by his Will in writing made at Pulham, devised the Land to the Defendant, and after at Sterston lying sick Dixit & declaravit, that his Will made at Pulham shall not stand, and the question was, if this were a Revocation, because it was by word only, and by words in futuro, and not in presenti: To the first it was resolved, that a Will may be revoked by Parol only; and so is Harrisons Case, 14 Eliz. Dyer. To the second it was said, that verba in futuro shall be taken futurely when they refer to a future act, otherwise when they refer to a present resolution. But by Popham, if he had said, I will revoke my Will made at Pulham, this is no present Revocation, for it referred to a future act: But when he saith, It shall not stand; this takes effect presently: As if I say to another, You shall have my Land for ten years; this is a present Lease: and it was adjudged a Revocation.

Sherburne's Case.

(7)
Ante 71. 136.

Prohibition against the Parson of T. for suing for Tithes of Wood of the Park of Thachsty, and surmised, that he and all those, &c. time out of mind, &c. had used to pay to the Vicar of T. ten shillings yearly, for all Tithes of Wood growing in the said place; and the proofs were. That he paid ten shillings for discharge of Tithe-Wood in the Park, and two other places. And Coke Solicitor moved for a Consultation; first, Because he surmised he paid so much to the Vicar in discharge of Tithes; and by this the right of Tithes, between the Parson and Vicar, is to come in question.

question, which is merely triable in the Court Christian, as it hath been twice adjudged in this Court, Mich. 28 & 29 Eliz. inter Hunt & Bush, and Mich. 30 & 31 Eliz. the Lady Greshams Case. Second cause, The proofs do not prove the prescription; for the prescription is to pay ten shillings for the Tithes of the Wood, &c. and the proofs are of that Park, and two other places. And of that opinion was the Court for both parties, but it was adjourned, and no consultation awarded.

Ante 71.
Post. 736.
1 Cr. 576.]

Crouch *versus* Givers.

Assumpsit; For that the Defendant in consideration of a marriage, &c. assumed to give him unum cubiculum, innuendo, the furniture of a Chamber; and for not performance, the Action brought; and upon Non Assumpsit, found for the Plaintiff, and thirty six pound given in damages. Coke moved in Arrest of Judgment, that the breach is not well alledged, in not giving the furniture of a Chamber, and the innuendo here can have no such intendment; and it is merely a collateral and void matter, as innuendo a Horse; for the innuendo ought to have some affinity with the matter precedent. Godfrey said the phrase of the Country is so, to give a Chamber upon the marriage; the meaning is the furniture, &c. But the Court contra: For prima facie, it is merely contrary, except it had been so averred in pleading; and it was adjudged for the Defendant.

(8)
Co. 10. 130.

Gravener *versus* Rake, Trin. 33 Eliz. Rot. 611.

The question was, if an Estate-tail might be of a Copyhold. Gawdy and Clench, that it cannot be by the Statute, but may be by use and custom. Popham and Fenner contra, That there may be an Estate-tail by the Statute of Copyhold, by æquitatem rationis, but it cannot be by custom.

(9)
Co. 4. 23. a.
Post. 373.
Ante 149.
Co. Lit. 60. b.

Hall and Gauen & alii.

Indictment upon the Statute of 8 Hen. 6. Exception was taken, because the Statute was recited, Si aliquis expulsus sit & disseisitus, whereas the Statute is vel disseisitus. But Gawdy and Fenner held it not much material; for the words are disjunctive, yet they are always expounded as copulative; for if he be not expulsus & disseisitus, Action lieth not upon the Statute. Secondly, the Statute was recited Vel aliquod Feoffment aut discontinuationem, whereas the Statute is Post talem ingressum aliquod Feoffment; and for this misrecital it was held insufficient: And it was moved, although the Indictment was void for the Entry with force; yet it being that they with others Riotose and routose entred, &c. it should be good for the Riot. Curia contra, for the Indictment beginning with the Statute of 8 Hen. 6. and concluding contra formam Statuti, this can have no relation to any offence, except upon this Statute; and the Indictment was awarded insufficient, and discharged.

(10)
8 H. 6. c. 9.
Post. 697.

Ante 231.
2 Cr. 498.
Post. 355. 697.

Ball versus Roane.

- (11) **A**ction for these words, There was never a Robbery committed within forty miles of Wellingborough, but thou hadst thy part in it. After Verdict it was moved in Arrest of Judgment, that the Action did not lie, because it was not averred there was a Robbery committed within forty miles, &c. For otherwise it is no slander, & sic opinio Cur^æ; and Judgment for the Defendant, Mich. 36 & 37 Eliz. 6 R. Placito 11.
- Ante 214.
Post. 312.

Preston versus Pinder.

- (12) **A**ction for these words, You have sought to murder me, and I can prove it; adjudged that it lay.
- Ante 6.

Guerdon versus Winterflud.

- (13) **A**ction for these words: He is a suborner of Perjury. After Verdict Harris Serjeant moved, that the Action did not lie; for it is not alledged, that he suborned any person to commit perjury; and the words of themselves have no sense, for one cannot suborn perjury. Curia contra, for he cannot be a Suborner of perjury, but it must be necessarily intended he did suborn some person to commit perjury, and the words in themselves are very slanderous; wherefore it was adjudged for the Plaintiff; and a hundred marks damages being given, the Court was moved to mitigate them, but they denied it.

Perepoint's Case.

- (14) **A**ction for these words, My Master hath put me away, because I would not be a Papist; for he will keep no Servants but Papists; and alledgeth, that he was a Justice of Peace; and upon Demurrer, the Court held that the Action did not lie for those words.
- Ante 192.

Young versus Watson, Pasch. 35 Eliz. Rot. 41.

- (15) **D**etinue of Goods, the Writ was Ad valentiam twenty pound, the Declaration Ad valentiam forty pound, it was adjudged Error, and the Judgment reversed. And in another Writ of Error between the same parties, Pasch. 35 Eliz. Rot. 42. First Error assigned was, that there were not fifteen days between the Teste, and the return of the Venire facias; but it was held, that this was clearly helped by the Statute of Jeofails. Second Error, that the Venire facias had no return; for the Statute did not help Non-returns, but Mis-returns: And this was held Error, for the Jury appeared without Warrant; and for this cause it was reversed.
- 2 Cr. 294.
Post. 310.

Gore & Uxor versus Perdue, Pasch. 34 Eliz. Rot. 234.

- (16) **E**rror upon a Judgment in Dowry, where the parties were at issue, and afterwards the Defendants made default; whereupon a Petit cape was awarded, and Judgment given by default; Error
- Post. 531.

Error assigned, that the Tenant was within age at the time of the Judgment; and the Court held it no Error, especially being after appearance, for he cannot save his default by Non Summons. Post: 323.
Ante 51.
2 Cr. 465.
Vide 7 Edw. 2. & 17 Edw. 2. Saver de default.

Tiblethorpe *versus* Hunt, Hill. 35 Eliz. Rot. 557.

DEbt upon an Obligation of fourteen pound, for payment of seven pound; the Defendant pleaded payment at the day, and upon this they were at issue; the Jury found payment of fifty shillings, parcel of it, and that the Defendant then delivered to the Plaintiff certain hats to the value of the residue, which he accepted: And it was adjudged against the Defendant; for this is no payment, but he might have pleaded this matter specially and then the acceptance of the Plaintiff had been a Bar. (17)
Ante 304:

The Queen *versus* Ingersfall.

ATtaint. The Case upon special Verdict was. Brooks had sued an Information for the Queen and himself, against the Defendant, upon the Statute for buying of Cattel out of Fair or Market, &c. And suppoeth he bought the Cattel of one Pearepoint and aliis Ignotis: The Defendant pleaded not guilty, and the Jury find for the Defendant. And upon this the Queen alone (for she cannot joyn with the party) brought an Attaint; and the Grand Jury in the Queens Bench, Pasch. 35 Eliz. find this special Verdict, scil. That it was given in evidence to the Petit-Jury by one Whitworth, That the Defendant out of Fair and Market did buy forty Cattel, which were the Cattel of Pearepoint; but they found that in truth the Cattel were bought of Whitworth, as the Cattel of Whitworth; and that it was not given in evidence that they were bought of Whitworth, as the Cattel of Whitworth; and if upon the whole matter, &c. And it was argued by Coke and Man for the Queen, that upon this matter the Jury is to be attainted: For here the point in issue is found, that they were bought out of Fair or Market, and it is not material if they were bought of him that is named in the Information, or of others, and then the Petit-Jury was to find him guilty; and for that cited 38 Hen. 8. Bro. Issues 81. And a Case in the Exchequer, 13 Eliz. in an Information for buying of Corn of J. S. Contra formam Statuti; and the Jury find it was bought of J. B. and adjudged against the Defendant; and so the Justices did agree here, that the buying of the Cattel of any other person is sufficient to maintain the Information. And although it be matter of Law, yet the Jury finding the contrary to it an Attaint lieth. As Pleadals Case, 10 Eliz. was, and 5 Eliz. 219. Dyer. (18)
Ante 140.] But it was here said by the Justices, that if the Judge delivers the Law to the Petit-Jury, and they find accordingly, although he mistakes the Law, the Jury shall not be attainted: And it was moved, if an Attaint lieth where Verdict passeth against the Queen upon an Information, and the Court held it did. But in the principal Case the Court held, that there was no sufficient matter to Attaint the Petit-Jury: For it appeareth, that the evidence given to them was false in part; and although the falsity was in a point not material, scil. that the Cattel were the goods of Pearepoint, whereas they were the goods of

of Whitworth; yet by reason of this falsity, the Jury need not give him credit in any other part; and so they had no cause to find their Verdict upon this Oath against the Defendant; And here though it was found he sold them *Ut averia W.* yet this is an express Averment, that they were the goods of Whitworth, as in pleading, it is alleged that Land descend to one *Ut filio & hæredi.*

Hanger *versus* Fry.

(19)
Moor 341.
3 Rol. 304.

Ante 160.

The Case upon special Verdict was, That the Plaintiff recovered in Debt against H. Fry, and sued a Writ of Elegit, and the Sheriff did deliver to him some Lands of the said H. Fry, in Extent, super quo the Plaintiff came in Court, and surmiseeth that the said H. Fry had other Lands in the same County, and prayed another Elegit, and had it; and by vertue of this second Writ, the Lands in question were delivered: The question was, if this second Extent was good, and if not, if it be void or voidable, 18 Edw. 2. Execution 140. 22 Edw. 3. 14. 29 H. 8. Popham Chief Justice, if it doth appear that the Plaintiff had taken the first Land upon the Delivery of the Sheriff, and accepted it, then he cannot afterwards take a new Extent; and if he doth, it is wholly void, and not only voidable or erroneous, for then the Record is ended, the Attorneys of both parts are out of Court, and it is as a Writ without original, which is wholly void: But here it is found, super quo he came and prayed a new Extent; and this shall be intended the first day of the Extent returned, and then it is reason that he may waive it, and pray a new Extent; for he never accepted of the first, and so are the Books, that if the Demandant in Dover accepted the Land assigned by the Sheriff, he cannot in another term pray a new execution. Fenner and Clench were of the same opinion, and said so is the course in the Common Place to grant a new Elegit, if the party pray it upon such surmise; and afterwards it was adjudged, that the new Extent was good.

Stainer *versus* James.

(20)
Post. 704.

Post. 509.
2 Cr. 188.
Post. 704.
Ante 308.
Moor 65. 587.
1 Cr. 189.
Post. 466.

It was moved in Arrest of Judgment, that the name of the Sheriff was not to the Distringas, nor to the Tales awarded upon it, and it was tried by Nisi prius. And it was said, that the name of the Sheriff was not of necessity till the Statute of York, nor was used or appointed; and by that Statute, the Sheriff is to forfeit a penalty, if he doth not return his name upon it; but this doth not make the return ill, and it is helped by the Statute of 32 H. 8. which helps insufficient returns; and no Writ returned. Curia contra; for of necessity, the name of the Sheriff is to be to the return, otherwise it appeareth not by what Warrant it came in; and otherwise any man without the Sheriff might return Writs, which would be a great inconvenience; and the Statute doth aid only insufficient returns, or when the Writ cannot be found; so it may be intended it is imbezled: But here it appeareth, and that it was never returned, wherefore it cannot be good. And it was said, it was so ruled in the Common Place, 35 Eliz. Walklies Case, and also in this Court between Mark and Lancaster. And for this cause the Judgment was staid.

Childe

Childe *versus* Towers.

Assumpfit in the County of Warwick, Warwick being in the Mar-
gent, and declareth, That the Defendant was possessed of a
term for years at Norton, in the County of Northampton, Et postea apud
Stonely in Com' prædict' assumed, &c. And upon Non Assumpfit the Venire
facias was awarded de Stonely in Com' War', and trial upon it; and it
was held a mis-trial by all the Court; for apud Stonely in Com. prædict.
shall be intended in Com. North. which is last named, and not to War-
wick which is in the Margent. (21) Ante 101. Post. 324:436.

Termino

Termino Hillarii,
Tricesimo sexto ELIZABETHÆ,
in Banco Reginae.

Thornaigh *versus* Disney.

- (1) **D**Ebt upon an Obligation of four hundred pound, the Defendant demandeth Judgment of the Bill, for that the Plaintiff in the Obligation was named J. Thornaigh, De Fenton in Com. Nott. Arm'. And in the Declaration he was named Jo. Tho. Arm', so (De Fenton in Com. ; Nott.) were left out ; and for this variance demands Judgment : And upon Motion without Argument, it was ruled, that the Defendant should answer over ; for this is no variance to abate the Bill ; when he is well named in his proper name and surname, the addition is not material ; otherwise, if it were of the part of the Defendant. And Coke Solicitor, who pleaded it, said, That he did it only to gain time, because it was a matter of great extremity. Vide 3 Hen. 6. 23. 5 Edw. 3. 230.

Fortescue *versus* Hext. Hill. 35 Eliz. Rot. 35.

- (2) **A**ction for these words, Thou art a Witch, an Enchanter, a Necromancer, and a Sorcerer, and thereby wast the cause of the death of my Husband. And upon Demurrer, and reading the Record without any Argument, adjudged, that the Action lay : For by Popham, there cannot be more hainous words, and by them the party was to suffer corporal punishment. Nota, the same Term and Roll, between the same parties, Action for these words, He is a Witch, and bewitched my Husband to death ; for he made his Picture in Wax, and roasted it every day by the fire, until he roasted my Husband to death. Upon Demurrer, Harris Serjeant moved, That these words will not maintain an Action ; for when she shewed the cause of the words, it appeareth to be a vain and fond conceit, and then no cause to call him a Witch ; as to say, Thou art a Thief, for thou hast stoln my evidences. But the Court held the words very heinous and actionable, and it was so adjudged.

Bleverhassett *versus* Baspoole.

Action for words, for that the Plaintiff was a Justice of Peace, and the Defendant was indicted of Felony, and pleaded to it not guilty, the Defendant said these words, Mr. Hassett did seek my life, and offered ten shillings to the Under-Sheriff to impanel a special Jury that might find me guilty of the Felony; and it was adjudged that the words were very slanderous being spoken of a Justice of Peace, and the Plaintiff had Judgment. (3)

Doctor Ford & Uxor *versus* Hollingbrough. Trin.

35 Eliz. Rot. 361.

Debt upon an Obligation brought by the Plaintiff and his wife, Executrix of Dr. Drury: The Condition was, That whereas Dr. Drury had let Land to the Defendant for Seventeen years; if the Defendant or his Executors do pay to Dorothy Goldingham ten pound yearly, during the seventeen years, if he or his Assigns, and all other persons that shall claim the said Lands under him, shall or may so long occupy the same Lands, &c. that then, &c. The Defendant pleaded, that within five years, &c. he surrendered the said Lands to Dr. Drury, and that all times before he paid the ten pound; and upon this it was demurred in Law. Coke argued for the Defendant, for that his Estate was ended by the act and assent of the Obligee himself, who was to take advantage of it, and therefore the Action did not lie. Tanfield contra, and all the Court held that the Action did lie; for the condition was collateral to pay money to a stranger, so long as he or his Assignees might enjoy the Land; here though he surrendered, yet to a stranger his estate is not determined, but is in esse: and this is an act to be done by him to a stranger, which the Obligee shall not estopp him to do, and the Obligee who had the reversion, and which is in by the surrender, is as to a stranger in by him, and under his title and occupied as his Assignee: Also the words are if he shall or may enjoy, &c. and here he might have enjoyed it; and therefore during the time he might have enjoyed it, he is to pay it. But Popham said, if the condition had been, if he or his Assignees, or those which should occupy the Lands, should pay the money, and after he had surrendered to the Obligee, and he did not pay it, the obligation had not been forfeited; for the Obligee in that case was the party that was to pay it, and he should not take advantage of the non-payment, as 35 H. 6. Bar; wherefore it was adjudged for the Plaintiff. (4)

Clerk *versus* Day. Hill. 35. Rot. 467.

The Case upon special Verdict was, Joan Marth devised certain Land to Rose her Daughter for life, and if she marry after my death and have heir of her body, then I will that the heir after my Daughters death shall have the Land, and to the heirs of their body begotten; and if my Daughter die without issue of her body begotten, then Philip Taylor shall have it to him and his heirs. J. M. died, Rose married Silly, and had issue; the question was if Rose had an estate in tail, or for life only. First it was agreed by all the Justices, that a devise to one and the heir of his body, is an estate tail, and shall go to all the heirs (5)

Ow. 148.

Moor 593.

1 Rol. 832. 9.

2 Rol. 417.

S l

heirs

Post. 453.

heirs of her body, for (heir) is nomen collectivum, and one can have but one heir at one time, and this shall go from heir to heir; but Gawdy and Fenner held that Ro. had but an estate for life, for so it is limited by express words, that she shall have for life, and then her heir shall take as a Purchaser, and it shall not execute in Ro. Popham Chief Justice contra, for the estate is limited to the Ancestor, and after limited to the heir, and shall execute in the Ancestor, especially the words being, if she hath any heirs, and therefore intended that any heir shall have it, & adjournat.

Post. 316.

Waring *versus* Whale, Pasch. 34 Eliz. Rot. 132.

(6)

Error to reverse a Fine in Shrewsbury, levied before the Bailiffs there: First Error, it did not appear that they had any authority to take Fines, and they cannot have it by prescription, or by general words in the Kings grant. 2. It is levied without any Writ of Covenant. 3. It is de messuagio five tenemento, which is in the disjunctive and uncertain. Curia, this Fine is void, for that it appeareth not by what authority the Fine was levied, for it is in derogation of the Crown, and profits of the Crown, pro licentia concordand', and Pasch. 36. the Fine was reversed.

Ante 116.

Ante 117.

Ka. Geanes *versus* Portman.

(7)

The case upon special Verdict was: J. Geanes the husband of the Plaintiff, and T. G. were jointenants for life, the reversion to H. Portman, J. G. by the assent of T. G. occupied the Land alone, and took the profits alone to his own use, and sowed the Land to his own use, and made the Plaintiff his Executor, and died; and afterwards T. G. made his Wife Executrix, and died; she sold the Corn to the Defendant which took it, and the Plaintiff brought trespass; and upon motion all the Court agreed for the Plaintiff, for by this assent that J. G. alone should occupy the Land and take the profits to his own use, this doth amount to a Lease at will, which one jointenant may make to the other, so the Plaintiff hath good title; but if he had said to his companion, I will not occupy it, this had not been material, for he doth not by this, assent that his companion shall have all, nor gave any thing by this to his companion.

Co. Lit. 186.a.

Pratt *versus* Stocke.

(8)
Jones 264.

37 H. 8. c. 17.

A Sumpt by an Administrator, and counts of an Administration granted to him by Th. Tayler Batchelor of Law, Commissary to the Bishop of London; the Defendant pleads the Statute of 37 H. 8. 17. intending that none by that Statute can be a Commissary but a Doctor of Law; also that since the last continuance (which was from Quindena Martini to die lunæ post oct. Hillarii) the Bishop of London granted Administration to him by his letters bearing date 27. January, and upon this it was demurred: two points moved. 1. If a Batchelor of Law may be a Commissary since the Statute of 37 H. 8. 2. If Administration be committed pendente billa, if the Bill abateth; but as to that it was held clearly that the Plea was mispleaded, for this is pleaded after the darraign continuance, where it appeareth to be after his Plea pleaded; but

but the Court held for the Plaintiff. J. Popham said, that administration and probate of Wills was by the Common Law, which any might do; and the Statute of 37 H. 8. is in the affirmative, that Doctors of the Civil Law may be Commissaries though they are married, but it is not restrictive, that no other may be Commissaries, and therefore taketh not away the liberty at Common Law. And if a Bachelor at Law cannot be a Commissary, yet acts done by him are not void till they be avoided by sentence, as if a Lay-man be presented, instituted and inducted, this is not void. And to the second, they hold that if letters of Administration be granted to one, and after are granted to another, by this the first are not avoided, except by judicial sentence, but by the mispleading this cometh not in question, and the Plaintiff had judgment. 2 Cr. 258. 259. Ante 283.

Buckland *versus* Brooke. Hill. 35 Rot. 360.

A Sumpfit against the Defendant as Administrator, W. B. upon an Indebitatus assumpfit, the Action was brought, Hill. 35. the Defendant pleads that the Intestate such a day made an Obligation to J. S. of forty pound for payment of twenty pound at Mich. which should be Ann. Dom. 1593. and that he hath fully administered all the goods of the intestate, which were the intestates at the time of his death, except to satisfy the said twenty pound, Et sic nihil habet nec tempore exhibitionis billæ prædictæ habuit, &c. and upon this it was demurred, Foster for the Plaintiff, that this Debt upon contract is to be satisfied before the debt upon the obligation, which is not yet due, for by this means he may defeat all contracts by a Debt upon bond which shall be due one hundred years after. Also the plea is not good, for that he saith that he hath no goods which were the Intestates at the time of his death, for he may have goods that were not the Intestates at the time of his death, and so is 7 H. 4. 39. Also he ought to answer to the time since the Bill exhibited, for he ought to say he had not at the time of the Bill exhibited, or at any time postea, and non habet, &c. without answering to the mean time is not good. Curia contra, the matter of the plea is good, for Debts upon bond are to be paid before Debts by contract, and this proved by the declaration in these actions, that he hath sufficient to satisfy all other Debts; and to the first exception, the plea is good to a common intent, and if the truth be as the Plaintiff supposeth, he is to shew it, and the Book of 7 H. 4. is not Law in that point, but the Court doubted as to the last exception, but Daniel said it was but of form, and it was not shewed for cause of demurrer. Et adjournatur. (9) 1 Cr. 363.

Cordal's Case.

Nota: Coke Attorney shewed to me a resolution of Gawdy and Anderson in a case referred to them by the Queens commandment, in which two points were resolved; where a devise was to two persons of Lands to hold for payment of the Legacies in a Will, and the Debts of the Testator, and afterwards to Ed. Cordal his Brother for life, remainder to his first son in tail, and so to the second, the remainder to the Heirs of the body of Ed. C. First it was resolved that this is no Freehold in the two persons, but only a term for years, although it cannot be said for any certain (10) Co. 8. 96. 2. Co. 8. 96. 2.

Ante 314.

R. 738.

Co. Lit. 28. a.

2 Sand. 386. *Hyd. au*
D 1062 *Caro.*

number of years, for the profits are not certain, nor the Debts, yet it is a chattel and quasi a term, as a devise during the minority of J. S. or Land extended for Debt; and this is in favour of Wills, but otherwise it is of such a limitation in a Deed, for there it is a Freehold conditional. V. 8 Co. Mannings Case. 2. It was resolved, that the estate tail was not executed for the possibility of the mean estate that might interpolate, and therefore it was always disjoyned, during the life of Ed. C. so that of that estate his Wife could not be endowed and this was resolved upon conference.

Termino

Termino Paschæ,
Tricesimo sexto ELIZABETHÆ,
in Banco Reginae.

Nota, in this Term there were ten Serjeants made, which appeared in Chancery, tres septim. Pasch. viz. John Heale of the Inner-Temple; of Grayes-Inn, William Daniel and John Spurling; of Lincolns-Inn, George Kingsmill, Peter Warburton, Richard Braethwaite and Thomas Fleming; of the Middle-Temple, Richard Lewker, John Savill and David Williams. All of them except Daniel and Kingsmill had their Writs in Mich. Term, returnable in Easter Term, as the Justices said the order was to have one Term between the Writ and the Return, but Daniel and Kingsmill had their Writs in the vacation between Hillary and Easter Term, yet they all appeared together, and had their Antiquities as they were.

(1)

Godfry *versus* More.

Action for these words, Thou hast killed a man at M. in Essex, upon not guilty it was found for the Plaintiff, and it was moved in arrest of judgment, that the words were not actionable, for they were too general, for it may be he killed one in his defence, or he killed a Chief that assaulted him in the high-way, or was an Officer, and in arresting killed him, &c. and of this opinion at the first was Gawdy; but it being moved again, all the Court held that the words being alledged to be spoken maliciously, shall be taken most strongly against him that spoke them, and it was adjudged for the Plaintiff.

(2)

Tryor *versus* Bestney Betts.

Prohibition for suing for Tithes-hay in Chartres, and surmised that the Defendant is Parson Imparsoner of the Parsonage of Ch. and that there was a Vicar of Ch. of which the Defendant was Patron, &c. and that time of out mind, &c. he had used to pay to the said Vicar in full satisfaction of the Tythes of Hay of the place, where, &c. six shillings eight pence per annum, and the pasturing of a horse in the same place. And Godfrey moved that it was no good surmise, for by it the right of Tythes came in question, to whom they were to be paid to the Parson or Vicar, as 31 H. 6. & 6 Ed. 4. are, and *Bushes* case in this Court. Gawdy and Popham, where the right of Tythes is to come in question, this shall be tried in the Court Christian, and it is no Plea, he hath used to pay the Tythes to the Vicar, for then he confesseth he ought to pay Tythes, but the question was who should have them, and this shall be tried in the Court Christian, and that was the reason in *Bushes* Case, for there he pretended he was to pay Tythes in specie, but here is only a *modus decimandi*, which though he pleads it, to be to the Vicar, in discharge of Tythes, yet it is good, for otherwise there will be a great

(3)

Ante 71.

great mischief, for the spiritual Court will not allow a plea of *modus decimandi*, but only of payment of Tithes in kind, and they will not allow him to plead the interest of the Vicar, nor payment to him for discharge, but he ought to come in *pro interesse*; and if he will not come, but collude with the Parson, to charge the Parishioner to pay Tithes in specie, he shall be charged to pay other Tithes then he hath used, and therefore the Common Law shall aid him, and especially as this case is, as it was moved by Tanfield, that the Defendant is Patron of the Vicaridge, and the Vicar in consideration of these Tithes, dischargeth him of all spiritual care and charge. Fenner and Clench inclined to this opinion, Et adjournatur.

Grills versus Ridgeway.

(4)
Post. 439.
Post. 883.
Ante 62.

The case 3 Co. 52. b. Gawdy said it is without question that a repleader may well be after demurrer, but that is when the pleading is insufficient of both parties; Popham, if it be insufficient in matter, so that by it the Action is confessed, and the Plaintiff reply, and a demurrer upon it, yet judgment shall be given against the Defendant, but where the bar is insufficient not in matter, but in form; (as for want of a traverse) and a replication is to it, which is ill, and a demurrer upon it, there shall be repleader; and afterwards the Justices moved the parties to discontinue the Action and to commence again, and so they did.

Rowland Hargthorpe versus Margery Milforth & Anth. Milforth.

(5)

Ante 216.

1 Cr. 373. 167.

Debt against the Defendants as Executors, they pleaded fully administered, and so nothing in their hands; upon issue the Jury found that they two and one Agnes Mil. their Mother were made Executors, and that Ag. had administered and wasted goods to the value of six hundred pound, and that the Defendants had not of the goods of the Testator, but to the value of thirteen pound; and that Ag. was dead, and if they should be charged by this *devastavit*, of their co-executor, or only charged for the thirteen pound, was the question, and the Court held clearly that one Executor shall not be charged by the *devastavit* made by his companion; for the act of one Executor shall charge the other no further then the goods of the Testator in his hands amount unto, but not to charge him of his own goods; for it was the folly of the Testator to put such trust in one, that would do such acts to his disadvantage, but the acts of one shall not hurt the other, for their own goods; as if one Executor will confess an action, this shall bind the other; so if he will release an action, or give away all the goods of the Testator, this shall bind his companion. V. 3 & 4 El. Dy. 210. 21 H. 6. 46. where they shall be charged of the goods of the Testator, the non-suit, release or other act of one shall bind the other, but not if they shall be charged of their own goods, 11 H. 4. 69. where both do waste the goods, execution shall be against both of their proper goods. It was then moved, if judgment shall be against them of the whole debt, or of so much as is found in their hands; and the Court held clearly that judgment shall be of the whole debt, but that execution shall be only for the thirteen pound, which is found to be in their hands; for otherwise the Plaintiff shall be barred of the residue, which is inconvenient. V. 46 Ed. 3. 9. 7 Ed. 4. 9. 33 H. 6. 24. 34 H. 6. 24. And afterwards at the end of the Term all the Prothonotaries of

of the Common Place, certified that their course was not to enter Judgment for the whole Debt, but only that he shall recover so much as was found in their hands, and thereupon the Justices would advise of their judgment in that point; but for the first point they were all resolved *ut supra*.

Fulshaw versus Ascue.

Error to reverse a judgment in the common Place, for that Ascue brought an audita querela to avoid a Statute acknowledged before the Mayor of Lincoln, because it was sealed with a seal of one piece, where the Statute of 13 Eliz. 1. de mercatoribus doth appoint it to be sealed with a seal of two pieces, whereof the Mayor shall keep one, and the Clerk appointed for this purpose the other, the Defendant pleaded it was sealed with a seal of two pieces, according to the Statute, and thereupon at the Nisi prius at the City of Lincoln, it was found for the Plaintiff in the audita querela, and thereupon in the Common Bench it was adjudged that statutum prædictum in forma prædicta recognitum penitus vacuum foret, & pro nullo habeatur, and upon this Error was brought. 1. For that the trial in this case was not good, for the issue was not to be tried per pais, but by the Certificate of the Mayor, and all the other matters were alledged as before in the Common Place. 2. That this judgment quod penitus evacuetur is erroneous, for though it be void as a Statute, yet it is good as an obligation; but the judgment was affirmed: for as to the trial, it was a matter in fact triable by the County; and if it be not a Statute, it is no obligation, but being discharged as a Statute, it hath lost his force in all respects; and that the sole means to avoid it, is by an audita querela, for Error lieth where the Statute is good, but the execution is erroneously sued upon it, as 17 Aff. and the judgment was affirmed, vide the judgment in the Common Bench, Pasch. 33. placito 4.

(6)

Post. 355.

Post. 355. 810.

Ante 231. 233.

Post. 355.

Codwell versus Parker, Mich. 33 & 34 Eliz. Rot. 419.

Appeal de Maihem; the parties were at Issue, and one Juroz was returned by the name of Palus Cheale and in the distringas, and pannel annexed, he was named Paulus Cheale and by that name sworn, and this matter was alledged in Arrest of Judgment, and this was held no trial, for it was only by Eleven, and for that cause a Venire facias de novo was awarded. V. 5 Co. 42. b. and upon that the Issue was tried. And it was moved in Arrest of Judgment, for that the Record was entred, that in the first Venire facias one Palus Ch. was returned, and in the Distringas awarded upon it, Palus Ch. was left out, and Paulus Ch. put in, super quo consideratum est per Cur. that a Venire facias de novo shall be awarded, and it is not mentioned that Paulus Ch. was sworn, and Trial had, wherefore no cause here appeareth to award a Venire facias de novo and so this is mis-awarded. But the Court held, although this be the cause set down in the Record, yet it shall be intended that there is a good cause apparent upon the whole Record together to award a Venire facias de novo, and the Court seeing it, did award the second Venire facias; and it shall not be intended to be an Error, when there is any cause to justify it; and the cause mentioned in the Record is not so material to bind them; for the Office of the Court is to see all the causes, and to give Judgment upon any

(7)

Co. 5. 42. 31.

Ante 57.

any matter which may appear to them, and it shall be intended they did so, as 22 Ed. 4. 45. b. upon a Judgment in a Writ of Dower. Another exception was taken, because no manucaptors are returned upon the distringas. And the Court held it shall be amended by the Sheriff, and it is not material if no manucaptors be returned when the Jury appeareth full, and the verdict given upon it is good, 3 H. 7. 8. and Judgment was given for the Plaintiff.

Walsh *versus* Collinger, Mich. 32 & 33 Eliz. Ro. 460.

(8)
1 Cr. 184.
Moor 365.

Error to reverse a Judgment in the Court of N. I. Error that the Judgment is entred to be before the Mayor and J. S. & J. D. Aldermannis, &c. and at the same time the Plaintiff was made Mayor, pending the Suit; Sed non allocatur, unless the party had excepted to it in the Court, and it was disallowed there, then it had been Error, but if he admits him to be his own Judge, it is not Error, 2 H. 4. 4. 2. Error, the prescription is to hold Courts before the Mayor, and two Aldermen, and it is alledged that at such a Court held before the Mayor and J. S. and J. D. Aldermen, &c. and alledgeth in fact that J. S. was not then Alderman, the Defendant pleaded in nullo est erratum. Godfrey moved that this is no Error, no more then in Error to avoid a Fine, that one of the Judges before whom the Fine is supposed to be levied, was not a Judge, 1 Ed. 5. 3. b. but the Court (absente Popham) held it to be a manifest Error, for the Court cannot be held except before Aldermen, so there must be two at least, and if J. S. was not Alderman, there were not two Aldermen; and it is not like the Case of a Fine, for that is before such Justices, & aliis fidelibus; and if there be no such Judge as one of them which is named, yet the Fine being levied before other Judges is good. And for this cause the Judgment was reversed, and it was here held by the Justices, that a discontinuance after verdict is not helpt by any Statute.

Griffin *versus* Spencer.

(9)
Post. 899.

Error of a Judgment in the Common Bench; Error assigned was, that Spencer brought Debt upon an Obligation against Griffin, the condition was, that if Griffin pay to Spencer a hundred pound within one month after notice of his return from Constantinople in Iliria into England, that then, &c. the Defendant pleads that there was no notice given to him of the return. &c. and upon this the issue is taken, and found for the Plaintiff, and judgment given for him; and now Error was assigned, because it was not averred that the money was not paid, and then no cause of Action. As in Debt for not performance of an Arbitrement, the Defendant pleads no Arbitrement, the Plaintiff shall not only say that they made an Arbitrement, but also that the Defendant had not performed it, in such a part, to inform the Court that there is good cause of Action; so here: but the Court held clearly that it was no Error; for when the Defendant saith he had no notice, this is a confession per nient dedire that he had not paid it, and issue being taken upon a collateral matter, and found for the Plaintiff, judgment shall be given for him; wherefore the judgment was affirmed.

Reade

Read & Morpeh *versus* Erington, Trin. 33 Eliz. rot. 611.

E Jectiōe firmæ, and declares of a Lease made by Anthony Mitford, (10)
 20. January, 11 Eliz. of Two hundred Acres of Land, One hundred Acres of Meadow, and one hundred and fifty Acres de pasture in Pont-Island, Habendum from the Feast of St Mich. last past for twenty years; upon not guilty pleaded, the Jury find a special verdict, which was thus in substance; that Anthony Mitford was seised in Fee of the Mannor of Pont-Island in the County of Northumberland, of which the Tenements in which, &c. were parcel, and of other Lands called Crawleys in Pont-Island, parcel also, tenement in quibus, &c. and of another parcel of Land called Island-Green in Pont-Island, parcel of the Tenements in which, &c. and being so seised, 8 Eliz. conveyeth the Mannor of Pont-Island to the use of himself for life, remainder to Jasper his eldest son, and the Heirs males of his body, remainder to the right Heirs of Anthony; and the Lands called Crawleys to the use of the said Jasper and Margaret his Wife, and of the Heirs males of the body of Jasper; and afterwards to the use of the right Heirs of Anthony. And the Lands called Island-Green to the use of the said Anthony and Julian his Wife for their lives, remainder ut supra. And they further find that Jasper had Issue Mary his daughter, married to the Defendant, and afterwards died without Issue male; and that Jasper was the eldest son, and Heir of Anthony; and they further find that Anthony 11 Eliz. makes the Lease in the Declaration prout, &c. and that afterwards the Lessees 24. Martii 11 Eliz. made a Deed of Feoffment of these Lands to Alexander Heron and others in Fee, with a Letter of Attorney to enter into them or any part thereof; and to make livery according to the Deed; and that the Attorney made livery in a Stable of a house, parcel of the Mannor of Pont-Island; Anthony M. the Lessor being then and there present; and that at the time of the Livery the Lands called Crawleys were in the possession of Anthony, as Tenant at sufferance to the said Margaret the Wife of Jasper; and that the Lands called Island-Green were in the hands of divers Farmers and Lessees, by vertue of several Leases to them made before the Lease made 11 Eliz. and that Anthony and Julian were dead; and that the said Alexander Heron and the other Feoffees enter and grant all their Term, Estate, and Interest to the Lessees of the Plaintiff, & li super totam materiam, &c. Nota, the Jury found that Crawleys contained sixty Acres, and Island-Green One hundred and Twenty. And upon this special verdict these matters were moved. 1. If the Remainder limited to the right Heirs of Anthony Mitford, for Crawleys, in which he had no particular Estate, be in him as his ancient reversion, or vesteth in his right Heir as a remainder by purchase, for if it were a purchase in the Heir, it was not chargeable with the Lease of Anthony Mitford. And all the Court resolved clearly, that the use limited to the right Heirs of Anthony is the ancient use in him, and was never out of him, and is in him as a reversion to grant or charge, and from him shall descend to his Heir, and is as if it had not been mentioned, and the limitation to his right Heirs is a void limitation, and is no more then the Law vests in him. 2. Question, if this Feoffment by the Lessee for years, the Lessor being upon the Land, was a good Feoffment for the Lessor.

Co. Lit. 22. b.
 Post. 334.

Co. 2. 22. b. 31.
Co. Lit. 48. b.

Co. 1. 76. a.

(as it was said) cannot be disseised, he being upon the Land; and no Freehold can be divested out of him, but he being in possession guards the Land, that no Feoffment can be made. Curia contra, that it is a good Feoffment, and shall inure by way of Feoffment, for the Lessor and Lessee being upon the Land, the Law shall judge him in possession that hath the right to it, and the Lessee hath the sole right to the possession, and livery ought always to be given of the possession; and therefore he that hath the possession shall make the Livery; and therefore if the Lessor makes Livery, the Lessee being upon the Land and contradicting it, this is void, for it cannot inure upon the possession, nor give it, when the Lessee is there and keeps it; and the Law shall adjudge it only in him; and when he cannot give or meddle with the possession, he cannot make Livery. And e converso, when the Lessee hath possession, he may make Livery, and the presence of the Lessor which hath nothing to do there cannot disturb it, but immediately by his being there, this is an entry by him, and a revesting of the Freehold in him; so Perkins, f. and 20 Eliz. Dy. 360. And Popham said, that if it cannot inure as a Feoffment; and though it cannot divest the Freehold, nor be a disseisin to the Lessor; yet clearly it is a forfeiture, because the Lessee had taken upon him to make a Feoffment, and give a Fee-simple, and so it is an extinguishment of his Term; as if the Lessee of the Queen makes a Feoffment, no Freehold passed, for he cannot divest the Freehold out of the Queen, yet it is a forfeiture. And for these causes the Court did clearly resolve for that part for the Defendant; but for Crawleys, because it was found to be in the hands of Anthony M. as Lessee to Margaret, it was held that nothing passed, and so for Island-Green, that was found to be in the hands of several Farmers, nothing passed, nor was it any forfeiture. 3. Coke Attorney moved, that the Plaintiff had declared of a Lease made 10. Jan. 11 Eliz. Hab. from Mich. before; and it appears by the special verdict it did not commence from Mich. before, for it was the jointure of Margaret that was Tenant for life, and died afterwards, so, for that it was a lease only from the time of her death, and so the Plaintiff had failed in his Declaration. But the Court resolved that the Declaration was good as to that point; for it being by Indenture (as it was found) it is good between the parties, and Margaret being dead it shall be said to begin according to the time limited in the Indenture; and he cannot declare in any other manner; but if it had been without Deed, peradventure it should be otherwise. 4. It was moved, that for Island-Green the verdict is for the Defendant, for it is found it was in the hands of Farmers and Lessees, by virtue of Leases made before this Lease; and it was not found that their Leases are ended, and then it shall be intended that they yet continue, and then the Defendant cannot be guilty of the Ejectment of the Plaintiff. But the Court conceived this not to be material, it being not found that the Defendant claimed under the Lessees; and the Plaintiff having entred, and the Defendant entering upon him, this is an ejectment of the Plaintiff, for which the Plaintiff shall punish him; And it was resolved that for the Manor of Pont-Island, Judgment shall be for the Defendant; and for Crawleys and Island-Green, Judgment shall be entred for the Plaintiff.

Downs *versus* Hopkins.

IT was found by special Verdict, that the Land was ancient Copyhold Land demisable for one or two lives, and that this Land was granted by Copy to J. D. the Husband of the Plaintiff, Habendum to him for life, and to the Plaintiff durante viduitate sua; and the question was if this were warranted by the Custom, for the Wifes Estate, for it is no absolute but a limited Estate. But all the Justices did hold without any argument that it was good; for when the Custom warranted the greater Estate for life to be made, it doth warrant the lesser Estate, specially here, because this is also an Estate for life, but limited and as it were conditional; then it was moved, that the Wife was named only in the Habendum, and it was held good, for it is common in Copies, and so adjudged, 4 Co. 23. (11)

Post. 373.

2 Co. 494.

Ante. 113.

Hopton and his Wife *versus* Johns.

Error to reverse a Common Recovery had against the Wife and her former Husband, in which they were Tenants, and vouched the common Vouchee; and the Error assigned was, that the Feme was an Infant, and appeared in person, and not by Guardian, and lost, and so is as a recovery by default, although they appeared and pleaded, for that Judgment was given upon default; and Common Recovery is but a Common Assurance, and not a Recovery by Title, which peradventure should be good, and an Infant cannot make an Assurance; and therefore it was erroneous, and for this cause the Judgment was reversed. (12)

Ante 309.

Charter *versus* Freind, Hill. 35. Rot. 502.

Error upon a Judgment in Redisseisin; Error assigned was, that the Plaintiff had entred pendente breve, and in this Action he is to be restored to the Land. But it was ruled that he cannot assign this for Error, for he cannot plead any thing in this Action, especially it being a dilatory Plea, but an audita querela is his remedy if he have cause; and here the Plaintiff is not to recover Land, but to be resealed. Wherefore the Judgment was affirmed. (13)

Milborne *versus* Dashburne.

TRespass, The Case was. A Reversion upon a Lease for life is granted for life, cum post mortem of the Tenant for life acciderit; the question was, if this shall refer to the Commencement of the future time, as to the Estate, or to have the Land in possession; and it was ruled it shall not refer to the Commencement of the Estate, but to the having the Land in possession. 23 Eliz. Dyer 376. (14)

Co. 10. 107. b.

Bishop *versus* Grant, Hill. 35. ant. 36 Eliz. Rot. 253.

(15)

Error of a Judgment in an assise of a Rent-seck in Kent, where the Plaintiff made his Title, that the Rent was granted to be paid yearly at the four Feasts, viz. Christmas, Annunciation St. Jo. Baptist, and Michaelmas, and at another place out of the Land; and sheweth that the Rent was Arrear for four years at the Annunciation last past, for which the Plaintiff in crastino prædict' Festi purificationis beatæ Mariæ, demanded the said Arrearages. 1. Error, that the Rent was demanded upon the Land; and not at the place where it was payable. Sed non allocatur, for it is well demanded upon the Land, and it is not like to a Rent reserved upon a Lease with a clause of re-entry. 2. Error, that it was demanded after the Feast, Sed non allocatur. That no Feast of the purification is mentioned before, so it appeareth not that the demand was after the Rent was due, or before. Foster moved that this word (Purification) shall be void, and surplusage, and then prædictum Festum shall refer to the Feast last mentioned. Gawdy, although the word (Purification) be void, yet prædict' Festum cannot refer to the last Feast, for there are divers Feasts mentioned, so it cannot be referred to any one certain, but the word (Purification) can be no more void, then the word (prædict') shall be void, and the other to stand, Comment. 86. and for this cause the Judgment was reversed; but if it had been, & postea after the said Feast of the Purification, &c. it had been good; for all after the word postea shall be void; and for this cause the Judgment was reversed.

1 Cf. 508.

Ante 311.

Pipe &c. *versus* Dominam Reginam, Trin. 35 Rot. 868.

(16)

Error by Pipe, as Son and Heir, and Executor of Sir R. Pipe, the Bishop, and the Incumbent, against the Queen, upon a Judgment in a Quare Impedit by the Queen against Sir R. Pipe as Patron, the Bishop, and Bagshaw the Incumbent, to present to the Church of B. in the County of Derby, to which she made Title to present by lapse, and recovered. Error assigned, for that the Patron died pendente breve, and yet Judgment was given against him. And this was held by the Court to be a manifest Error; for although the death of the Patron shall not abate the Writ, as 9 H. 6. 30. is, yet when Judgment is given against him, it maketh all Erroneous, and shall cause the Judgment to be reversed in all, for it cannot be reversed by parcels. Nota, This Error was confessed by the Queens Attorney; and note here, all the other were summoned and severd, except Pipe; and this was held good: for as summons and severance shall be in a Quare Impedit, so in a Writ of Error upon it. But then it was moved that this Writ of Error was not well brought by the Plaintiff as Heir and Executor together; but the Court as to that held it good enough; as a Writ of Debt may be brought against one as Heir and Executor together. But then it was moved that he had no cause to bring a Writ of Error as Heir, or as Executor, for he cannot have it as Heir, for the Inheritance is not touched, for the Queen only claimed by Laps, so affirmeth the Inheritance; and as Executor he cannot bring an Action, for he hath no damage, for the Testator had presented, and the Incumbent was in the Church; but if the

Co. 7. 26. b.

Co. 6. 25. a.

the Testator had not presented, peradventure it had been otherwise; and here all the loss is to the Incumbent, and he cannot reverse the judgment, for he is severed; but the Court held the Writ of Error did well lie, for it is to maintain the Incumbent in the Church; and the Incumbent although he be severed, yet shall of necessity have judgment to be restored, for the judgment is entirely to be reversed. And Trin. 36 Eliz. the judgment was reversed, but it was not laid at whose Suit, viz. as Heir or Executor. And it was said the Incumbent may well enter, for by the reversal there is no Record of the recovery against him.

Buckly versus Williamson, Hill. 36. Rot. 246.

Error of a judgment in Debt upon an Obligation; the Error assigned was, that the teste of the Writ was 15. Septem. 32 Eliz. returnable Octab. Michaelis, and the money was due at Mich. 32 Eliz. and so after the teste, and before the return of the Writ, and this appeared by the condition, which was entred in hæc verba; and for this cause, although the Judgment was after Verdict, so that if there had been no original it had been good, yet it being brought before cause of Action, the judgment was reversed, and it is not aided by the Statute of 18 Eliz. (17)

1 Cr. 575.
2 Cr. 70.
Hob. 199.

Termino Paschæ, 36 Eliz. in Scaccario.

Allen's Case.

A Scire facias was sued in the Queens name against Allen, why execution should not be against him for a debt that came to the Queen by Attainder of J. S. the Defendant pleads that the Queen hath granted over this Debt, and all actions and demands for it to York; and upon this it was demurred, if the suit could be in the Queens name, after it is granted over (Nota, in truth there were special words in the Patent, that he might sue for it in the Queens name, but this was not pleaded; and the Court held clearly, that if it had been pleaded, the Suit might be in the Queens name, for the Queen had this liberty to grant to sue in her name, but if as the case is pleaded, he might sue in the Queens name) the Court doubted, and two presidents were cited, the one P. 30 Eliz. Rot. 291. where Green to whom a debt was due, was attainted of Felony, and the Queen granted over the debt, and all actions and demands for it, and a Scire facias was sued in the Queens name; the other president was Hill. 32 Eliz. Rot. 216. Mabb was indebted by Bond to J. S. and the debt came to the Queen by Attainder, and she granted it and all Actions for it to Bowes, and notwithstanding the Suit, for it was in the Queens name; but the Court said, they will see the presidents, & adjournatur. (1)

Dier 1, b.

Green versus Edwards, Hill. 36 El.

Information for converting Two thousand timber Trees into Coals to make Iron; and demanded 4800. l. the Defendant pleads that the same Plaintiff had another information against him for the same cause, and demanded the same sum, and demanded Judgment (2)

2 Cr. 481.
Ante 261.

2 Cr. 481.

Judgment whither he shall answer to the last, pending the first. And Altham argued, he was not to answer; for when a Declaration is made, and the certainty appeareth, there shall be no other suit for the same cause, for the double veration to the Defendant. 14 Ed. 3. brief 318. 22 H. 6. 52. 14 Aff. 6. 29 Aff. 40. 39 H. 6. 12. & 28. 40 E. 3. 35. 39 H. 6. 14. and there is no difference between the Case of the Queen, (as it was objected) and of a common person, for the Queen shall not have two suits for the same cause, 19 Ed. 3. brief 470. & 33 Ed. 3. brief 916. & Q. Impedit 58. and if it should be suffered, the party shall be twice charged, and have no remedy, for an Audita querela lieth not against the Queen. 18 Ed. 3. 2. 45 Ed. 3. brief 547. Coke Attorney contra; for it is but in the nature of a Trespass, 5 H. 7. 15. no Plea in Trespass, that another is depending; and the Queen hath a prerogative above a common person; and he offered to withdraw the first suit, but the Defendant would not assent to plead to the second; And the Barons would advise; but they said it was not peremptory, but a respond' ouster.

Agard *versus* Candish.

(3)

Information upon the Statute of 8 E. 4. 2. for giving licences; upon not guilty it was found for the Queen. And it was moved by Tanfield, that the Action lieth not in this Court; for the Statute appoints it to be sued in certain particular Courts therein mentioned, and there is no word of the Exchequer: Atkinson contra, the Statute is in the affirmative, and not in the negative that it shall not be sued elsewhere. Stradling's case in the Commentaries, f. And to this the Barons agreed, for this is a superior Court, though not named, and so suit may be here, for there are no restrictive words in the Statute, and this Court hath power to hold Plea in any thing concerning the Queen, if not restrained. Et adjournatur.

Hitchcock & Uxor *versus* Skinner & Lacy, Sheriffs of London.

(4)

Post. 350.

2 Cr. 545.
Co. 5. 31. b.

2 Cr. 545.

Debt upon an escape of Lyster, who was taken in Execution, and declared that whereas the Plaintiff as Executor of one Bevill brought an Action of Debt against Lyster, and recovered and had Execution, the Defendants suffered him to go at large, and counted in this Action, in the debet & detinet; the Defendants pleaded nihil debent, and found for the Plaintiffs. And it was moved in arrest of Judgment, that the Action was not well brought in the debet & detinet, for as the first action was only in the detinet, so this Action grounded upon the Record ought to be, and to pursue it, 10 H. 7. 5. b. 11 H. 6. 17. 9 H. 6. 11. 20 H. 6. 4. 5. & 6. where an Executor brings Debt for arrearages of account found before Auditors assigned by himself; so in all Cases where an Executor sueth for any thing due to the Testator, or by reason of any such thing; as if an Executor recover damages in Trespass, de bonis testatoris asportatis, and recovers, and then brings Debt for the Damages, it must be in the detinet; and in Scroggs Case, against the Lady Gressam, 27 Eliz. C. B. when she was Executor to her Husband, and sold Lands by vertue of an Act of Parliament, to pay her Husbands Debts, it was adjudged she shall be charged only in detinet; and if a recovery should be in this Action in the debet & detinet, it shall not be to the use of their Testator, but of themselves.

Periam

Periam; this Action is grounded upon a tort done to themselves, and is not grounded meerly upon the Record; and is not like the cases put of Debt upon arrearages of account, or upon a Recovery, but is meerly collateral, for the tort done by the Sheriffs in suffering the party to escape; yet when it is recovered it shall be Assets in their hands, and the Action in the debet & detinet is well brought. ^{2 Cr. 546.} Ewens & Clerke contra, ^{Co. 5. 31. b.} for the ground of the Action is the recovery as Executors, and the tort is due to them in that right; and therefore the Action is to be brought in the detinet only, and it was afterwards adjudged accordingly.

Termino

Termino Trinitatis,
Tricesimo sexto ELIZABETHÆ,
in Banco Reginae.

Humble *versus* Glover, Hill. 36 Rot. 420.

(1)
Poph. 120. 55.
Gould. 182.

Moor 351.
Post. 636. 633.
Jones 44.
Co. 3. 24. a.

Ante 57. 59.
Co. Lit. 3. a.

DEbt upon a Lease for years, made by Tho. Play to the Defendant, and declares upon an Assignment of the reversion by Indenture of Bargain and Sale enrolled; the Defendant pleads that after the grant of the Reversion, and before any Rent arrear; he assigned over his Term to Scotmead, and doth not name his Christian name, but a blank was left for it; and upon this Plea it was demurred. 1. Point, if the Lessee shall be charged with the Rent after the Assignment of his Term; and resolved he should not. V. 3 Co. 23. b. for there is no privity between the Bargainee and Lessee, but by reason of the privity of Estate, which being gone, the Lessee is not chargeable; but between the Lessor and Lessee he shall not discharge himself, by assigning over his Term, for the privity is by reason of the contract and reservation, rather then by the occupation of the Land; which by his own Act he shall not discharge; but in this Case the privity is destroyed. 2. Point, it was moved that the Plea is not good, for a grant to one not naming his Christian name is void, for it is uncertain to whom the grant is, except the grant be to one which by reason of his dignity or office, it is known there is no other of the same name, as to Popham Chief Justice, or Glanville Serjeant; and yet in that Case it must be averred that there be no more of that name; and if an Obligation or Grant is made to one, and his Christian name is mistaken, the grant is void; so a grant made by him, a fortiori, where there is no Christian name; and of that opinion was all the Court, except Feener, and that the Plaintiff shall have Judgment to recover; but no Judgment was given, because the Plea was discontinued.

Brooke *versus* Clarke, Pasch. 36. Rot. 397.

(2)

Action for words; for that whereas Clarenceaux King of Arms had a Patent of his office; and that he might grant Commission to any to be his Deputy, to visit in things concerning his Office; and he by his Commission did appoint the Plaintiff to be his Deputy in the Counties of Devon and Somerset; and the Plaintiff by vertue thereof did sit and inquire of matters concerning the Office, the Defendant *præmissorum non ignarus* said of the Plaintiff, He came and sat by force of a forged Commission; and he is a Scrivener and no Herald; the Defendant pleaded not guilty; and it was found against

gainst him. And it was now moved in arrest of Judgment. 1. That the words would not maintain an Action. 2. If some of the words were actionable, yet others of them were not, and damages were entirely given. To the first, the Court conceived that the Action lieth; for they touch him in his profession, and are very slanderous, that he sat by virtue of a forged Commission: And whereas it was objected, that peradventure he did not know it, it is expressly averred by those words, Præmissor' non ignarus; but if those words had not been in the Declaration, it had been otherwise; for it might be, that he sat by virtue of a forged Commission, and knew it not, and then it touched him not in his credit. And the words, He is a Scrivener, and no Herald, touch him in his profession, and by it he getteth his living; and therefore it is reason, that for them he might bring his Action. And as to the second, All the Justices held, that Judgment shall be given for the Plaintiff; for it shall be intended, that damages were given for the words, which were actionable. But Popham said, that if an action be brought for words spoken at one time, and for other words spoken at another time; and for the words spoken at one time an Action lieth, but not for the words spoken at the other time, and damages are intirely assessed, no Judgment shall be given; for the Action is brought for all the words, and damages for all: And so it was held in the Lord Admirals Case,¹⁸ Eliz. and afterwards Judgment was given accordingly.

Co. 10. 130.b.

Co. 10. 131.a.
Ante 282.

Co. 10. 131. a.

Chapman *versus* Thumblethorp, Hill. 36 Eliz. Rot. 113.

T Respals, for breaking his Close, Et quædam averia ibidem existent' cepit & asportavit. The Defendant pleads, that the Cattel were his own goods, and that J. S. took them by wrong, and put them in the Plaintiffs Close by his assent; for which, he finding them there, did take them, &c. as it was lawful, &c. And upon this Plea it was demurred. Pudzey argued for the Plaintiff, that the Defendant could not enter into the Plaintiffs Close to fetch them out, except they were put there by the Plaintiffs Tort; and this Plea doth amount to a General-issue, for he cannot Traverse the property of the goods. But the Court held it a good Plea; for the Plaintiff by his Declaration doth not aver the property of the goods to be in him, but saith only quædam averia: And when the Defendants Beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justify the taking of them in any place he finds them, and it was adjudged for the Plaintiff.

(3)

Haselop *versus* Chaplin. Cujus principium antea.

Mich. 33 & 34 Eliz. B. R. Placito 36.

It was now moved again, and divers Presidents were shewn out of the Common Bench, that always since the Statute, damages and costs had been given to the Avowant in Avowries for Amercements in Leets, and for Perriots, and other cases not

A 4

mentioned

(4)
Ante 257. 8.
Ante 300.
2 Cr. 28.
1 Cr. 532. 2.
2 Cr. 520.

1 Cr. 534.

mentioned in the Statute. And the Justices conceived, that their course being so since the Statute, the Law shall be construed to be so; and so inclined in their opinion: But then it was moved, that the Replevin was De averiis taken, and the taking was only of a Horse, and so ill. And of that opinion was the Court, that the Count had made the Writ false; and for this cause the Judgment was reversed.

Dickins *versus* Marshal, Pasch. 33 Eliz. Rot. 403.

(5)
Post 696.Co. Lit. 9. b.
Co. Lit. 42. a.

Ante 9.

The Case upon special verdict was; J. T. devised all his Lands and Goods after his Debts and Legacies paid to R. Toby and Mary his Children, equally to be divided between them. The questions were, first, Whether an estate of Inheritance, or only a Freehold passed by those words? Secondly, If they were Joynt-tenants or Tenants in common? And after Argument, the Court resolved, 1. That an Estate for life only passed; for although the devise of the Lands and Goods are coupled together, and it be a devise for ever of the Goods; yet for the Land, there being no words to pass the Inheritance, only an Estate for life passeth. And although it was objected, that the Devise of the Land is, after his Debts and Legacies paid; so this is limited after he hath made an end of disposing any thing; and it was to his Children, of which his Heir is one; so that he intended to give as much to one, as to the other, and that he doth not limit any estate over to any other; yet the Court held, that only an Estate for life did pass. Popham said, it may be doubted if any Land did pass, in case he had a term for years in Lands, and so the Devise of Land may be supplied, and that only the term shall pass. Second point, They all conceived it was a Joynt-estate, and that they shall not take by parts in common; for he doth not appoint a division to be made. But Fenner said, that in 2 Eliz. between Hide and Southcot it was adjudged, that a Devise of Land to two equally divided, this was a Tenancy in common. But here it is to two equally to be divided, and it is not certain that a Division shall be made. Vide 3 Co. 39. b.

Barry *versus* Stanton.

(6)
Ante 60.

The Case upon special Verdict was. A Lease was made for years upon condition he shall not Devise the Land, or assign over his term, and by his Will he devised it, Gawdy, Fenner and Clench, held clearly, that the Condition was broken; for by this Devise the term is disposed by his gift, which is an Alienation, and is as strong as any other Alienation. But Popham delivered no opinion.

Kent *versus* Sponder.

(7)

Scire facias to have execution of Land, and damages recovered in an Ejectione firmæ; the Defendant pleaded an Entry into the Land after the Judgment, and before the Scire facias; and because he did not answer to the damages, the Plea was ruled ill in all:

Where-

Wherefore it was adjudged, that the Plaintiff shall have Execution of the Land, and damages.

Patridge versus Mayler.

Error upon a Judgment in an action upon the Statute, 1 & 2 P. & Mar. c. 12. for taking a Distress in one County, and inclosing and impounding it in another County, and the Venire facias awarded only of the place where the taking was; and this was assigned for Error; and for this cause the Judgment was reversed. (6) Post. 489.

Harvy versus Wroth.

Error upon a Judgment in Dower. Error assigned was, that the Tenant was an Infant, and the Judgment was by default. (7) Ante 308. V. 5 Edw. 3. 70. 17 Edw. 3. 47. 17 Edw. 2. Saver Default 80. where an Infant shall be compelled to save his Default. And it was moved here, that in as much as in a Writ of Dower the Paroll shall not Demur for his nonage, that the Infant shall be compelled to save his Default: And so it was cited to be adjudged in Cories Case. 34 Eliz. Sed adjournatur.

Berry versus Taunton. Hill. 36 Eliz. Rot. 376.

The Case upon special Verdict was. A Lease was made to Giles Taunton for eighty years, upon condition, That if he, his Executors or Assignees do demise the Lands for more then from year to year, that then the Lease shall cease and be void. G. T. doth demise it to his Son, and dieth, the Son enters by the assent of the Executor; the question was, if the condition be broken, for the demise is not properly a Demise. But all the Justices held it a breach; for a Condition shall not be taken so strictly, that it shall be according to the precise words; and if the meaning be broken, it is a breach of the Condition; and none will deny but a grant of all his Estate had been a breach; so it is here of a Devise: And it was so adjudged. (8) Ante 60.]

Lee versus Norris, Pasch. 36 Eliz. Rot. 41.

Ejectione firmæ: The Plaintiff declared of a Lease by J. S. The Defendant said, that long time before the Lease and Ejection, that the Queen was seised of the Lands, and let it to B. for years, who let it to the Defendant for two years; upon whom J. S. the Lessor of the Plaintiff entred, and expelled him, and let it to the Plaintiff: And upon this it was demurred, because the Plea amounts to Non-guilty. Gawdy, the Plea is good; but if it had been in the case of a common person, it had not been good, without saying, He ousted the Lessee, and disseised the Lessor; but here there can be no Disseisin to the Queen; wherefore he saith enough, that he put out the Lessee; for otherwise it is not good, 10 Edw. 4. 6. for otherwise his Entry may be intended lawful; but when he saith, (9)

he expelled him, this intendeth an unlawful Entry, and confesseth in him such a possession, that he may make a good Lease against any but him that hath right. Fenner agreed, and by this Entry he hath gained such a possession, that the Lessee of the Queen may bring an Ejectione firmæ, although the Queen be not put out of the Freehold; which Popham agreed.

Nevill *versus* Seagrave, Trin. 33 Eliz. Rot. 323.

(10)

Post. 813.

Post. 813.

R Eplevin. The Defendant avows for Damage-feasant; the Plaintiff replieth, that the day after the Distress taken, he tendered sufficient amends, scil. Six pence, which the Defendant refused; upon which the Plaintiff demurred, because the Tender was not before the impounding. Gawdy, the tender is good, although the Cattel be impounded; and if the party that distrained refuseth it, the Owner may take them out of pound. And it is clear, if the Tender were before the impounding, he might take them out, Quod fuit concessum: Whereupon the Court gave day to the Defendant to shew cause to the contrary, otherwise Judgment shall be given for the Plaintiff: But Tanfield at the Bar said it was adjudged in Sir Henry Cromwells Case in the Common Bench, that tender after impounding, cometh too late. V. 5 Co. 76. a.

Dr. Andrews *versus* Wood.

(11)

Post. 829.

D Ebt upon an Obligation. The Condition was to perform Covenants in an Indenture of Lease, whereof one was to pay the Rent at the day; the breach assigned was for not payment of the Rent. Upon which it was demurred, because no demand of the Rent was alledged; but the Court did over-rule it, because it was an express Covenant; and by the Recovery the Obligation is determined. Sed Adjournatur.

Lambert *versus* Austin, Trin. 35 Eliz. Rot. 185.

(12)

88 H. 8. c. 34.

Co. Lit. 162. a.

R Eplevin. The Defendant avowed upon the Statute of 32 H. 8. as Executor; for that the Lady Southwell was seised in Fee of the Mannor of Weston, and 3 Eliz. granted a Rent of five pound per annum to Richard Adamson for his life, issuing out of the Mannor, who made the Defendant his Executor, and died 28 Eliz. And for ten years arrearages between 17 & 28 Eliz. he avowed. The Plaintiff replied, that after the Grant, scil. 12 Eliz. the Lady Southwell made a feoffment of this Mannor to Copley; who 13 Eliz. let the Land to Bocket for twenty one years, which occupied it for the term, which expired 34 Eliz. and afterwards Copley let it to the Plaintiff for three years; upon whom the Distress was taken, and upon this it was demurred. The question rests only, if for the Rent incurred during the term, if by the Statute he may distrain for it after the term expired, upon him in the reversion: for the Statute is, that he shall distrain upon the possession of the Tenant in Demesne, which was chargeable with the Rent, or any claiming under him. Gawdy and Fenner, the Tenant of the Freehold

hold is only to be charged, for an assise only lieth against him, and he is the party that is to attorn; and the Lessee for years is only chargeable for his Cattel being upon the Land, as a stranger shall be in that case; and the intent of the Statute was only to give remedy against him who was chargeable in the life of the Testator. And Fenner said, if Lessee for life grants a Rent-charge, and then makes a Lease for years, and dieth, debt lieth for this Rent against the Executors of the Tenant for life, and not against the Tenant for years, for he is not the party chargeable; and in this case, if no Seisin was had, there is no remedy: For Tenant for years cannot give Seisin, and a Release of this Rent must be to the Tenant for life, and not to the Tenant for years. Clench and Popham contra, That the Tenant for years is only chargeable in debt, for the Rent incurred during the years, and not the Tenant of the Freehold, and both are chargeable, one with an Assise, and the other with a Distress during the estate. Then it is to be considered in this case, who is chargeable by the intent of the Statute: If Tenant *Pur auter vie* grant a Rent and *cestuy que vie* dieth, the Grantee of the Rent dieth, the Executors of the Grantee have no remedy by the Statute; for the Statute giving the Distress intends the party that properly and usually is to be distrained, which is the Termor in possession, and those that come in privity under him; but so is not he in the Reversion: And therefore in this case the Executors cannot distrain, but only have an action of Debt, and the Statute giveth the Distress upon the Tenant in Demesne, which is chargeable immediately, and not on him in the Reversion, except his Cattel come upon the Land by escape. Fenner, If Tenant in Tail grant a Rent-charge, and then makes a Lease for years according to the Statute, and dieth, the issue shall hold it discharged, and the Grantee shall not distrain during the term. *Quod Gawdy concessit, & Adjournatur.*

Folcot *versus* Ridge.

Prohibition for suing for Tithes-Hay upon fifteen acres of Land, ten acres of Meadow, and seven acres of Pasture, and surmisseth, that he and all those, &c. time out of mind, &c. had used to pay four pence yearly in satisfaction of all Tithes of Hay cut there, &c. and issue upon it; the Jury find the prescription; but that part of the Land was never mowed, but shew not what part in certo. The question was, if this verdict be certain enough, and for whom it was found, and it was adjudged for the Plaintiff; for both parties are agreed, that all the Land had been Mowed, and the finding contrary to it is void; and the Verdict is certain enough. (13) Ante 287.

Annesly *versus* Stokes.

Error upon a Judgment in Debt; for that in the Writ he was named Son and Heir apparent, and in the Declaration, Son and Heir generally; and for this variance the Judgment was reversed, yet it was said, that Apparent was Surplusage, *Sed non allocatur.* (14)

Termino Trinitatis, 36 Eliz. in Communi Banco.

Frederick *versus* Frederick.

(1)

Partition. The Case was upon special Verdict. A. levies a Fine to J. S. which by Indenture is declared to be, to the use of B. for life, and after to the use of the Children of C. procreatis: C. at the time of the limitation had two Sons, and before the death of B. had issue two Daughters; the question was, if the Daughters should take: After argument at the Bar, it was resolved by the Court (except Owen) that the Daughters should not take. Anderson first shewed his opinion, that the Postnatæ shall not take; but only the Children that were in Esse at the time of the limitation for they shall not take as Joyntenants, nor as Tenants in Common, nor by way of Remainder; and therefore not at all; as Joyntenants they cannot take; for they were not in being at the time of the limitation of the Remainder, nor as Tenants in Common or by Remainder, no more then they could take by an estate executed by other conveyances: And uses are not allowable, but as they are consonant to the Rules in Law and Reason; and it is plain here, that no present or future uses are limited to those that should be afterwards born, and no matter can be collected out of the parties intent to help them. Walmesley accorded; this Rule is to be observed in Uses, in every Case there is to be Donor and Donee, who shall take as well in limitation of an Use, as of an Estate executed: And although the Common Law knows nothing of Uses, yet now by the Statute an Use is an Estate; and to take such an Estate, there ought to be a Donee. As if a gift be made to the Father, Et primogenito filio, if he hath no son then, the son born afterwards shall not take, and the Use ought to be observed, as it is appointed; and when it is limited in possession, it must take in possession, and in futuro, and in expectancy, when it is so limited; but there must be a Donee to take at such a time as it is limited. And where it was objected, That the intent and meaning of the Uses is to be observed, it is true, if they be not fond and idle, as in Wills, which are greatly favoured, for the weakness of them that make them. And it is against the Rules of Law and Reason, and of Uses, that one who is not in Esse should take by an Use limited in possession: And therefore the Sons in Esse shall only take in this case, and not the Daughters born after. And in the Earl of Bedfords Case it was ruled by the advice of the Justices in the Court of Wards, that where he made a Conveyance to the use of himself for years, the Remainder to his eldest Son in Tail, the Remainder to the Heirs of the Earl, although his meaning was (as it appeareth by the words) that his Heir should take as a Purchaser; yet it was ruled according to the Rules of Law, and not according to his meaning; scilicet, That he should take it as a Fee executed in himself. And it seemeth, That if a limitation be

Co. 6. 17. a.
Ante 121.Co. 1. 100.
Ante 121.Ante 321.
Moor 721.

he to the right Heirs of J. S. and he hath issue a Daughter and dieth, his Feme enseint with a Son, who is afterwards born, yet the Daughter shall retain it, for she was in the Estate executed. Beaumont agreed in omnibus: Owen contra, For the intent here appeareth, That all the Children shall have it; for procreatis referreth to those that were born, as to those that shall be born, and an use is a matter of Conscience. But it was adjudged by the other Justices against the Daughters.

The Lord St. John *versus* Talbot.

Forfeiture of Marriage, and counts that the Father of the Defendant held of him by Knight-service and died, the Defendant his Heir being within age; whereupon the Plaintiff tendered him a marriage, and he refused and married himself elsewhere, and at his full age intruded; the double value of his marriage not being satisfied; the Defendant acknowledging the tenure and marriage, traverseth the Tender: And it was thereupon demurred, and ruled, that the Tender is chiefly traversable in this Case; but the Court held, that in a Valore maritagii, the Tender is not traversable, for the Lord shall have it without Tender. Anderson and Walmsly held, that if the Heir marry himself before Tender, the Lord shall have only Valorem maritagii, and not the Forfeiture; for the Tender afterwards, when he is married, is in vain, for he cannot accept of it, and it shall not gain to the Lord the double value. (2)

Post. 468.
Co. Lit. 82.
2 Cr. 66.
Co. 5. 126. b.

Gurney & Somes Case.

Debt for Thirty five pound for their Fees, as Sheriffs of London, for executing a Capias ad satisfaciendum directed to them, and demanded by force of the Statute of 29 Eliz. cap. 4. twelve pence in the pound for the first One hundred pound, and six pence in the pound for the residue: And it was thereupon demurred; First, because there is not any action given by the Statute: Secondly, because they ought to have but six pence in the pound, where the sum exceeds fifty pound, and not to take twelve pence in the pound for the first one hundred pound, and six pence for the residue; and so the Court held upon the first Argument in both points. Sed quære, quia adjournatur. (3)

Post. 654.
2 Cr. 103.
1 Cr. 287.

Ferrer *versus* Johnson.

Action upon the Case, for disturbing him of an Office, the Plaintiff made a special title to it, and a special Verdict was found, wherein a title variant in part from that which was alledged, was found. And after divers arguments it was held per Curiam, That notwithstanding the Variance, the Plaintiff should have Judgment: For Walmsly said, that the Title in this Action was superfluous, and the Variance found was not material. And it was held per Curiam, That if one grant an Office of (4)

Ante 288.
Co. Lit. 233. b.
Post. 839.

of Bailiff or Steward, or the like, with the profits thereof, without
Co. Lit. 233. b. rendering an account, he cannot discharge the Grantee, but he shall
continue to have the profits of the Office; but otherwise it is,
if no Fee or Profits had been granted for the exercising thereof.
And Walmisly held, that one may grant an Office, Habendum after
1 Cr. 279. the death of J. S. for it varieth from the Case of Land, &c. and
Co. 11. 4. a. the Plaintiff had Judgment.

Termino

Termino Michaelis,

Tricesimo sexto & septimo ELIZABETHÆ,
in Banco Reginae.

Ro. Blackwell *versus* Eyre, Hill. 36. Eliz. Rot: 404.

Assumpsit, and declared, Quod cum quidam exitus in quadam actione eject' firmæ of the Lease of Blackwell the Plaintiff, ⁽¹⁾ Moor. 351. junctus fuit inter Anth. Buxton querent' & R. Senior, & Geo. Nedham & Hen. Bradly Defendants, ad quem exitum triandum, the said Anth. Buxton had sued out a Venire facias, the Defendant in consideration that the said Anth. Buxton and R. Blackwell the Plaintiff, ad triandum exitum prædict' parcarent inforciare their title, Sed darent tenuem & parvam evidentiam super triationem exitus versus præfat' R. Senior, Geo. Nedham, & Hen. Bradly, assumed to pay to the Plaintiff two hundred and seventy pound, scil. Twelve pound at the Feast of St. Michael, next ensuing, and twenty four pound at every other Feast of St. Michael, until the two hundred and seventy pound were paid, and if default of payment should be made of any of the said several sums by the space of one month, then he would pay for every month after such default twenty shillings Nomine pænæ, and alledged in fact, Quod exitus prædict' triatus fuit; and that the said A. B. and the Plaintiff spared to inforce their title, and gave but small evidence Super triationem exitus prædict' against the said R. S. G. N. & H. B. sic quod juratores jurati ad triandum exit' prædict' dixere, that the said R. S. G. N. & H. B. were not guilty, and alledges in fact, that the Defendant did not pay the said twelve pound at the Feast of Michaelmas aforesaid, and that thirty four months are passed since the said Feast, after the said Feast, till the tenth of June, 35 Eliz. And that the Defendant had not paid the said twelve pound at the said Feast of St. Michael, 32 Eliz. nor within one month after, nor the thirty four pound forfeited Nomine poenæ, and for the not payment, &c. he brought his Action; the Issue Non Assumpsit; the Jury find a special Verdict, that in the said first Action of Ejectione firmæ, there were two Issues joyned, sc. R. S. pleaded not guilty, and G. N. and H. B. pleaded a Surrender of the Term, and Issue upon them, Et si super totam materiam, &c. The question was, if this Verdict be for the Plaintiff or the Defendant. And it was moved, that the word Exitus was a general word, and might be referred to both the issues; and so is good Reddendo singula singulis, and relied upon 28 Edw. 3. 97. 41 Ed. 3. Brief. 4. H. 6. 11. But it was answered, that although Exitus be general, and may be referred to divers Issues, yet it be-
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Post. 427.

ing coupled with quidam, this restrained it to one, and junctus fuit is in the singular Number, and sheweth it cannot be intended to refer to more issues; and the Plaintiff afterwards sheweth that exitus prædict' triatus fuit; and that the Jurors said, that they three were not guilty, sheweth his intent to be, that but one issue was joyned; and the Verdict findeth the contrary to it; and so he hath failed of his consideration. But the Court held, That the words quidam exitus being general, shall refer to both; and in this it may be intended, that they meant both; and in that it is afterwards said, that the Jury found them not guilty, this is but nugation; and he needed not to have spoke of the Verdict, and so is not material; and of that opinion was the whole Court, & adjour'. And at another day it was moved again, Popham and Gawdy being absent. And Clench and Fenner held their former opinion; and then another matter was moved, that it was not shewn how long the payment of the twenty shillings should continue; for it is not said, quousque the Plaintiff shall be satisfied: But they held it not material, for it shall be intended till they be satisfied; and they gave Judgment for the Plaintiff, and said he might have a Writ of Error if he would.

Button *versus* Wightman.

(2)

Ejectione firmæ. For Lands in Barrow, upon a Lease by the Lord North; upon special Verdict the Case was, 38 H. 8. The Dean and Canons of Christ-Church in Oxon were incorporated by the name of the Dean and Chapter of the Cathedral Church of Christ, Oxon ex fundatione Regis H. 8. and 1 Ed. 6. they make a Feoffment to Edward Lord North, by the name of the Dean and Chapter of the Cathedral Church of Christ in Academia Oxon ex Fundatione Regis H. 8. And afterwards, 12 Eliz. they make a Lease of the Land for years, by the true name of their Corporation to the Defendant; and the Jury find further, that the City of Oxon, and the University of Oxon, sunt unum & idem in circuitu; but the Liberties of the University extend further than the Limits of the City. The question was, if this Addition in Academia be such a Misnomer as shall make the Feoffment void. Fenner, this Misnomer is a material variance, for the place of the name of a Corporation is material; for a Corporation cannot be without a name, and Oxon, & Academia Oxon, are diverse, Quæ in uno cadere non possunt, although both contain the same thing: As a Grant to an Abbot, and all the persons of the Covent, or to a Mayor, and all the persons of the Corporation, is not good. 13 Edw. 4. 22 Edw. 4. For it is not by the name of their Corporation, and it is no addition to name one of the University of Oxon; and that they are both of the same content, is not material. Popham, Clench, and Gawdy, contra: We all agree there must be a local place of a Corporation; and so it is here, though not so precisely, and the recital of the local place by another name is good; and it is not necessary to recite the place by the very Letter of the place. 44 Edw. 3. 16. a Recovery was had against the Prior of the Hospital of St. Johns of Jerusalem, and in a Scire facias upon it, the word Hospital was omitted, yet held good. L. 5. Ed. 4. 20. The Case of the Abbot of York, &c. and Oxon, and the University of Oxon, are by intendment both one, and so are in common knowledge. 28 H. 6. 8. the Case of Prior, &c. And if a Corporation be made of a Town, and then it is made a City,

Co. 10. 125 a.

City, and they grant Land by the name of a City, it is good. And by Popham, an University is as much a local place as a Town, and there be divers Colledges founded in Academia Oxon, without any other place; which doth prove it is a local place, and is all one with the City. And there is a great diversity in the name of a Corporation, between the name before the place, and after of the place; for that which is precedent before the place ought to be precisely observed; but in the name of the place, it is sufficient if it be shewn by circumstances: And therefore Oxon and the University of Oxon being both one in common knowledge, and speech, and well known, a Grant shall not be avoided by this Misnomer; and Judgment was given for the Plaintiff, and the Defendant immediately brought a Writ of Error.

Jordan *versus* Cleabourne, Pasch. 35. Eliz. Rot. 144.

Ejectione firmæ, of the third part of a Close called Gate-house Close; and after Verdict for the Plaintiff, it was alledged in Arrest of Judgment, that an Ejectione firmæ lieth not of a Close, although a name be given to it; for it is in nature of a Præcipe of Land, which ought to be of a certain number of Acres. Popham and Gawdy, it is but a personal Action, and a Trespass in its nature; and although an Habere fac' possessionem lieth upon it, yet a name being given to the Close, the Sheriff may well take Cognisance of it; and in 22 Eliz. it was so adjudged. Clench and Fenner, contra, for all the Presidents are, that it should be demanded by a certain number of Acres, & adjourn'. And in the same Term inter Palmer & Humphry, which is entred Trin. 35. Eliz. Rot. 815. an Ejectione firmæ was of a Garden called Minchins Garden, of a Meadow called Dale Meadow, and of a piece of Land called Minchins piece; and being found for the Plaintiff, it was moved in Arrest of Judgment, that an Ejectione firmæ lieth not of a piece of Land without shewing the number of Acres. Vide 5 H. 7. 9. 45 Ed. 3. Brief. 588. 11 H. 4. 43. and adjudged that the Ejectione firmæ was well brought; but upon a Writ of Error brought, the Judgment for this cause was reversed. Nota, Pasc. 38 Eliz. Rot. 453. inter Penn & Merevill. Ejectione firmæ de una Virgata terræ. Adjudged in the Erchequer-Chamber, that it lieth not. (3)

Mo. 422. 702;
Ow. 18.

Ant. 235.

Ireland's Case.

Error upon a Judgment in a Replevin in the Common Bench; the Declaration was in Easter Term, the Defendant imparled and afterwards pleads, and nothing done more in Michaelmas Term, and in Hillary Term the Plaintiff replieth, and they were at issue; and after evidence, and before Verdict, the Plaintiff was nonsuit, but the Jury gave a Verdict for the damages; and now the Plaintiff assigneth this for Error, that it was a discontinuance. And the Court held it to be a manifest fault, and the Plaintiff might assign it, though it was for his advantage. And it was held, that though a Verdict was given for the damages, yet it is but in the nature of an Inquest of Office; and therefore it is a Discontinuance not helped by the Statute of 32 H. 8. c. 18 Eliz. as Discontinuance after Verdict found, and the Judgment was reversed. (4)

Long *versus* Michell.

- (5) **E**rror of Judgment in the Common Bench; and the Error assigned was, That the Judgment was given upon a Verdict by Nisi prius, and there is no Record of the postea, nor the Writ of Habeas Corpora certified, nor in the custody of the Custos brevium, which is the office for this purpose: And upon a Writ of diminution it was certified accordingly. But it was alledged, that in as much as in the Plea-Roll the Record maketh mention, that the Verdict was given and certified, and Judgment given upon it; it is well enough; for this is the principal Record, but the Court held, that every Officer hath his several charge, and their course is to be observed. And in the Common Bench the course is, that the Plea-Roll shall be warranted by the Record of the postea, which is always to remain with the Custos brevium; and when it is not warranted by it, it is erroneous. But in this Court the Plea-Roll is the chief Record, and the Postea is entred in it, and Judgment given upon it; and if the Postea be certified, and is afterwards lost, it is not much material: Therefore for this cause they held it Error, Sed adjournatur.

Post. 368, 466,
367, 433.

Griffith *versus* Williams, Hill, 36 Eliz. Rot. 610.

- (6) **E**rror upon a Judgment in Wales in Ejectione firmæ. 1. Error, That the words Vi & Armis are not in the Declaration. 2. Error, the suit there was by Plaint, whereas it ought to be by original. Williams Serjeant; none of these are Errors: For as to the first, it may be one way or other, 7 H. 6. 4. 17 Ed. 3. 1. and it is after Verdict, and is but matter of form, and cited a president, Trin. 33 Eliz. inter Lawfel & Spring, that this is helped after Verdict. And as to the second Error, the Statute of 34 H. 8. appoints, that for Lands in Wales the Action shall be by original, is to be intended in real Actions, in which Lands are demanded, but this Action is in the personality. And the Court held, that Judgment was to be affirmed. Sed adjournatur.

Laurence Tanfield *versus* Rogers & Watson, Pasc.
36 Eliz. Rot,

- (7) **R**eplevin for taking of Cattel at Clanfield in Com' Oxon': Rogers answers in his own right, and W. as Bailiff of Chapman, and his Wife made Cognisance for Damages-feasant, as in their Freehold. The Plaintiff said, that long time before the taking, &c. J. Edmunds was seised of the Mannor of Clanfield in Fee, and gave it to Thomas his son, and Agnes his Wife in tail, that Thomas died, having issue by the said Agnes two Daughters; Agnes enters, and by Indenture 25 Eliz. let to J. Fox, the Scite of the Mannor, and all the Demesn Lands of the said Mannor, and all other Lands with it enjoyed by the said Fox; Ac etiam totum illud Manerium de Clanfield ac omnia terras & Tenementa eidem Manerio spectant'. Habendum the said Scite and Demesns, and also the said Mannor and Premises to the said J. Fox for twenty one years, from the day of the date of the Indenture, yielding and paying for the said Scite and Demesns and Premises therewith letten, three pound six shillings eight pence; and yielding and paying for the said Mannor and

and Premises therewith letten nine pound ten shillings, and conveyed the estate of J. Fox to himself, and that he put in his Cattel, and averred, that the Land where the taking was, was at the time of the Lease parcel of the Demesnes of the Mannor, and were in the possession of the said J. Fox, and that the said Scite and Demesnes had been usually let for twenty years before, and that the Rent was the ancient Rent, that they were not then in Lease, and that the Lease was not without impeachment of waste, and that Agnes is dead, and the two daughters were the heirs of the body of Agnes, in whose right the abowry was. The Defendant demanded Oyer of the Indenture, which was entred *ut supra*, and pleads, that the Mannor was not let for the greater part of twenty years before the Lease made; and upon this the Plaintiff demurs: And the question was, if this were a good Lease for the Scite and Demesnes which had been usually let, and avoidable for the residue, or being both joynted in one Lease, is avoidable in all. And it was moved, though it be by one Indenture, yet the words being severall in the Demise, and the Habendum and severall Reservations; this is not a joynt, but severall Lease. And one Lease for the Scite and the Demesnes, and another for the residue of the Mannor, *14 Eliz. Dyer 308. Winters case*; but admitting it to be a joynt Lease, yet when one Rent is reserved for the Scite and Demesnes which had been usually letten, and another Rent for the Mannor; so the Rents are severall and distinct, and so no prejudice to the Issue Intail, and no danger of apportionment. But of the other part it was urged, that this is an entire Lease; for when she first lets Scite and Demesnes, and after lets the entire Mannor, it is as if she had let the Mannor entirely and the Rent reserved as issuing out of the whole Mannor. And at the end of the Term it was moved again, and all the Justices resolved there are severall Reservations, and so the Lease is good for the Scite and Demesnes; and it seemeth, that these severall Reservations, and the severall words in the Habendum make it as severall Leases; but they said it was not much material, whether it be severall Leases, in regard there are severall Reservations; and it was adjudged for the Plaintiff. Co: 5: 55.

Cherbourn versus Rye.

DEbt upon a Lease for years of a House and Land: The Defendant pleads, that the Lessor had entred upon part of the Land let, and that he had pulled down part of the House, and so had suspended his Rent: The Plaintiff replieth that the Defendant had re-entred into the Land, and into that part of the Land where the House stood. And hereupon it was offered to demur; Bromly moved, if the Rent were not revived by the re-entry into the Land where the House stood. Popham and Gawdy conceived the Rent is not revived; for when the House was let, it is part of the cause for which the Rent was reserved; and when the Lessor had taken from him part of the benefit, *sc. the House*, yet his re-entry into the Land where the House stood, doth not revive the Rent. Fenner and Clench doubted. *Et adjournatur.* (3)
1 Rol. 940.

Peter Palmer *versus* Boyer.

(9)

Action for words, that he being a Counsellor at Law, and Steward to J. S. of his Mannors, the Defendant said of him, He is a paltry Lawyer, and hath as much Law as a Jack-an-ape. Upon not guilty pleaded, it was found against him, and damages twenty pound. And it was moved, that the Action lieth not; for it is not said, he had no more Law than a Jack-an-ape. But it was adjudged for the Plaintiff, for the words are scandalous, and touch him in his Profession.

Baxter *versus* Shade.(10)
Post. 348.

Action for these words. Thou art a forsworn Jack in the Court-Baron of D. thou hast sworn me out of twenty shillings Rent, and hast me on thy side. Adjudged that the Action lay, and the Plaintiff recovered.

Ball *versus* Roane.

(11)

Action for these words. There was never a purse cut within twenty miles of Wellingborough, but thou hadst thy part in it; and avers, that such a purse was cut, &c. and he had no part in it. And it was moved, that an Action lieth not; for it is not said he had a part of it as a partaker in the Felony, for he may have a part in it in the loss, and so it is no slander: But it was adjudged for the Plaintiff; for the words shall be taken to be spoken in the worst sense, in disgrace and reproach of the Plaintiff. Nota Serjeant Yelverton cited a case, Pasch. 32 Eliz. Sir Edward Hastings brought an Action for these words, You have procured a perjured man to seek my Blood; and ruled, that an Action did not lie. But Fenner said the case was not adjudged, but ended by his Arbitrement. Vide Mich. 35 & 36 Eliz. Antea B. R. placito 11.

Ant. 308.

May *versus* Middleton, Trin. 35 Eliz. Rot.

(21)

Debt upon an Obligation of eighty pound. The Defendant pleads, that the Plaintiff pending the Bill brought against him a Plaint in London, and there by custom had attached forty pound of a debt due to the Defendant in the hands of J. S. in satisfaction of forty pound due upon this Bond, and demanded Judgment of the Bill, and prayed it might abate. And to this the Plaintiff did demur, for this amounts but to an acceptance of part Pendente Billa, which goeth in Bar, and not in Abatement. And it was argued by Godfry for the Plaintiff, and Altham for the Defendant; and all the Court (except Popham) conceived, that it is a Plea in Bar, and not in the abatement of the Bill, for the Plaintiff for this part is to be barred for ever; and this Receipt of parcel is a lawful act; but if the Demandant enters pending the Writ, this shall abate the Writ, for his entry may be unlawful. And Fenner said, it hath been so adjudged in the Common Bench. Vide the Book of Entries fol. 159, a president accordingly;

Ant. 253.

ly; and they adjudged it so, against the opinion of Popham, because the Plaintiff by his own act doth falsifie his own Writ. But it was said, a Recovery is by Act in Law, which may help the case; otherwise of a bare acceptance.

Brent versus Ingram.

Action for words. For that the Defendant said to J. B. son of the Plaintiff, in the presence of divers, Thou (Præfat. J. B. innuendo) and thy Father (innuendo the Plaintiff) were both perjured, and I (innuendo the Defendant) will prove you both perjured. Upon not guilty, it was found for the Plaintiff, damages twenty pound. And it was moved in Arrest of Judgment, that it was not averred that J. B. was the son of the Plaintiff; but it was held well enough, for that it was alledged, that the words were spoken to J. B. his Son. And it was adjudged for the Plaintiff. (13)

Lacy versus Whetston.

Assumpsit. And declared, that whereas there were divers Controversies between the Plaintiff and Defendant, concerning the right of the office of Steward and Clerk of the Court of Pleas in Peterborough, and concerning the right of the Court of Pypowders in Peterborough, and concerning the office of Stewardship and Clerk of divers Courts of the Dean and Chapter of Peterborough, and concerning an annuity of six pound thirteen shillings and four pence granted by the Dean and Chapter of Peterborough to J. S. And that whereas they submitted themselves to the order of Mr. Heron de præmissis fiend', the Defendant in consideration, that the Plaintiff of his part assumed to stand to the Award of Mr. Heron, did assume to stand to, and perform the Award and Order of Mr. Heron de præmissis fiend', and alledges in fact, that Mr. Heron made an Award, that the Defendant should have and enjoy the said office of Steward and Clerk of the Pleas, and of the said Court of Pypowders, without interruption of the Plaintiff; and that the Plaintiff should enjoy the Stewardship of the Courts of the said Dean and Chapter of Peterborough, and the Court of Pypowders without interruption of the Defendant; and also the said annuity of six pound thirteen shillings and four pence, and that the Plaintiff should make an Assignment of all his right in the said office of Steward, and Clerk of the Court of Pleas in Peterborough, and of the Court of Pypowders there, to the Defendant in such manner as he shall advise; and further awarded, for that the Defendant had exercised the said office of Steward of the Courts of the said Dean and Chapter without the assent of the Plaintiff, and for divers other considerations, and for the quieting of all controversies between them, that he should pay to the Plaintiff thirty pound within three months then next ensuing; and for not payment of the thirty pound he brought this Action. Upon non Assumpsit pleaded, it was found for the Plaintiff, and damages forty pound. And it was now moved in Arrest of Judgment; First, that the Arbitrement is not made according to the submission; for the submission was for the right of the office, (14)

fice, &c. And the Award is only, that the Defendant shall enjoy the office, and speaks not of the right of the office. Sed non allocatur; for the Award is, that he shall enjoy the office, which doth imply the right of the office; and the Award is, that the Plaintiff shall make an assurance of the right of the Office, which is as much as the submission requireth. Secondly, it was moved, that the Award is, for that the Defendant had meddled with the Office of, &c. without assent of the Plaintiff; and for divers other considerations, and for ending all Controversies, that he shall pay thirty pound, &c. which is void; for that the Arbitrator Awards this for other Considerations, with which he was not to meddle, and for the ending of all Controversies which is out of the Submission; for he was to meddle only with the Controversies concerning the offices, &c. and the submission is to his Award Super præmissis. Sed non allocatur; for other Considerations being but general parlance implies nothing, except expresse Considerations were shewn, for otherwise none shall be intended: But if any had been found which were not within the submission, this would make the Award void for that part; so in that it is awarded for the ceasing of all Controversies between them, &c. it shall not be intended there where any except concerning the offices, if none be shewn in the Award or by Averment; and this being so in a general intendment, is good. And it was adjudged for the Plaintiff.

Post. 661.838.
861.

Walter Dennis *versus* Wells. Mich.

34 & 35 Eliz. Rot. 147.

(15)

Error of a Judgment and Execution sued in the Common Bench. Error assigned was, for that the said Wells recovered against the said Dennis, a Debt of four hundred Marks, and had Execution by Fieri facias; and upon it the Sheriffs returned, that he had levied ninety pound, parcel of the Debt, and had the Money in Court; and that Dennis the Defendant had no more Goods, unde, &c. And notwithstanding Wells sued a Capias ad satisfactum of the whole four hundred Marks, and an Exigent upon it: Upon which Dennis was outlawed; and to reverse this Attlay and Execution, he brought a Writ of Error. And for this cause it was held clearly by the Court, that the Execution and Attlay was erroneous; for it ought to have made mention of the ninety pound which was levied before; and the Attlay and Execution was reversed; but no Error being assigned or found in the Judgment that was affirmed. 44 Edw. 3. 12. 4 Hen. 7.

Callard *versus* Callard.

(16)
2 Rol. 7. 788.

Ejectione firmæ. The Case upon special Verdict was, that Thomas Callard being seised in Fee of certain Land, in consideration of a marriage of Eustace his eldest Son, said these words (being upon the Land.) Eustace stand forth, I do here reserving an Estate for my own, and my Wives life, give thee these my Lands, and Barton to thee and thy heirs. The question was, if this was a good Feoffment to Eustace. Coke Attorney General for the Plaintiff, there are two points to be considered,

sidered. 1. If this shall inure as a Feoffment to the use of Th. and his Wife for their lives, and after to the use of Eustace and his Heirs, or if it be an immediate Feoffment, and the reservation void. 2. If it be not a Feoffment, if the words spoken, being in consideration of Marriage, the use shall arise out of the possession of Thom. and shall execute by the Statute of uses, although it be without Deed. 1. It seemeth that it is a good Feoffment, and the use shall arise upon it, although the words (reservant) are first; for so the Court is to consider it, to make all to stand together, and in 22 Eliz. between Hare and Barton, it was adjudged that where one giveth Land to J. S. reserving a rent to the Feoffor and his Heirs, Habendum to the Feoffee and his Heirs, the reservation being before the Habendum, yet the Feoffment being by Indenture, it is well enough; for the Law shall marshall it according to the intent; so here it shall be intended as following, and to shew the intent of the parties, and not to make it all void. 2. Admitting that the reservation is repugnant, and it can be no Feoffment, yet the use shall arise and execute by Parol, for it is out of the Statute of Enrollments, for this doth not hinder the rising of any uses, but only upon Bargains and Sales, which shall not execute by Bargain and Sale, but by Indenture enrolled; but all other uses are at the Common Law, which arise upon consideration upon Marriage, &c. But he did agree that an use shall not arise upon general words or words spoken in futuro, but in presenti; as to say, if you do such a thing, I will give you my Land; but upon words spoken advisedly, and by reason of a valuable and great consideration, and spoken in presenti, as I do here, &c. which is an immediate gift. And he had seen the Record of the Case, 12 Eliz. Dyer 296. and the words were upon communication of a Marriage to be had. I will assure after my death Old Acre to my son, it was ruled no use ariseth; and the reason seemeth to be, that the words were spoken in futuro; and therefore if one saith to his son, in consideration he is his son, I do give thee my Mannor of D. this is sufficient to raise an use; for they being words spoken with advisement, and for consideration, it shall be intended a gift of the Land. Gawdy, I have not seen any Book, that at the Common Law a use shall arise by Parol, but in a Bargain and Sale which is by reason of the consideration given for the Land, and that is the reason that a Fee doth pass without the word Heirs, and in this case an use shall not arise, for it appeareth his intent was to pass the Land by way of Feoffment, when he saith, Stand forth, I do here give thee this Land, &c. which is void by way of Feoffment, for the reservation preceeding it is repugnant to the Livery, for it cannot inure in futuro, Fenner, the reservation is void, and it shall inure to Eustace presently; and an use by Parol upon good consideration is sufficient. Clench, it shall inure as a Feoffment to the son, and an use shall arise to the Father, &c. and so the intent of all the parties shall be observed. And at another day it was moved again. And Popham said they were all resolved that Judgment shall be given for the Plaintiff, (which claimed under Eustace) And being moved to shew the reasons of their Judgment, they would not; But Gawdy said, he was clear of opinion, that an use shall not arise by parol. Popham and Fenner said, they were clear of a contrary opinion. And Popham said, that 7 Ed. 6. It was adjudged, that an use may rise by

Ant. 279.

Moor 544.

parol, and he could shew the Record of it : Fenner said it was a good Feoffment, but would say no more. And it was adjudged for the Plaintiff.

Bold versus Bacon.

Action for slandering his Title, and declared that whereas William Bacon Brother of the Defendant had married one Isabel, and died, and afterwards the Plaintiff married her ; and whereas the Plaintiff and the said Isabell, as in her right, were seised of divers Lands as well free-hold as Copy-hold in Fee ; and had made a Surrender of the Copyhold to the Plaintiff and his Heirs ; and of the Freehold hath levied a Fine to the use of the Plaintiff and his Heirs ; And that whereas the Plaintiff intended and had offered to sell the said Land for payment of his Debts, &c. and had offered them to J. Cleyburne in Sale, the Defendant well knowing the same, and envying the Estate of the Plaintiff, and to slander his Title to the Premises, said these words, She (innuendo the Wife of the Plaintiff) was never the lawful Wife of my Brother William Bacon, for she was married before to one Nicholas Killingtree who is yet alive, which Marriage is fully to be proved, and hath been already as fully proved as any other Marriage can be proved, and that by reason of these words none would buy the Land, &c. to his damage of 300 pound : upon not guilty pleaded, it was found for the Plaintiff, to his Damage Twenty pound. And it was now moved in Arrest of Judgment, that upon the matter the Action lieth not, for that which is alledged is no slander, for it may be that Killingtree was married to her *infra annos nobiles*, and they afterwards disagreed, or that a divorce was had between them for this cause ; and then although Killingtree be alive, yet it might be a Lawfull Marriage with William Bacon, and by consequence with the Plaintiff ; and so is no direct slander. Gawdy and Clench conceived the Action lieth ; for the Action is brought for slandering his Title, and not his person ; and the Law intends it was a good marriage with Killingtree, and no divorce was, except the contrary be shewn ; and those that heard the words knew not if a divorce was. Fenner contra, this Action lieth not but by reason of the prejudice in the Sale ; and this appeareth not, for upon a Surrender or Fine by a feme covert, she is examined, and it is good till the Baron doth defeat it, which appeareth not here, and an Action doth not lie for slander, but when it is express, and not by argument ; and here it is by way of Argument, for that K. was married to her, and is alive, and so may be collected that she is not the Lawfull Wife of the Plaintiff ; and the Surrender and Fine not good. Popham agreed. 1. Because it was said it was but by way of argument, and all the words may be true, and yet she may be the lawfull Wife of the Plaintiff, for it may be she was precontracted to the Plaintiff, and afterwards married to K. and then to Bacon, and he died, and then divorced from K. and married to the Plaintiff ; and so there may be an evasion of the conclusion. 2. Here is no direct speech, but oblique ; and an Action lieth not but for words directly spoken, and cited Anne Davies case 4 Co. f. 17. so if J. S. hath Land by descent ; and sells it to J. D. and he offers to sell it to B. and one saith to C. in Common discourse, that J. S. is a Bastard, and this cometh to the ears of B. yet J. D. shall have no Action

Action, for it was not spoken directly to slander the Title of J. D. but oblique this is no slander; but if he had said to B. take heed how you buy the Land, for J. S. was a Bastard, Action lieth, for it was directly spoken to that purpose to slander the Title, Et Adjournatur.

Buckhurst versus Newnton.

Prohibition for suing for Tythes of Faggots, of Dake, and Elme, cautele making his Libel for Faggots, which were of Beech and Thorne; the Defendant prayed a consultation, ita quod he should not meddle with the Faggots of Dake and Elme, for other wise the party that maketh the Faggots may per cautelam put in a stick of great Wood into the Faggots, and so prejudice the Parson of all the Tythes of the residue. But the Court said, if it be so, the party must shew the special matter pro consultatione Habenda, that the Dake and Elme are so intermirt, that he cannot do otherwise; and pray a consultation as to that which was Thorne and Beech. And so it was done in Molyns and Dawes case, where such a special consultation was granted upon such special Plea; but as it is he can have no consultation for any part.

(18)
Yelv. 119.

*Pannel versus Fenn, Int. Mich. 35 & 36. Rot. 26.
vel Hill. 36. rot. 56.*

Trespas upon special verdict; the Case was, John Fenn was possessed of a Lease for years, and having Issue John and George his Sons, and Margaret his Daughter, maketh George and Margaret his Executors, and deviseeth his Term to his Executors until such time as all his Debts and Legacies be paid, and that they shall have levied all charges they shall be put unto by any suit touching his will, or by any other means in the due Execution of his Will, and the residue of his term then unexpired, he deviseeth to John his Son; and to the Heirs of his body, and afterwards to George and his Heirs, and dieth; the Executors enter generally into the Lands, and Margaret sells the Term to the Plaintiff, and afterwards George sells it to the Defendant, and John dieth without Issue, and they further find that the Debts are not paid. The question was, if George and Margaret take this Term as a Legacy, or as Executors; and Secondly, if the general entry be an Execution of the Legacy; and as to the first, the Justices resolved, if they take it as a Legacy, then the Plaintiff and Defendant are Tenants in Common, and then an Action of Trespass doth not lie; for although the Defendant who had the Estate of George doth not plead the Tenancy in Common, but pleads not guilty, yet this appearing to the Court by the verdict, the Action lieth not, but they all resolved they do not take as a Legacy, but as Executors; for no more is given to them by the Will, then the Law giveth to them as Executors, then the devise is void, and they take as Executors, for it being given to them until Debts and Legacies be paid, this the Law willeth; and when it is given to them until they be satisfied of the charges they are put unto by the Will, this is no more then the Law giveth, for by Law they are to be satisfied of all such charges, if the charges do not arise by their own default. But admitting the devise be good, yet their general entry

(19)
1 Rol. 618. 9.
924.
Moor. 350.
Gould. 185.

Ant. 223.
Co. 10. 47.
Post 387.
Post 816.

entry doth not execute the Terme in them as a Legacy; for when a particular Interest is given, and the residue to another, this entry shall not be an election to take it as a Legacy, except there be an expresse Declaration of their intent, for otherwise they shall be charged for the residue as a devastavit, which the Law will not enforce; but if the entire Terme be given to the Executors, it shall be otherwise, for there is no mischief; and it was adjudged for the Plaintiff.

Stich versus Wisdome.

(20)

Action for these words, Many an honest man hath been hanged, and a Robbery hath been committed, and I think he was at it. and I think he is a Horse-stealer: It was moved after verdict, that an Action lieth not without an expresse averment he was so; Curia contra, they are a great slander, if the Defendant sheweth not a good cause of his thinking; and it was adjudged for the Plaintiff.

Nichols versus Badger.

(21)
Mo. 428.

Action for these words, Thy credit hath been called in question; and a Jury being to pass upon it, thou soystedst in a Jury early in the morning, and the Lands thou hast are gotten by lewd practices. It was adjudged that no Action lay, for the words are too general.

Banks versus Stacy.

(22)
Ant. 342. 297.

Action for these words, Thou art a forsworn Jack in the Court of A. thou didst swear away Twenty Shillings from B. and avers that the Court of A. was a Court Baron; And the Plaintiff had Judgment although it was not shewn between what persons or in what Action he was sworn.

Colt versus Howe, Trin. 36. rot. 897.

(23)

Covenant, for that the Defendant by Indenture did Covenant that he his Executors and Assignees would repair a Mill let to the Defendant, and alledgeth that the Mill was defective in reparations, and the Defendant his Executors and Assignees did not repair it, and it was demurred upon the Declaration, because he did not alledge that he nor his Executors or Assignees did not repair it, for if any of them did repair it, the Action doth not lie; and it ought to be alledged in the disjunctive, not in the conjunctive. And of that opinion was the Court, that the breach was not well assigned; and though this fault was not assigned by the demurrer, yet he shall take advantage of it; but upon the motion of the Court the Defendant waved his demurrer, and the Plaintiff amended his Plea, and the Defendant pleaded to Issue.

Weeks Case.

Action for these words, Weeks assaulted me, and others, to have robbed us, but we were too strong for them and escaped, adjudged actionable; for if one saith that J. S. lay in wait to do a Robbery or Murder, an Action lieth tho no Felony was done. (24)
Moor 409.
Ant. 6.

Berry *versus* Greene.

Trespals upon special verdict, The Case was. A Copyholder surrenders to the use of J. S. the Lord without reasonable cause refuseth to admit him; the question was, if he might enter without admittance. And the Court held clearly he could not enter, unless there be a special Custome to warrant it; for after the surrender and before admittance, he which maketh the surrender continueth in possession, and not the Lord or cestuy a que use, and he shall have Trespals against any that enters, as if a Copyholder surrenders to the use of his Will, yet it is clear he shall have it during his life; so in the principal case, Cestuy a que use shall not enter nor have Action before admittance. (25)
2 Rot. 264.
1 Cr. 283.
2 Cr. 403.
Co. Litt. 62. a.

Atterton *versus* Harward.

Action upon the Case, and declareth that a Capias ad satisfaciendum upon a Judgment was awarded against the Defendant to the Sheriff of Suff. who directed his Warrant to the Plaintiff as his Bailly to serve it, and that the Plaintiff assumed to the Sheriff to save him harmless against all escapes, and that by force of the Warrant he arrested the Defendant, and the Defendant intending to make the Plaintiff to be charged, escaped, for which the Plaintiff in the first Action, brought an Action against J. Colt then Sheriff, upon this escape, and recovered, and Colt brought an Action against the now Plaintiff upon his Assumpsit; and for this tort he brought his Action: Upon not guilty pleaded, it was found against him. And it was moved in Arrest of Judgment, that there is no sufficient cause in the Declaration to maintain an Action, for although the Sheriff may have an Action of the Case against the Prisoner who escapes, as it was adjudged in Hill and Holts Case, yet the Bailly shall not have it. And of that opinion was the Court, for the Bailly was not chargeable to the Sheriff by Law, but by his Assumpsit; and this being his voluntary act, shall be no cause to charge the Defendant, but shall onely make himself chargeable. But they agreed, if the Bailly had been chargeable by Law, without such promise, an Action did lie for him against the Defendant, who caused him to be charged. (26)
Ant. 53.

Watkinson *versus* Man

- (27) **U**pon special Verdict the question was, if a Lease made by a Prebend is good by the Statute of 32 H. 8. for he is not leised in Jure Ecclesiæ sed præbend. And it was adjudged good, for a Prebend is not excepted, but only Parsons and Vicars, and being not excepted, he is as Bishops. And Popham said, in Dr. Dales Case, for a house Juxta Pauls, it was so adjudged, and so had been twice adjudged in his experience. And Fenner said, it was so adjudged in the Case of a Treasurer of a Church.

Termino Michaelis 36 & 37 Eliz. in Communi Banco.

James Apharry *versus* Roger Bodingham, and the Petit Jury.

- (1) **A**ttaint upon the Statute of 23 H. 8. for that the Petit Jury at the Assises at Hertford, gave a verdict for Bodingham, and assigned the Faux serement in this, that whereas R. Bodingham brought Debt against J. Apharry as Heir to G. his Father, he pleaded Riens per discent unde debitum prædict³ solvere potuit, &c. to which the said R. Bo. replied that he had by discent, viz. at Sul. in the same County, and Issue was taken upon it; And evidence was given that certain Lands in S. and descended to him as Son and Heir to his Father; but he shewed a deed indented made 27 Eliz. between himself of the one part, and Walwin and others of the other part, by which he covenanted for natural affection, &c. to stand seised of the Land to the use of himself for life, remainder to his first Son in Tayle; and so to his other Sons, the remainder in Fee to himself, in which there was a clause to give power to make Leases, and to revoke the uses; and the Petit Jury notwithstanding this conveyance conceived it to be fraudulent, and so void by the Statute of 13 Eliz. did find that he had assietts. Nota the Action brought by Bod. was 33 Eliz. long time after the conveyance made by Apharry, but it was proved that the Plaintiff Apharry had notice of the Obligation before the making of the conveyance. Glanvil for the Defendant; notwithstanding this conveyance, the remainder that is limited to his right Heirs is his ancient reversion; and this he had by discent, and the Issue being that he had riens per discent, and he having this reversion by discent, the Issue is found against him, though the conveyance had been bona fide. But to that it was answered, that the Issue was he had nothing by discent, unde debitum prædict³ levare potest; and although he had this reversion by discent, yet it being a reversion upon an estate in Tayle, it is not extendible for this Debt; quod fuit concessum per curiam, absente Anderson. It was then moved by the Counsel of the Plaintiff, that this is no fraudulent conveyance within the Statute of 13 Eliz. (for it is clear that the Statute of 27 Eliz. doth not touch it) for a conveyance by the Statute of 13 Eliz. must be made by the Debtor, and not his Heir or any other; for the Heir is not a Debtor in respect of his person, but in respect of the Land. Walmsly, it seemeth that it is within the Statute, for the Heir is a Debtor, which is proved by the Writ against him, which is in the debet & detinet, whereas an Action against the Executors is in the detinet only, and so is within the intent of the Statute, but the grand Jury

Co. 10. 80. b.
Post 355.

Co. 5. 316. 35. b
Ant. 326.

Jury may find it specially if they will, to which Owen and Beaumont did consent, that the conveyance of the Heir shall be fraudulent as a conveyance by the Father, which is the principal Debtor; and so they conceived it clearly, but the grand Jury gave a general verdict, and affirmed the first verdict. Nota, when the grand Jury was sworn, the Justices demanded of the Crier what manner of Oath he gave to them, for the Oath ought to be special: But Scot the Prothonotary said it ought to be general to try the Issue in the attainr; to which the other Clerks agreed.

Quare Impedit, It was resolved if there be two Parsons of one Church, and each of them hath the entire cure of the Parish, and both the Benefices of the value of Eight pound per annum, one of them dieth, and the other is presented, this is a plurality within the Statute of 21 H. 8. cap. 13. and is within the intent of the Statute, that none shall have two livings or Benefices with cure. (2) 21 H. 8. c. 13d

Jackman *versus* Hoddesdon.

Trespas; upon not guilty pleaded, the Jury being at the Bar, The question was, upon the forfeiture of a Copyhold in Layton Buffard, by reason of a Lease for years made by a Copyholder. And it was held per curiam, that a Lease for years of Copyhold Land by Indenture or parol is a forfeiture, unless there be an express Custome to warrant it. And thereupon it was shewn on the part of the Copyholder, that there were Leases made by Indenture, 27 H. 8. and divers times since, some Twenty, and some Forty years since, of Copyhold Land of that Mannor. But the Court held that was not sufficient, for they are of too late time to prove a prescription, which ought to be from time, whereof, &c. And the Court held that a willfull refusal to pay a Fine is a Forfeiture, if the Fine demanded by the Lord be reasonable, where the Fine is Arbitrable at his Will, and the Jury is to try whether it be reasonable or not. And the Custome of the Mannor was here shewn to be, that the Lord was to seile the Land, till Fine was made with him for it, which was held a reasonable Custome. And upon evidence it was held, that if a Tenant be amerced and dieth before the Lord hath levied it, that it is lost, for it is quasi actio personalis. (3) Post 499. 1 Rol. 507; Post. 779. Co. Lit. 59. b.

Vaughan *versus* Comitem Bedford, the Bishop of London and Gainsford.

Quare impedit, for the Church of Littleton. It was held per curiam upon evidence, that a Corporation may be known by two names; and if it hath been so known from time, &c. a grant made by either of the names is good. (4)

Lyne *versus* Backhouse.

Action for these words, He hath beaten me and taken away my purse, and Twenty shillings in Money. It was held per curiam, that the words are not actionable (absente Anderson) for it may be intended he took it as a Trespassor, for he chargeth him not with Felony. (5) Underhill

Underhill *versus* Jo. Brooke & Margaret Uxorem.

(6)

DEbt against them as Executrix of her former husband upon an Obligation of Two hundred pound. The Defendants by J. G. their Attorney plead. viz. prædict' Johannes & Margareta by their Attonny plead that they were divorced before the Writ purchased, and it was thereupon demurred in Law. 1. Because it is not alledged that the divorce did continue, for it may be it is repealed, Sed non allocatur, for it shall be intended to continue, if the contrary be not shewn; Secondly, because they plead as Baron and Feme, & prædict' Johannes & Margareta, and that after imparlance; Sed non allocatur, for they do not plead & prædict' Johannes & Margareta uxor ejus, for then it should be an Estoppel; but they plead according to good form; and it was adjudged that the Writ should abate.

Deux *versus* Jefferies.(7)
1 Rol. 939.

DEbt upon an Obligation; the Defendant pleads that the Plaintiff by Indenture, &c. did Covenant that he would not sue the Bond before Michaelmas, and thereupon demanded Judgment, si actio, &c. intending that the Action being suspended for that time, was gone for ever, And it was thereupon demurred, and argued by Fleming for the Plaintiff, and by Drew for the Defendant, and 21 H. 7. 24. 4 H. 7. 6. were cited. But the Court without further argument resolved for the Plaintiff, for it is only a Covenant, and shall not inure as a release, and it is not to be pleaded in Bar, but the party is put to his Writ of Covenant, if he sued before the time. But if it had been a Covenant that he would not sue it at all, there peradventure it might inure as a Release, and to be pleaded in Bar, but not here; for it never was the intent of the parties to make it a release. And it was adjudged for the Plaintiff.

Pipes Case.

(8)

ASumpsit, and declareth that whereas the Defendant was arrested for surety of the Peace, in consideration the Plaintiff would be bayl for him, he did assume, &c. and alledged in fact that he became Bayl for him, but saith not before whom; and this matter after verdict being alledged in arrest of Judgment, it was held to be good cause of staying it, by Walmisly and Beumond, for the consideration ought to be precisely alledged to be performed, and therefore he ought expressly to have alledged before whom he had entred into Bayle, that it might appear he had authority to take Bayle. Sed adjournatur.

Samms *versus* Foster.(9)
Co. 8. 124.

Action of Trover and conversion, of an Ore-hide of the Plaintiffs in Middlesex, The Defendant pleaded that the City of London is an ancient City, and that there is a Custome there, that si aliquis extraneus forinsecus e libertate ejusdem civitatis buy any thing de alio forinseco a libertate prædict', that it should be forfeited to the Major and Commonalty of the said City, and saith that the Plaintiff

Plaintiff extraneus a libertate, did buy the said Dr-hide of another foreigner, whereupon he seised it in London to the use of the Mayor, &c. absque hoc that he did find it, and convert in Middlesex; And it was thereupon demurred. Glanvil argued for the Plaintiff, first, that it was not a good or lawful custom, and in proof thereof cited the case 36 H. 6. of Jewels of the Kings sold, and 21 H. 7. 40. 3 Eliz. Dy. 186. and 246. And the form of the pleading he said is not good, viz. si aliquis extraneus e libertate, but doth not shew where the liberty is, and the traverse is not good, for he ought to traverse every County, besides London, and not Middlesex only, Anderson and Beaumont conceived the form of the pleading to be ill; but for the matter of the custom it self they doubted. Owen said the custom was good; and had been allowed before these times. Et adjournatur.

Taverner *versus* dominum Cromwell.

TRespass. The Case upon demurrer was: divers Copyholders were granted by one Copy, and several Habendums and several Reddendums for every of them, but they all began at one time, and were to end at one time. The Copy-holder committed waste in one of the Copy-holds, the question was, whether that should be a Forfeiture of them all. Secondly, for this Copy-hold wherein the waste was done, which was cutting down trees, the Copy-holder prescribes, That every Copy-holder of that parcel of wood, hath used to cut down trees there growing; the question was, if such a prescription for one Copy-holder only was good. Thirdly, whether the not coming to the Court upon Summons at the Church because of seisure, was the third question. For the first, all the Justices resolved that they are several grants, and as several Copies, and the forfeiture of the one is not the forfeiture of the other, and the several Habendums and Reddendums make them several in themselves, although they be all by one Copy. V. 4. Co. 27. a. For the second they held the prescription good, for Walmsly said there is a difference between a prescription for Freehold Land and for customary Land; for custom which concerneth freehold, ought to be throughout the County, and cannot be in particular place 45. Añ. But a Prescription concerning Copy-hold Land is good in a particular, for de minimis non curat Lex, and the Law is not altered thereby, and it may be there is but one Copy-holder there, for which he might prescribe; and Beaumont agreed this difference, and custom to have profit a prender, priviledge, or discharge, may very well be in a particular, and by Owen it was ruled accordingly in Collis's case in the Queens Bench: For the third they conceived it to be no cause of forfeiture, for it shall not be a forfeiture but upon refusal to perform his services, or a wilful not payment of Rent, or wilful absence from Court, but in this case it may be he had no notice of the Summons, and knew not of the Court, for the Summons properly is to be to his person or at his house, or it ought to be averred, he had notice thereof, And Exception was taken to the Summons, because it was but four days before the Court, whereas it ought to be fourteen days at the least, and of that opinion was Walmsly; but the other Justices were against him therein; for they said the Summons was well enough for the

(10)

1 Rol. 507.
Co. 4. 27. a.Co. 4. 31. b.
Post. 390.

Post. 506.

1 Cr. 217.

time; and it was adjudged for Taverner the Copy-holder. Vide Cokes Entries 272 & 288.

Bach *versus* Onesly, Pasc. 33. Rot. 409.

(11)
Ant. 264.

Co. 5. 113.

Co. Litt. Sec.
476. 7.

R Eplevin; The Case upon demurrer was, that one Roger Cooper made a Lease for years to the Plaintiff, and afterwards levied a Fine of the Reversion to Noke, who before Attornment entred and Dusted the Lessee, and enfeofed the Abowant; the Plaintiff re-enters, and for Rent arere after the Feoffment, and re-entry, the Defendant avoweth; and the question was, if the Abowpy were maintainable; and after divers arguments at the Bar, it was resolved this Term by Walmisly, Beamond and Owen, that the Abowpy was not maintainable for want of Attornment; for as the Conusee himself could not avow without Attornment, no more shall he that claims in the per from him, as his Heir or Assignee, for as the folly of the Conusee (who might have had a quid juris clamat, and compel the Tenant to Attorn) shall prejudice himself, so it shall his Feoffee, but the Lord of a Villain, or he who cometh in by Eschets shall avow without Attornment, for they come in in the post, and no folly can be intended in them; and Walmisly said the reason that an Attornment shall be upon a Fine is because the Tenant is not to take Conusans of every Fine, until it be notified to him, by bringing a Quid juris clamat, or a per quæ servitia; and therefore it is not reason, that he by his re-entry shall be compelled to take Conusans of the Fine, and inforce him to Attorn, who otherwise was not by Law compellable; for the Law will not compel him to take notice of a Feoffment by the Conusee, who is quasi a stranger to him; but there is so great privacy between the Lessor and Lessee, that he ought at his peril to take notice of acts done by the Lessor upon the Land, whereof by intendment he cannot be ignorant; but of acts done by a stranger, the Law enforceth him not take knowledge; and the case of Littleton, that a re-entry shall be an Attornment is quasi a maxim and reason of Law; for otherwise it is very hard, and shall not therefore be construed so largely, as to extend to the Feoffment of another, for it may be the Lessee was beyond the Sea, or in Prison, at the time of the Feoffment, and therefore no equity is given to this maxim, wherein is no exception, and therefore they held that the Abowpy was not good for want of Attornment; but they in their Arguments did conceive, that if in this Case the Conusee had devised the Reversion and died, or had died without Heir, so as the Reversion had Escheated, that the Devisee or Lord might have avowed without Attornment; And it was adjudged for the Plaintiff, 5 Co. 113. Nota, Thwaytes Case in the Court of Wards was cited to be ruled by the advice of the Justices, that where a Reversion was granted, and before Attornment, the Grantor made a Lease for years, that Attornment afterwards cometh too late.

Pethouse *versus* Crane & alios.

TRESPAS: The Case upon demurrer was, Tenant for life remainder in tail, remainder to the right heirs of the Tenant for life, the Tenant for life acknowledged a Statute, and dieth, the Tenant in tail dieth without issue; the question was, if the right heir of the Tenant for life be bound by this Statute, and the Land liable in his hand: And all the Justices conceived, that the Land is liable, for the right heir hath it by descent, as the case 5 Ed. 4. 2. where such a Tenant for life granted a Rent charge, and if the Tenant for life had granted the remainder over, as he might, the Grantee should have held it charged, Sed adjournatur, and was not adjudged this Term. (12)

Ant. 350.
Co. 104. a.

Freeston *versus* Stanford & alios.

TRESPAS: the Defendant pleadeth, that the place where is called White-acre, &c. and that it is his free-hold. The Plaintiff replieth, that the place where is called Black-acre, alius quam in Barra. The Defendant rejoyneth that the Acre mentioned in the Bar, and the Acre mentioned in the Replication, are one and not divers. And it was thereupon demurred, and adjudged without argument to be no Plea; for it is repugnant to say they are both one, when the Plaintiff by his Replication hath affirmed upon record that it is another; for when he saith alius it cannot be idem, and so are 14 H. 8. 4. 27 H. 8. 7. and Walmisly said it was so adjudged 28 Eliz. wherefore it was adjudged for the Plaintiff. (13)

Hollingworth *versus* Ascue, Pasc. 35 Eliz. Rot. 1255.

DEBT upon an Obligation of three hundred pound, the Defendant demanded Oyer, and upon Entry in hæc verba, it appeared that it was a Statute Staple of three hundred pound acknowledged by the Defendant, and two other before the Mayor of Lincoln; but because the Seal of Lincoln annexed thereto was not a Seal of two pieces, according to the form of the Statute of Acton Burnell; it had been ruled before betwixt these parties, That it was not a Statute Staple (but void as a Statute Staple) wherefore he now brought his Action of Debt as upon an Obligation at the Common Law; And it being hereupon entred, the Defendant pleaded, that it appears, that two others were bound jointly with him, who are yet alive and not named: Judgment si actio, &c. against him only; and upon this Plea it was demurred. Harris Serjeant argued for the Defendant, That the Writ should abate, because they three are jointly obliged, and none of them without the other can be Sued, as 4 H. 7. and 17 Eliz. are. Also Debt cannot be brought upon this Statute, for being void as a Statute, it cannot be brought as upon an Obligation. And Debt lies not upon a Statute Staple, as appears by 4 Ed. 4. 5 Ed. 2. Debt. 167. Owen Justice held, That the Action lay, for he doth not declare upon the Statute, but he declares that he was bound by Obligation. And when you say that you and two others acknowledged a Statute unto him, that is not any answer unto him. Also the Plea is not in abatement, because it is not averred that the other two did (14)

Ant. 319.

Ante 231, 307

Ant. 319.

Ant. 219.

Co. 9. 137. a.

Ant. 7.

Co. Lit. 36. a.

Post. 461. 494.

enfeal and deliver it as their Deed; for otherwise it shall not be intended but that the now Defendant sealed and delivered it only; and so is the Course of pleading, as appears in 28 H. 6. & 17 Eliz. Beaumont accord in omnibus; For a Defendant shall not take advantage of a joynt Bond, unless he avers that the others delivered it also. And that Debt lies upon a Statute, or it is extendable at the election of the party. Walmisly. The Statute compriseth two things by the words Teneri & Obligari, it is an Obligation: By the words Concessit quod levetur de terris; it is a Statute whereupon Debt may be brought. Anderson Chief Justice. Debt may be brought upon a Statute Staple or Merchant; for the words Obligari & Teneri make it an Obligation, although it be not a Statute to some intent; and by delivery of the party it is an Obligation, but not a Statute until the Majors hand be thereto; and a delivery may be without words of delivery, as it hath been adjudged, that one made a Release, and cast it upon the Table and said, There, this will serve, This is a good delivery. And to aver that the other two delivered it, he conceived it to be needless; for it shall be intended to be so if the Plaintiff doth not shew the contrary; wherefore, &c. Et adjournatur; but afterward in the next Term it was adjudged for the Plaintiff, that Debt well lies upon the Statute as upon an Obligation, and it shall not be intended that the others sealed it without Averment, &c. And a Writ of Error was brought, which is yet depending. Vide postea Hill. 38. B. R. placito 8. & Mich. 39. placito 12.

Sacheverel *versus* Bagnoll.

(15)
2 Rol. 31. 833.
1 Rol. 266.

1 Rol. 128.

WAsse: The Plaintiff counts, that one Eliz. Bingham was seised in Fee, and by Deed infeoffed Sir Gervise Clyfton, and others in Fee to the use of the said Eliz. for life, and after to the use of Eliz. her daughter for life, remainder to the Plaintiff in tail. That Eliz. the Feoffor died, and Eliz. the daughter took the Defendant to Husband, who committed Wasse, and his Feme died; and for that Wasse done during the coverture, This Action was brought (and it was not brought in the Tenet nor Tenuit, wherefore for this cause the Court held the Writ to be ill) the Defendant pleads in Bar (confessing all the matter precedent) a concord and satisfaction, viz. That the Feoffees gave and delivered unto him the Deed of Feoffment to uses, which he delivered to the Plaintiff in satisfaction of the Wasse, &c. And it was thereupon demurred and argued by Savell, That it was not any Plea. First, Because it is an Action founded upon a Statute, and in the Reality, wherein concord is not any Plea, and in proof thereof relied upon 1 H. 7. & 13 H. 7. where it is held, that concord is not any Plea. Secondly, Because the concord alledged is by the Delivery of a Deed to the Plaintiff which belonged unto him, and so it cannot be any satisfaction, as 33 & 38 H. 6. a Deed of the gift of intail, to the issue intail cannot be any satisfaction; So 9 Ed. 4. & 19 Eliz. Oneley's case; accord upon this reason; wherefore, &c. Warberton e contra. First, the Writ of Wasse is not Tenet nor Tenuit, and therefore it is not good, because it is variant from the form of the Register, for it ought to have been the one way, and to make his count special: And of that opinion was the Court, that for this cause the Writ was ill; As also because the Writ supposeth, that the Baron fecit
vastum;

vastum; whereas the Baron being charged as Tenant in right of his Feme, the Writ ought to have been fecerunt vastum, for so is the form in the Register, and so is N. Br. and to this opinion the Court agreed, the form also of the Writ was ill for this cause, for in Debt against them for Debt of the Femmes, it shall be debent, &c. The Court also conceived that the Writ lies not against the Baron for Waste committed by him in the time of his Feme, for he is to be charged by reason of his Feme, and jointly with her, and she being dead, the Action is gone; for it is but a personal wrong done by her; but the Protonotaries informed the Court that an Action of waste hath been brought against the Baron for waste done in the life of the Feme; and the Writ was Quod tenuit in jure Uxoris; and it hath been maintained; but the Court said they greatly marvelled at it. Vide 10 H. 8. 11. But for the matter all the Court resolved that it was a good Bar, admitting that the Action lies; for it is in its nature personal; for damages only are to be recovered, and not the place wasted; and in every Action personal, concord with satisfaction is a good Plea; and therefore in an Attaint Concord is a good Plea; but where Land is to be recovered by a Writ of Waste, it may peradventure be otherwise, as 11 & 13 H. 7. & 10 Eliz. 2. Dy. 277. are; and here the delivery of this Deed is good matter of satisfaction; for the Deed did not appertain to cestuy que use, but to the Feoffees by the common Law, and the Statute doth not transfer it unto him; then by consequence the gift by the Feoffees to the Defendant is good, and the delivery thereof by him to the Plaintiff is good satisfaction, and Walmsly cited, That it was adjudged in one Ekins case, wherein he was of Counsel, that the Deed appertained to the Feoffee, and not to cestuy que use; Wherefore it was adjudged for the Defendant.

Co. Littl. 54. a.
Post. 462.
2 Rol. 83.
Co. 5. 75. b.

Co. 9. 78. b.

2 Cr. 342.
Ante 194.
2 Cr. 217.
2 Rol. 31.
Post. 496.

Hill versus Hart.

Waste: a special Verdict was found, that the Plaintiff had but a third part of a Reversion in Common with two others; and whether he should have Waste, the others not named, was the question; for it was said that this Action is quasi in the reality; but the Court held, that the Action lies not for one Tenant in common sole; for damages and the place wasted are to be recovered by moieties or a third part; it is also inconvenient that the third part should be recovered and delivered in Execution. But it was moved, that this matter of Tenancy in Common ought to have been pleaded; otherwise the Defendant shall not take advantage thereof; for the issue here was joyned upon a collateral matter, viz. upon the devise of a reversion, &c. But the Court spake not thereto. Sed adjournatur.

(16)

Moor 388.
Co. Lit. 197. b.

Brown versus Peys.

Trespas: upon a special Verdict, the case was such, John Warners was seised of the Mannors of Warners and of Church-hall, and devised the Mannor of Warners to the eldest Son of his Cozen Richard Foster in Fee, and devised the Mannor of Church-hall to one Margery Waters for life, remainder thereof To such of my Cozen Richard Foster's Children as shall then be alive and have the Mannor of Warners, and died; the eldest son of Rich. Foster entred into the Mannor of W. and alien-

(17)

Co. Lit. 27. a.

ed

ed to the Lord Rich in Fee; afterwards Margery Waters died, the eldest Son of Richard Foster then living; and whether he should have the Mannor of Church-hall, or any other of the Sons of the said Rich. Foster, or whether the Heir of the Devisor should have it, was the question. Warberton Serjeant argued for the Plaintiff, that the eldest Son of Foster, notwithstanding that he had aliened the Mannor of W. so as he had it not at the time of the death of Margery, yet by the Intendment of the Will should have the Mannor of Church-hall; for the words of the Will being; And if the dye, any of my Cozen Fosters Children then living, which shall have the Mannor of W. he to have the Mannor of Church-hall, are words demonstrative, to shew that he who should have the Mannor of W. should have the Mannor of C. and the party is sufficiently shewn, although he had aliened the Mannor before; as 15 Eliz. Dyer 323. Devise to Jane his Daughter was good, although she were a Bastard. So Hill. 30 Eliz. Rot. 336. in the Queens Bench betwixt Chapman and Thomson, a man devised Lands which he had bought of one Kingmill, who had sold it to another, and he to the Devisor, yet it was a good devise; and although he had aliened it, yet he is the party who had it; as Tenant in Dower, or Tenant by the Courtesie, although they alien their Estates, yet they shall be sued in Waste; and if in this case the eldest Son had been disseised or evicted from the Mannor of W. it is not reason he should lose the benefit of Church-hall also; wherefore, &c. But all the Court after argument on all sides resolved to the contrary, for in Wills the words ought to be observed as near to the intent as may be; and therefore the Devise being to one of Richard Fosters children, his Childs Child shall not have it, for it is out of the words; it ought also to be such a Child as then should have the Mannor of Warners; for there be two descriptions who shall have it, and both of them ought to meet together at the time of the devise executed; otherwise he shall not take thereby, viz. he ought to be a Child, and such a Child as then should have the Mannor of W. for his intent was that both Mannors should go together; therefore it was adjudged accordingly for the Defendant.

Co. Lit. 54. a.

Wright *versus* Moorhouse, Mich. 35, & 36. Eliz. rot. 517.

(18)

1 Cr. 14.
Co. 4. 16. a.

Action for these words, Before the Plaintiff came to the service of the Merchant Taylors, he dwelt in Shrewsbury, and set the Town together by the ears, and so long as he was there they were never in quiet; but afterwards they lived quietly; and he being Clerk to the Merchant Taylors, was of consent and counsel with W. Goodlaw, to deliver the Books of the Corporation which he had in his keeping, to the intent that thereby some of the Lands of the same Corporation might be found concealed. And it was thereupon demurred, because that for none of these words an Action lies; but after Argument, the Court resolved for the Plaintiff, for these words touch him in his Office and credit; for his Office is an Office of Trust, and these words touch him therein; and Anderson said, if one saith to a Councello, Thou didst disclose my Counsel; or to a Justice of Peace, Thou art a false, or a lewd Justice, or Thou dealest corruptly, or Thou dost not administer true Justice, an Action lies; Beaumont said, If one saith to a Councello or Attorney, Thou didst deliver my Evidence to my Adversary, an Action lies, wherefore it was adjudged for the Plaintiff.

Sir

Sir Edw. Cleer *versus* Peacock and others.

Quare impedit : The Plaintiff declares that Sir Richard Fulmerstone was seised of the Advowson of D. in Fee, and devised it for ten years, Remainder to Sir Ed. Cleer in Fee, the Defendant by his bar confessed the Devise for years ; but that the Devise was after to Sir Ed. Cleer and his Feme, and their heirs, upon such Condition, that if they did not such an Act, their Estate should cease ; and that it should be to the Defendant, and shews the breach, &c. whereupon it was demurred. First, because the Plaintiff entitles himself by a Devise in Fee absolutely, and the Defendant pleads a Devise unto him and his Feme upon Condition, and takes not any Travers. Secondly, that by a Will an Estate in Fee cannot be limited to cease, nor a Remainder to be limited over. Thirdly, it was moved whether there may at this day be a Devise of an Advowson in gross. Harris Serjeant argued that the bar was not good without a Travers, and in proof thereof relied upon 19 H. 6. 13. To the second, that the Condition is void, for an Estate in Fee cannot cease upon such a limitation, nor another Estate rise thereby, nor can an Estate of inheritance be limited to cease, as 2 & 3 Phil. & Mary 127. & 11 H. 7. 6. and Scholastic case, but there the Estate devised was an Estate tail, and therefore differs from this case, 28 H. 8. 33. To the third, that it is not devisable, for it is not valuable, nor within the intent of the Statute.

(19)

Ant. 30.

Post. 361.

Drew e contra, First, that the bar is good without Travers, for when the Baron survived, he might plead it as a Devise made unto him sole, 17 Ed. 4. 7. 35. H. 6. 38. Secondly, an Estate in Fee as well as an intail may determine upon a limitation, and agreed that a Remainder cannot be limited upon an Estate in Fee determined ; but upon an Estate determinable upon a limitation it may. Thirdly, it is devisable, for it is an hereditament and lies in Tenures, as 5 H. 7. 37. & 43. & 31. are, and it is valuable, for it is Assets in a Formedon, wherefore, &c. but the Justices spake not to the two first points ; but to the third Anderson conceived clearly, That it is not devisable ; for it is out of the Letter and intent of the Statute ; for a Devise shall be but of such things which are departible, and of an Annual value, for the Queen ought to have the third part thereof, or the third part of the value thereof ; and this is not partible ; and although it may be holden and is Assets in a Formedon, yet it is not Assets in Debt ; for it is not of an Annual value and so cannot be devised. So it is of Liberties and common sans number, they cannot be devised because they be not departible ; and so it was agreed in the Lord Monjoys case for the Mannor of C. that neither customes nor liberties in gross are devisable ; but Walmsly, Beaumont and Owen held that it is well devisable, for the body of the Act is, that Lands, Tenements and Hereditaments may be devised, and this is an hereditament ; and there is not any mention therein that it shall be of things valuable ; nor is there any mention of value, but in the saving ; and that is, that the Queen shall have the third part, or the value of the third part, which may well be ; for it is not of necessity that they should be things of annual value which should be devisable ; and an Advowson is an hereditament departible, as betwixt Sister,

Co. Lit. 18. a
Ant. 142. 205
Post. 361.

Co. Lit. 374. b

Sister and Dower shall be thereof, and it is valuable, viz. twelve pence in the pound, as 12 H. 8. 8. and other books are; and the Statute shall be well satisfied, for of things valuable the Queen may have the third part or value of them; and if they be not valuable, the third part howsoever they be, and it is clear, that an Advowson appendant, and liberties appendant to Land are devisable, as those which are arising out of the Land; and a Reversion upon an intail, whereunto no Rent is annexed is devisable, yet it is not of any annual value. Sed adjournatur.

James Cogan *versus* Katherine Cogan,
Pas. 38. Eliz. Rot.

(20)

T Respals upon Demurrer: The Case was, That John Cogan was seised in Fee, and let it to Robert Cogan for life; Remainder to Katherine the Defendant for life: Provided, That if John the Lessor had issue a Son, during his life, who should live unto the age of five years, that the Estate limited to the Defendant, Katherine should cease, and it should remain to the said Son in tail, the Lessor had issue the Plaintiff, who attained his age of five years; and whether the remainder limited to the Defendant shall cease, and the remainder limited to the Plaintiff were good or not, was the question, and after the Serjeants had argued the case, it was resolved by the Court for the Defendant, for Anderson said, there be certain rules in Law touching Remainders, viz. that a Remainder ought to pass at the first by the Livery, and shall not take effect with a Condition precedent, nor shall begin upon such a Condition; and although Colthurst's case gives colour thereto, and that the Remainder in question shall be good; yet he held not that case to be Law in this point; for a Remainder depending upon a Condition precedent is merely void; and further in this case, an entry is requisite to avoid the Remainder for life, for a Freehold cannot determine without the ceremony of Entry; but otherwise it is of a Lease for years, wherefore this Remainder depending upon a limitation which is against the Rules of Law is void. Walmsly to the same intent; the Remainder is void by Littleton, and by the ancient grounds of a Law, for the Remainder (by Littleton) ought to pass at the time of the Livery, and the nature of a Livery is a Giving; and there cannot be a Giving, but there ought to be one to take in presenti or in expectancy, so as the Law shall preserve it in the interim and there needs not be any Deed of a Remainder, which probes, that it passeth by the Livery, and by Richilds case the Remainders shall take effect when the particular Estate takes his effect, and ought to pass presently by the Livery or otherwise will never pass, and although in Colthurst's case, the condition be precedent in words, yet it is subsequent in reason, wherefore it may be well maintained by Law; and a Remainder cannot pass by contingency, for then there would an Absurdity follow, viz. There should by the first Livery, be an immediate Reversion expectant upon the Remainder for life; and afterward, This Remainder shall be turned out, and the Reversion also, and a new Remainder and Reversion should come in place of them, so as there should be turnings out and turning in at several times by one Livery which was made at one time. But

Ante 205.
Con. 361. t.
Co. Litt. 218. a.

Sec. 720. I.

But as touching the ceasing of the Estate in Remainder, he conceived it might very well be without any Entry by the operation of Law, the particular Estate remaining in being; wherefore, &c. Beamond, to the same intent: For a Remainder ought to begin and be created with the first livery, and concurrent with the other estate, and cannot afterwards begin upon a Condition. And he said, he never had heard or read, That a Proviso could create a Remainder, although it might determine a Remainder; but he held, That a Remainder of an Estate of Freehold or Inheritance, cannot cease without Entry or Claim, no more than an Estate of Freehold in possession. Owen agreed with Beamond in omnibus, for the Reasons before specified. Wherefore it was adjudged for the Defendant.

Post 379.

Ant. 359.

Dawbridge versus Cocks.

TRESPASS. The question was, whether a Coptholder might lop off the boughs, without an especial custom; and it was resolved per Curiam, That by the Common Law he may cut off the under boughs, which cannot cause any waste. But the Amputation of the top boughs will cause the Putrifaction of the whole Tree. Wherefore it is waste as well as the Decapitation thereof, &c.

(21)

Ant. 5.

Paulter versus Cornhill and others.

EJECTIONE FIRMA. Upon evidence it was held, that the Husband shall not be Tenant by the courtesie of a Coppyhold, unless there be an express custom to warrant it. It was also held by all the Court, That if a Coppyholder surrenders in Tail, and the heir of the Donee is to bring a Formedon, he ought to Count of the gift made by the Coppyholder who surrendered, and not by the Lord; for he is but the Instrument to convey it, and nothing passeth from him. It was also moved, whereas the Surrender was to the use of one in Fee, upon condition to pay one hundred pound to a stranger; and if he failed, that it should be to the use of a Stranger in Fee, whether that were a good limitation to the stranger, so as there should be a Fee dependant upon a Fee. The Court spake not much hereto, but willed to have it specially found; yet Beamond conceived it to be good enough, for it shall be as an use limited upon a Feoffment; and these uses shall rise out of the first Surrender. Fourthly, Whether in this case (upon the tender of the one hundred pound to a stranger, and he refusing) the condition be saved, for as much as it is to be done to a stranger. Beamond, There is difference where one is obliged to do an act to a stranger, and he refuseth; the Obligation is not saved, for he takes upon him to do it. And where a Lease, or Feoffment, or Surrender is made as here, upon such a condition: for herein it is otherwise, but the Court moved, that it should also be specially found.

(22)

Co. 4. 27.

Post. 442. 382.

Ant. 359.

Ant. 399.

Co. Litt. 209. a.

Post 694.

Archer versus Green.

FORMEDON. The Tenant pleads a Fine with Proclamations in Bar, by one Richard, the Demandant's ancestor. The Plaintiff Replies, that Richard entred upon his Father, being Tenant in Tail, and levied the fine: And before the Proclamation passed, the Father re-entred and died, &c. And by the whole Court, it was held

(23)

A a a

Co. 3 90.
Ant. 122.

held to be a good Replication, and the Bar well avoided. For when the Father re-entred before all the Proclamations passed, the Fine thereby is avoided to all purposes, as well as to himself as to the son who levied it: But if the Proclamations had incurred before his entry, although he had re-entred within the five years and died, yet it should have bound the son and his heir for ever. Vide postea.

Strowd *versus* Willis, Mich. 36 & 37 Eliz. rot. 312.

(24)
2 Rol. 454.
Popham 114.
Owen 110.
Moor 405.
Post 374. 757.
769.

Ante 122.

Post 757.

Co. 2. 33. b.

DEbt upon an Obligation, conditioned for the payment of thirty seven pound ten shillings Rent, reserved upon a Demise of Coppelhold Land for forty years, according to such Articles indented. The Defendant pleaded, that he had not any thing in the Land demised by the said Articles; and it was thereupon demurred. Savel for the Plaintiff, he is concluded by the recital of the Obligation, and also by the Articles, 5 H. 7. 20. Against a Lease by Indenture, the Lessee shall not say, that the Lessor had nothing to let; and by a bare recital in an Obligation, one shall be estopped, as 13 Ed. 4. 4. is. And a recital by a single Bill, shall estop the party, 25 Ed. 4. 54. Recite by an Obligation, that he made a Will, he is estopped to say the contrary, and 2 & 3 Eliz. Dyer 190. accord. Wherefore, &c. Drew to the contrary; for where one is obliged to pay Rent, if he cannot enjoy the Land, he is not bound to pay it; and therefore 14 Ed. 4. 4. 20 H. 6. 22. H. 6. 57. The tender thereof shall be upon the Land, and not to the person, 21 H. 7. 6. The Dean of Windfors case, it is ruled, That if he cannot enjoy the Land, he shall not pay the Rent. And as to the Estoppel by the recital, there is a difference where it goes in the generality, and where in the particularity: For where it is in the generality, as to Infeoff one of all the Lands descended unto him; or to be nonsuited in all Actions depending in the Common Bench, he shall not be estopped to say, That he hath not any Land, or that he hath not any Action depending there, 18 Ed. 4. 4. Against a Condition to perform all Covenants, a man may say, that there were not any Covenants, and 21 H. 4. 54. agrees with this difference. And of this opinion were all the Court at the first; but afterwards, upon a second Argument, they conceived, that he should be estopped. Wherefore, it was adjudged for the Plaintiff.

Agnes Fowler *versus* Dale, Hil. 36 Eliz. rot. 42. or 421.

(25)

REplevin. The Defendant made Conusance as Bailiff of Sir Thomas Hatton, the place where being parcel of the Mannor of Benyfield; and that the Will of Benyfield is an ancient Will, and that in the said Will, Habetur talis consuetudo & a tempore quo, &c. habebatur, &c. Quod quilibet inhabitans in aliquo antiquo Messuagio, within the said Will should have Common in the said Waste for all his Beasts Levant & Couchant within the said Will, and that he was an Inhabitant, &c. And Issue was joyned upon this Prescription, and found for the Plaintiff; and it was moved in Arrest of Judgment, that it was a void and ill Prescription for every Inhabitant to prescribe, &c. And therefore the Bar was ill, and the Issue being joyned upon an ill Bar, the Plaintiff is not to have any Judgment. Yelverton moved for the Plaintiff, to have Judgment; For it is pleaded by way of Custom and Usage, and it is not a Prescription, which may be well enough, for Common may

may be as well by reason of Inhabitaney, as otherwise. And 22 H. 6. 43. Common may well be appendant to an House; so it is 10 H. 7. 24. 15 Ed. 4. 32. It is said there is not any difference betwixt Common appendant, and Common by reason of inhabitaney; so as it is there admitted, that there may be Common in respect of inhabitaney. It hath been objected, That Inhabitants are not persons able to prescribe: But it was thereto answered, That it is not here alledged to be in the person, but to be the usuage of the Village. V. 18 Hen. 8. 11 H. 6. Prior of Dunstable case, 7 Edw. 4. 24. 15 Edw. 4. 29. 18 Edw. 4. 3. 20 Edw. 4. 10. And second^d Mariæ Præscriptio, Bro. 100. Inhabitants cannot prescribe, but a Custom may be alledged, that Inhabitants may have Common. Wherefore, &c. Anderson. It hath been adjudged lately in this Court, That it is a void and an idle Prescription, and I can shew the Roll thereof, and there is not any colour against it; for an Inhabitant cannot have Common, if he hath not any Interest or Estate therein: And this is not shewn in such a Prescription, wherefore it is not a good Prescription. Also if he be ousted thereof, he hath not any remedy nor Action for it, but the Lord who is the owner thereof: And therefore the Interest shall not be taken from the Lord, and the Lord and the Inhabitants cannot both have Interest therein. Walmley, such a Prescription cannot begin at this day, and therefore continuance cannot make it good. For a grant of Common Inhabitantibus cannot be good, because they be not any Corporation; and by Prescription it cannot be good for it is in nature of a purchase, and an Inhabitant cannot purchase to himself and his Successor. Beaumont, This is not any of the four Commons, viz. Appendant, Appurtenant, in Gross or Vicinage; wherefore it is no good Common. Owen accord; for they be not any Corporation to prescribe; but a Freeholder may alledge, That he is seised, and that he and all those, &c. have had Common, and that is a good Prescription: But all the Justices held, That Usage may be alledged by reason of Inhabitaney to have an Easement, but not to have Inheritance. Anderson; It is the common course throughout England; and it is absurd and Oppositum in objecto, that the Common should be in the Inhabitant; for it should be mischievous to take it by a Prescription from the owner of the Soyl. And it is not possible, that should be good by Usage, which cannot have a lawful continuance. And Custom and Prescription are all one: Wherefore, &c. Sed Adjournatur.

Ant. 180.

Co. 6. 60. 4.

Ant. 35.

Co. 6. 60. 4.
Ant. 180.

Jesop *versus* Payne, Parson of Upway.

Prohibition prayed for suing for Tythes of Locks of Wool, suggesting, That he paid the tenth Fleece of Wool in satisfaction for all Locks, and Tythes due for Wool. Drew moved, that the Prescription was not good, because it is but to have the same thing, and of the same nature in recompence, And it hath been ruled in the Queens Bench, to give the tenth Sheaf in satisfaction of the Tythe of the Corn, and Bakings is not sufficient to maintain a Prohibition. And there in 33 Eliz. in the case of Shakerley against Sir James Marvin, it was held, That it was not any Prescription to have Cocks of Hay for all Tythe-Hay; but the Court held, That in this case the substance of the Prescription was good enough, and agreed to the case of the Bakings; for that is as good Corn as any other, but Locks be not of the same value

(26)
Post. 475. 660.Post 446. 660.
609.

with the Fleece : But in regard of a fault in the suggestion that it was not, (That they usually had paid,) &c. which is issuable, it was not good : And therefore they held, That consultation should be awarded.

Charnock *versus* Sir Thomas Gerard.

(27)

Audita Querela : For that the Conusee upon a Statute Staple, had purchased part of the Land, and the Plaintiff another part, and yet had caused the Plaintiffs Lands to be extended and delivered in Execution ; and it was held to be a good cause for an Audita Querela. It was then moved to have a Superfedeas to stay Execution ; for although they were extended, yet they were not delivered by Liberate. And the Court doubted, because it was upon a Statute Staple, which was not returnable in this Court, but in the Chancery : But it well may be upon a Statute Merchant ; for that is alwayes returnable in this Court. But the Prototaries said, That an Audita querela lies well in this Court, in this case, and a Superfedeas should be awarded ; as it was in the case of the Lord Dudley, and divers other Presidents accorded therewith. Whereupon the Court afterwards resolved, that it well lay here, and a Superfedeas was thereupon awarded.

Stainfield and his Wife *versus* Viscount Bynden,
Mich. 35 & 36 Eliz. rot. 1434.

(28)

Dower. The Tenant pleads in Bar, that the Wife of the Demandant was endowed by Commission out of the Court of Wards De dote assignanda, which she accepted, and demanded Judgment Si action, &c. And it was thereupon demurred ; and after Argument by the Serjeants, the Court resolved for the Demandants for they conceived, although the Statute of 32 H. 8. for the Authority to the Court of Wards, yet the Authority of the Chancery is not transmitted to the Court of Wards : For the Marriage ought to pass under the Great Seal ; the Office ought to be always returned into the Chancery ; the Libery shall be always sued out of the Chancery, and all other Acts (saving the Survey of the Wards, Lands, and Letting it for years) shall be in the Chancery, and not in the Court of Wards : and therefore an assignment by Commission out of the Court of Wards is void and shall not bind him, and no Act there shall bind the Heirs or any other mens Inheritance ; but this Dower ought to have been assigned out of the Chancery by a Writ De dote assignanda, and if it be evicted, the Record shall be transmitted into Chancery, and there she should be endowed de novo ; wherefore it was adjudged for the Demandant.

F.N.Br.263.d.

Termino

Termino Hillarii.

Tricesimo septimo ELIZABETHÆ, in
Banco Regina.

Wesby's *versus* Skinner and Catcher, late Sheriffs of
London, Hill. 34 Eliz. Rot. 169.

DEBT upon an Escape; upon Nihil debet pleaded, an especial Verdict was found, That the prisoner for whose escape the Action was brought, was in Execution in the Counter at the Suit of one Dighton for Two hundred and forty pound, and at the Suit of the Plaintiff for four hundred and forty pound: That the Defendants in Exitu ab officio delivered him as in Execution for one cause onely, viz. at the Suit of Dighton, to the new Sheriffs, and they suffered him to escape; and for this escape the Action was brought against the ancient Sheriffs; And whether upon this matter the Action lies against the Defendants, or ought to be brought against the new Sheriffs; because the tort began first in them, was the question. Tanfield, the new Sheriffs are chargeable, for there is not any Law to compel the ancient Sheriffs to deliver the Prisoners by Indenture with their causes; but the new Sheriff ought at his peril to take notice especially of Executions, which are upon and out of the Records; for he ought to be attendant upon every Court at Westminster, and to have his Deputy in every Court, whereby he is to be informed of every Execution issuing out of every Court. And in divers cases a man must take notice at his peril of Acts, of which by intendment he may have Conulance; as Lessee for life shall take notice of Liberty made upon the Land, so Lessee for years or for life, shall take notice of the grant of a Reversion by Deed enrolled. And in 16 Eliz. it was ruled in one Wyle's case, where a Writ of Discharge was shewn in the County Court for the ancient Sheriff, who was not present, that he ought at his peril to take notice thereof. So Executors ought to take notice of every Judgment against their Testator: And if in this case the Ancient Sheriff had died, and a new Sheriff made, he at his peril ought to take notice of the prisoners in Execution, and of their Causes. So here, the new Sheriffs

(1)
Co. 3. 71. b.

3 Co. 72. b.

Ant. 13.
Ant. 12.

Co. 3. 72. a.

2 Co. 72. b.

Sheriffs when they found him in Execution, and so was lawfully under their charge: but if there had not been any cause certified of detaining him in prison, it might peradventure have been otherwise; for then, if they detained him in prison, they should have been chargeable in false imprisonment. Also in this case, they suffered him to escape before Dightons debt was satisfied: Wherefore forasmuch as he did a Tort therein, it is reason he should the rather be charged therewith. Snigg e contra. The ancient Sheriffs are not discharged, nor the new Sheriffs charged until three things be performed, viz. The Patent to the new Sheriff; the Writ of Discharge to the old Sheriff; and the Delivery of the Prisoners by Indenture to the new Sheriff: And there is a Writ in the Register, f. 295. That the Prisoners and Writ shall be delivered to the new Sheriff by Indenture. Wherefore in as much that it was not done so, whereby the new Sheriff might have Conufance, they shall be charged, and not the new Sheriff. Wherefore, &c. Popham and all the Court (Gawdy absente) held, That the ancient Sheriff shall be charged, and not the new Sheriff: For this Delivery over of the Prisoner, and Writ by Indenture, was by the order of the Common Law: and reason wills, That the Sheriff should not have Prisoners delivered unto him, but that he also should have the causes certified with them; and not to compel him to search out the Causes of their imprisonment: And in regard there was a default in the old Sheriff, that when they delivered the Prisoner by Indenture, they shewed but one cause only of his detainment, and not both. It is therefore reasonable they should rather be charged than the new Sheriff; and it was an Escape in them presently: For the Prisoner when he is delivered to the new Sheriff for one cause, although he be in Execution for one cause, he is out of Execution for the other: Wherefore it is an Escape Maintenant in the ancient Sheriff, and they be forthwith chargeable therewith; and the Law will never charge the new Sheriff, but where the prisoner is delivered unto him in the Common Gaol of the County, with the cause of his detainment, and he needs not otherwise to take him. And therefore in Dawbridgecourts case in this Court, who being Sheriff of the County of Warwick, and had a prisoner in Execution (whom he kept in an house in Warwick, and not in the Common Gaol of the County) being afterwards removed from his Office, would have delivered the Prisoner to the new Sheriff at the said House, who refused to receive him, unless he were brought to the Common Gaol, and afterwards the prisoner escaped, it was adjudged, that the said D. was chargeable with this escape, and not the new Sheriff, unless he had been delivered unto him in the Common Gaol. And as to the case where the old Sheriff dieth, that may be agreed to be good Law, for its of necessity, because there the new Sheriff was to take notice at his peril; and it was afterwards adjudged accordingly. Note, Gawdy said unto me, That he was of the same opinion clearly, for the inconveniencies which otherwise would ensue to Sheriffs, to inforce them to search all Records out of every Court, and in the interim not to know what to do with their prisoners. Vide 5 Ed. 4. 71. 39 Hen. 6. 33. Note, a Writ of Error was after brought in the Exchequer Chamber, and after Argument there, the Judgement was affirmed. V. 3. Co. 71.

Stokes *versus* Annesby.

Error to reverse a Judgment in a Writ of Dowry in the Common Bench. The Error assigned was, for that in Term Mich. 21 & 22 Eliz. Rot. 2315. Annesby brought a Writ of Dowry against Stokes, retornable Quind' Martini, at which day the Tenant made default. And a Grand Cape was awarded retornable O'gab. Purificat. next following; at which day the Tenant appeared and tendered his Law De non Summons, and had day to make it until Quinque Septim' Pasch. At which 5 Septim' Pasch. the Tenant iett essoyne, which was adjourned until Tres Trin. 22 Eliz. At which day the Tenant appeared, and the Demandant released the default. And the Tenant imparles until Mich. 22 & 23 Eliz. And upon the Plea-Roll, Pasch. 22 Eliz. it is entred, that the Tenants then appeared and pleaded in Bar; that the Demandant detained Charters from him, being Feoffee to the Baron; and Issue was joyned thereupon, which was afterwards tryed in Mich. 23 & 24 Eliz. and found for the Demandant; and she thereupon had Judgment; and thereupon this Writ of Error was brought. The first Error assigned was, because this appearance and pleading in Pasch. 22 Eliz. at which day the party was out of Court, by the Essoyne cast and adjourned, is meerly contrary to the Record, and void; and therefore the Issue joyned, and Tryal and Judgment thereupon are altogether void. But Coke Attorney General, and Glanvil Sergeant moved, That the Essoyne-Roll, and all thereupon should be void. For when the party appears, and pleads, that appearance confounds the Essoyne; and that appearance and pleading is upon the Plea-Roll, which shall the rather, and more forceably be intended true, then the other Roll; for the Plea-Roll, controls all other Rolls: But after divers Arguments, the last day of this Term, the Court resolved it to be Error; for every Roll hath his course and order. And when it appears, That the Tenant was Essoyned, and the Essoyne adjourned until another Term, the parties thereby are out of Court, and their appearance cannot be recorded. And in that, an appearance is recorded, and a Plea pleaded upon the Plea-Roll, it shall be intended to be a practice and mis-entry (as in truth it was, as appeared upon examination) then otherwise. Wherefore the first shall be intended the true Roll, and all proceedings shall be according to it; and the appearance after, when none of the parties had day in Court, is void: And so the Plea pleaded, and Trial, and Judgment thereupon, are erroneous, and not aided by any of the Statutes of Jeofails. Wherefore for this cause they awarded, that the Judgment should be reversed. A second Error alledged was, That this Plea of Detainment of Charters by the Feoffee, is a void Plea en son bouch (which was agreed by all the Court) and then the Issue joyned thereupon, is void, and so a mis-trial and Jeofail; and of that opinion was Fenner Justice: But it was thereto answered, That although it were an insufficient Plea, yet it is not meerly void; for it is a Plea proper to this Action: And Issue being joyned thereupon, and tryed, it is aided by the Statute of Jeofails, and not like where Not Culpable is pleaded in Debt, or Non debet in Trespals; for those are meer void Issues

(2)

1 Cr. 92.
Ant. 340.

Co. 9. 18. 2.

Post. 455.

Issues in those Actions. But the other Justices did not speak much thereto, the Judgment being reversed for the first cause.

Ive versus Ambrey.

(3)
Ant. 340.

Error upon a Judgment in Debt, and Attlawry thereupon. The Error assigned was, For that the Plaintiff appeared, and declared, and prosecuted per Ivonem attorney suum, as the Plea-Roll was; but the Roll of the Warrant of Attorney is ponit Jovem son Attorney. And for this cause it was held to be Error, and should not be amended; but the Judgment and Attlawry thereupon was reversed.

Hall versus Combs, Trin. 34 Eliz. rot. 667.

(4)
2 Rot. 91.

Co. 2. 33. a.

Ejectione firmæ, of a Lease of Dodington against the Defendant, as Tenant of one Aylesworth, upon a special Verdict the case was, That King Henry the Eighth had two Mills under one house, and granted to Aylesworth all the Houses, Mills, Lands, &c. in Wells, and the Suburbs, and Liberties thereof; and it was found, that one of those Mills was in Wells, and the other out of Wells, and the Liberties and Suburbs thereof. And whether this Will passed, for as much as they were both under one Roof, was the doubt, and adjudged for the Plaintiff, that it passed not.

Harford versus Gray.

(5)

2 Cr. 96.
Mo. 464.

Replevin. The Plaintiff in Bar to the Abowry made title to an Hundred, That the Abbot of Abbington was seised in Fee, and pleaded the Statute of 31 H. 8. of Monasteries; and that the Abbot surrendered to King Henry the Eighth, and that Postea, scilicet, 28 H. 8. King Henry the Eighth died seised, and it descended to King Edward the Sixth; and from him to Queen Mary; and from her to Queen Elizabeth, who now is, who granted it to the Lord Norris, who let to the Plaintiff. And upon this Bar, a Demurrer was joyned; and now exception taken, because it cannot be, that the Abbot should surrender in 33 H. 8. whereas it is pleaded, the King died in 28 H. 8. But it was thereto answered by Tanfield, That it was but a mistaking of the Clerk, and might be well amended: For it appears, that it cannot be, that King Henry the Eighth died in the eight and twentieth year of his Reign, where an Act of Parliament is pleaded in 31 H. 8. and a Surrender in 33 H. 8. Wherefore that which comes after the Postea, (viz. 28 H. 8.) is vain and void, and may be well stricken out, and yet the sence remain perfect enough, viz. Quod postea, he died seised, and in proof hereof, he relied upon 11 H. 7. 3. 20 H. 6. 15. & 11 H. 6. 22. And of that opinion was all the Court, because it is not much material, but matter of conveyance only. Sed Adjournatur.

Hore versus Broom.

R Eplevin. The Parties being at Issue, the Jury appeared in Banco to try it. And the Defendant would have challenged the Array, Ore tenus, because it was returned by one Stonner Sheriff, two days after he had received a Writ of discharge. And it was held by the Court, That he could not challenge it for that cause; Because it would be a direct averment against the Record; for it is returned by him as Sheriff; and the return accepted. But by advice of the Court, he made his challenge to the Array, because it was favourably made and returned in favour of the Party, &c. And Issue being joyned thereupon, and all this matter given in evidence. The Court directed the Tryors, that it was not duly made and returned, for it was without Warrant. Whereupon the Array was quashed.

(6)

Jordan versus Jordan.

A Sumpsit, and declares whereas he sued a Writ of Latitat against the Defendant, intending to sue him for a Debt of Forty pound directed to the Sheriff of Wilts, and delivered it to J. S. to procure a Warrant from the Sheriff to arrest the Defendant; And J. S. accordingly obtained a Warrant, that the Defendant in consideration the said J. S. would forbear to arrest him, assumed to J. S. to appear in the Queens Bench, at the day contained in the Writ, or to pay the Debt. And for not performance of this promise he brought the Action. And the Defendant pleaded non assumpsit, and found against him, and it was now alledged in arrest of Judgment, because he did not shew how the Debt grew due, nor in fact that there was any such Debt due. Secondly, because he declares of a promise made to J. S. and not to himself; and for this cause principally it was held to be ill, and adjudged for the Defendant.

(7)
1 Rol. 32.

Post. 849.

Bothwright versus Harvy, Mich. 36, & 37 Eliz. rot. 573.

D Ebt upon an Obligation of One hundred and twenty pound. The Condition was, that if he acquitted and saved him harmless from an Obligation of Sixty pound, wherein the Plaintiff and Defendant were obliged to J. S. that then, &c. The Defendant pleads, that J. S. sued the Plaintiff upon that Obligation, and had Judgment; But that before execution he delivered the Sixty pound to the Plaintiff to satisfy it, and it was thereupon demurred and adjudged to be no Plea; for although execution be not sued, yet by the Judgment the Party is damnified, for his Land and Body is thereby lyable; and although he pays the Sixty pound Debt, yet he doth not satisfy the Costs. So the Bond is not saved, for he doth not acquit nor save him harmless, as 2 and 3 Eliz. 186. is, also the Bond is conjunctive, Acquit and save, &c. wherefore he ought to do both, which was not done. And it was thereupon adjudged for the Plaintiff.

(8)
1 Rol. 432.

Ant. 264.

Philpots Case.

(9)
1 Rol. 583.

Post. 611.

2 Cr. 445.

AN Exigent was awarded against Philpot and his Wife, and divers others upon an Indictment of Recusancy. The Husband appeared upon the exigent, and conformed himself according to Law, but the Wife made default and did not appear. The Husband prayed to be bailed, *de die in diem*, until the appearance of his Wife, for the default of the Wife ought not to prejudice the Husband. And the practice and usage of the Common Bench is, where process of Outlawry issues against Baron and Feme, and the Baron appears, he shall have day by Bail, until the appearance of his Feme; but the Court said, that it was in the discretion of the Court, when he came in upon the exigent, whether he should be let to Bail. And this Court used not to let the Baron to Bail, but to continue him in prison for the contempt of his Feme, until the Feme comes in, wherefore the Bail was refused. Vid. 8 H.4. 6. 21 H.6.4.

Rotheram *versus* Crawley, Pasc. 35 Eliz. Rot. 332.

(10)

Co. 8. 153. a.

DEbt upon an Obligation. The Defendant pleads a release, and upon the pleading, the Case appeared to be, that there were Controversies betwixt the Plaintiff, Lord, and the Defendant being his Tenant for a Relief, and an Harriot, and they having submitted it to Arbitrament, it was awarded that there should be a Release made of them, and in performance of this Arbitrament a Release was made by these words: Of all Reliefs, Duties, and Amercements; and this Release pleaded in Bar of this Obligation, which was not put in Arbitrament, nor intended to be released. And upon all this matter disclosed, it was demurred, and Coke Attorney General moved, that it should not be a Bar, for this word Duties being placed betwixt Reliefs and Amercements, shall be intended Duties of such a nature, and not any other; wherefore it shall not extend to this Bond. But the Court held the contrary, for although the intent was not to extinguish it, yet Duty extends thereto in extremity of Law, wherefore it shall be an extinguishment and discharge of the Bond. And thereupon it was adjudged for the Defendant.

Thornborough *versus* Monpenson.

(11)

2 Cr. 251.

COvenant; The Covenant wherein the Breach was assigned was, That he should make such an assurance as his Counsel should devise of an Annuity of Twenty pound, and alledgeth for Breach, that his Counsel devised that he should bind himself and his Heirs by an Obligation for the payment of this Annuity yearly, which he had not done. And issue being joyned thereupon, after Verdict, it was moved in arrest of Judgment, that this was not within the Covenant, and so no breach, for it is not any assurance of the Annuity. Popham, if a man Covenant to make such an assurance of the mannor of D. as his Counsel shall devise, & the Counsel deviseth an Obligation or a Statute to be made for the peaceable enjoyment thereof, he is not bound to make it (Quod curia concessit) But if the Covenant were to do such Act or Acts for the assurance

assurance of the Hammor of D. as his Counsel shall devise, and they devise a Statute for the peaceable enjoyment thereof, he is bound to do it. It was also moved that this was not within the Covenant, because the devise was that he should bind him and his heirs; and there is not any word in the Covenant, that the heir should be obliged; wherefore, &c. But the Court gave not any answer thereto, and it was ended by arbitrament.

Weaver *versus* Cardan.

Action for these words, Thou wert detected of Perjury in the Star-Chamber. It was held upon motion that the Action lay not; for an honest man may be detected, but not convicted; so no slander. Sed adjournatur.

(12)

Harlestone's Case.

It was found before the Coroner, Super visum Corporis, That I. Harlestone fell into a Harlepit fortuito and so died. Afterwards by the procurement of the Queens Almoner, a Commission issued out of the Crown Office (Quali in nature of a Melius Inquirendum) and was awarded to the Sheriff to enquire of his death, and of what Goods and Chattels he was possessed at the time of his death; and it was found before the Sheriff, that he was Feio de se, &c. It was moved that this Writ or Commission was not well awarded, but utterly void; for the Statute of 28 Ed. 3. cap. 9. is expressly, that no such Commission shall be granted; and that the Sheriff shall not take Judgment by Writ or Commission, and F. N. B. R. 144, and 250 agreeeth therewith. But I've the Clerk informed that they have divers presidents since that Statute of such Commission awarded.

(13)

Collet *versus* Marsh, Trin. 35 Eliz. Rot. 38.

Error upon a Judgment in a precipe quod reddat. The Error assigned was, because the Defendant was not summoned at the Church door, according to the Statute of 31 Eliz. cap. 3. and by reason of his default a grand capias was awarded, and Judgment given against him, and he lost his Land by default, and in truth the Sheriff returned him summoned at the Church door. And it was thereupon demurred, whether he should have this averment, or should be put only to his Action upon the Case against the Sheriff. Quere, for the Court upon the motion doubted thereof. Et adjournatur, vide postea, Trin. 37. B. R. placito. 2.

(14)

Moor 349.
1 Rol. 793.
621.
Gould. 128.
Post. 397.

York *versus* Allen.

ATraint was brought in the Common Bench of a Verdict in Banco Reginae, whereupon the Record was removed, and there the Verdict was affirmed, and now the Plaintiff in the first Action prays execution according to the first Verdict, as 7 Ed. 6. Dyer 81. is. And Popham and the other Justices held that he should have execution; for the Justices in the Common Bench, may not

(15)

1 Rol. 887.

award execution, for they have but only tenorem Recordi. But if the Verdict had been disaffirmed, and execution on the first Verdict had been had before, the Court of the Common Bench might have awarded restitution very well, and afterward execution was awarded accordingly.

Watts versus Hagden.

(11)

R Eplevin. The Defendant avows the taking in White Acre for Damage-Feasant: the Plaintiff replies that they were taken in Black Acre, absque hoc that they were Damage-Feasant in White Acre; and it was thereupon demurred. Et per curiam without argument it was ruled to be an ill Traverse. For he ought to have traversed the place of the taking, and not that they were Damage-Feasant; wherefore it was adjudged for the Avowant.

Dell versus Higden, Trin. 36. Eliz. Rot. 547.

(17)
1 Rol. 506.
Moor 358.
Co. 4. 23. 2
Post. 380, 391.
Ant. 149.

Post. 391. 2.

E Jectioe firmæ, upon a special Verdict the Case was, Tenant in Tail of a Copy-hold, Remainder in Fee, is impleaded by plaint in Court Baron in nature of a Writ of entry in the Poss, and suffers a common Recovery with voucher: whether this shall bind the Remainder was the question, the Tenant in Tail being dead without issue, and it was found, Quod nunquam antea videbatur talis recuperatio in curia manerii prædicti. The Court upon the motion seemed to incline, that it should bind the Remainder, but they spake not much thereto. Sed adjournatur.

Parlet & Bartholmew versus Cray, Mich.

36 & 37 Eliz. Rot. 25.

(18)
1 Rol. 916.
Co. Lit. 8. 2

Co. Lit. 8. 2.

T Respals. The Case was, That a man having Fishes in his Pond, made his Executors, and died. The Defendant being his Executor takes the Fishes, and the Plaintiff as Heir brings Trespals, and upon this matter disclosed by Barr, it was demurred in Law, and adjudged without argument for the Plaintiff. For although it be felony to steal Fish out of a Dam, or Pond, or Trunk, as 18 Ed. 4. 8. yet the owner dying and leaving them in the Pond, they are as profits of the free-hold, which the Executor shall not have, but the Heir or he who hath the Water; wherefore it was adjudged for the Plaintiff.

Leigh versus Shaw, Trin. 36 Eliz. Rot. 767.

(19)

E Jectioe firmæ of a Chamber. The Case was, that one let a Rectory for years, excepting the Mansion house of the Rectory, Saving to the Lessee the Chamber, now in question, and whether this shall be said to be let for years was the question. Popham, here is an exception out of an exception, which is good enough, and shall make it pass by force of the Lease; for this exception or saving makes the thing excepted as if it never had been let: so a saving out of a saving makes it as if it never had been excepted, and then it passed by force of the Lease at first. To which opinion without any argument the other Justices agreed, and it was adjudged for the Plaintiff.

Stanton

Stanton *versus* Barnes, Hill. 36 Eliz. Rot. 492.

UPon a special Verdict it was found, that it was ancient Copyhold Land, parcel of the Manor of A. and devisable in Fee, or for life, Solummodo ea capienti extra manus Domini. And it was moved that the Surrender was to the use of one for life, Remainder in Tail; Remainder in Fee who were admitted accordingly by the Tenant for life, who dieth. And whether that were good to him in the Remainder in Tail was the question. For Tanfield moved that in regard the custom is found expressly, that it shall be solummodo ea capienti extra manus Domini, It ought to be an immediate taking; and he shall not take by way of Remainder. Also the custom will not warrant any estate but for life or in Fee. But the Court resolved to the contrary, that it is good enough. For in that it is limited to one, and the Heirs of his body, it is not void: but if it be not an Estate Tail, it is a conditional Fee, and so it was agreed by us all in the Case of Granvenor and Rake. For when a custom warrants a greater, it shall warrant the lesser Estate also; to the second it may be well limited by way of Remainder as well as to the immediate taker; for when the custom warrants it, it cannot restrain a Fee to be limited as well by way of Remainder as otherwise; and he in Remainder, and the particular Tenant make but one Estate; and in that, it is found that the custom is, that it shall be granted Solummodo ea capienti, it is void therein, wherefore it was adjudged accordingly for the Plaintiff.

(20)
Co. Litt. 52. b.
1 Rol. 511.Ant. 307.
Co. Litt. 52. b.
Ant. 323.Noke *versus* Awder, Trin. 36 Eliz. Rot.

COvenant, wherein he shews that one John King made a Lease for years to A. the Defendant, who by Deed granted it to Abel, and covenanted with him, that he and his Assignes should peaceably enjoy it without interruption. Abel grants it to J. S. who grants the Term to the Plaintiff, who being ousted by a stranger brings this Action, and after issue joyned upon a collateral matter and Verdict for the Plaintiff, it was alledged in Arrest of Judgment, that this Action lay not for the second Assignee, unless he could shew the Deed of the first Covenant, and of the assignment, and of every mean assignment, for without Deed none can be assignee to take advantage of any Covenant, which cannot commence without Deed. And to that purpose cited old A. 102. and 19 Ed. 2. Covenant 25. And if one be infeoffed with warranty to him his Heirs and Assignes, and the Feoffee makes a Feoffment over without Deed, the Assignee shall not take advantage of this Warranty, because he hath not any Deed of Assignment. But if he had the Deed, it should be otherwise; and to that purpose, vide 13 Ed. 3. vouch. 17. 3 Ed. 3. monstrans de fayts 37. 11. E. 4. ibid. 164. 15 Ed. 2. ibid. 44. 13 H. 7. 13, and 14. 22. Ass. plea. 88. But Popham held that he shall have advantage without the Deed of assignment; for there is a difference where a Covenant is annexed to a thing which of its nature cannot pass at the first without Deed, and where not. For in the first case the Assignee ought to be in by Deed, otherwise he shall not have advantage of the Covenant; and therefore he denyed the case of the Feoffee with warranty. For the second Feoffee shall have benefit of the warranty, although he doth

(21)
Moor 419.
Post. 436.
Co. 3. 63. a

Co. 3. 63. a

doth not shew the Deed of assignment, but shews the Deed of the warrant; and so is the better opinion of the books. And to that opinion the other Justices inclined. Sed adjournatur. V. 3. Co. 63. V. Post. 436. postea Mich. 37, & 38. placito 52.

Carrel versus Read.

(22)
Mo. 402.
Ow. 65.

Ant. 362.
Co. 8. 92. a
1 Rol. 453. 4.

Covenant. Lessee for years Covenants to drain such water out of Land before such a day; he pleads that before the day, the Lessee entered and continued in possession, until after the day. And it was thereupon demurred and adjudged to be no Plea, because it is a collateral Act to be done by him; unless he had said, that the Lessee held him out, and disturbed him to do it.

Hillary, 37 Eliz. in Communi Banco.

Allen versus Hollowell.

(23)

Ejectione firmæ the Defendant pleads that the Queen was seised in Fee; and let it to J. S. for years by patent, who let it to the Defendant; and prays in aid of the Queen; and it was ruled to be no Plea, because he is not immediate Tenant; wherefore a Respondeo ouster was awarded.

Day versus Bisbitch.

(24)
1 Rol. 891.
2 Rol. 556.

Co. Lit. 53. a

Trespas. For the taking and carrying away of a Dyers Fat; upon an especial Verdict, it was found that the Sheriff upon an Action against the Plaintiff, attached it being fastned to the wall of the house, and delivered it to the Defendant. And whether this taking or delivery were lawful, or not, was the question. First, it was moved, that it could not be attached, because it is parcel of the Freehold, and fixed thereto. Secondly, That the Action lies not against the Defendant, because he hath it by the Delivery of another, and not by his own taking. And it was resolved by all the Court that it could not be attached, in regard it is fixed to the Land and Wall: And Anderson said, that Wainscot fixed to a Wall cannot be removed, and if it be, it is waste; So of Tables dormant, fixed, &c. And Walmesley said, that in the time of the Lord Dyer, this difference was here taken and agreed, that a Furnace fixed in medio domus is but a Chattel, and is removeable; but otherwise it is being fixed to the walls, and afterwards it was adjudged accordingly for the Plaintiff. The second matter was not much insisted upon, because he was present and took it; and so he was an immediate Trespasser; vide 42 Ed. 3. 6. 20 H. 7. 13. 21 H. 26.

Brawn versus Michael.

(25)

Action for words. Whereas he was a Justice of Peace, that the Defendant spake of him these words, He hath delivered untruths upon his Oath in his Answer in the Chancery at the Suit of J. S. And it was thereupon

thereupon demurred, and without privy of the Court, in Mich. 36, & 37 Eliz. Judgment was entred for the Plaintiff; and it was now moved to stay the Writ of inquiry of Damages to be awarded, and all the Court agreed thereto, for Judgment was entred without their privy, for they all now agreed that an Action lies not for these words. For he might deliver untruths upon his Oath in his answer, and not be perjured; for there be therein two Oaths, the one upon his knowledge, the other upon his Evidence upon report of others, which may be untrue, and he not be perjured: Wherefore, &c.

Sharrock versus Hannemer.

False Imprisonment: The Defendant justifies for that he was High Constable of the Hundred of D. in the County of Salop, and that the Plaintiff made an affray upon J. S. and that he came presently after the affray made, and J. S. prayed him that he would take sureties of the Peace, because he stood in fear of his life, whereupon he committed the Plaintiff to ward there for that he would not find sureties for the Peace as it was lawful for him to do; and traverseth the Imprisonment in any other County; and it was thereupon demurred. First, because a Constable cannot take sureties of the Peace, unless for an affray committed in his view. Secondly, because the County is not traversable. But as to the second the Court would not hear any Argument, for there is no question but it is traversable when the justification is Local; and so it was adjudged in the Queens Bench, 27 Eliz. Rot. 404. betwixt Dawby and Dawby. But as to the first, Anderson, Walmsley, and Beaumont held that the justification is not good. For Anderson said, that a Constable may commit one for the breach of the Peace in his view, but not if it be done out of his sight. And he cannot take an Obligation for the breach of the Peace, if it be not broken in his view; and an High Constable is not such an Officer nor Conservator of the Peace, whereof the Common Law takes any notice, for he is not mentioned in any Book; and neither the High nor Petty Constable can take any mans Oath, that he is in fear of his life, wherefore, &c. Walmsley, a Pettit-Constable may commit one who hath broken the Peace, although it were out of his sight, if he will not find sureties of the Peace, upon information that one intends to make a Battery, and to disturb the Peace. For by preventing of the occasion of the breach of the Peace, it shall be well preserved. And although that 10 Ed. 4. 22 Ed. 4. 25. 3 H. 4. 9. are, that he may commit one upon view of the breach of the Peace, and make him find surety therefore, yet 44 Ed. 3. Tittle Barr. is that he may do it upon Information of the Peace broken, or to be broken, or that he comes where the persons are assembled to break it, for thereby the breach shall be avoided; but he may not take sureties by Recognisance entred, because he is not a Judge, nor any Officer of Record, but is elected by matter in pais, and therefore may take surety by matter in fait (viz.) by Obligation. But an High Constable cannot do so, for he is not a Conservator of the Peace by any Law, nor find I any Authority which mentions him, and in the North there be not any High Constables. But neither high nor petty Constable can take an Oath of any one that he

(25)

Ant. 168.

Ant. 204.

he is in fear of his life, wherefore, &c. Beamond, a Constable and Sheriff are Conservators of the Peace at the Common Law, and may take surety of the Peace by Obligation, upon view of the Peace broken or Tumult made, otherwise not. But they cannot take any mans Oath that he is afraid of death, for he is not a Judge nor Officer of Record, which is the reason that an Obligation taken by him shall be in his own name, and not in the Queens name, and shall be certified at the Sessions of Peace. But a Chief Constable cannot do so, nor be they by the Common Law, but by Custom, and for Conformity, wherefore, &c. Owen, a Constable is a Conservator of the Peace by the Common Law, and may take sureties of the Peace as well before the Peace broken, as after, for otherwise it would be too late; and this Authority at the Common Law yet remains, and that a Chief Constable may also do it; but notwithstanding his opinion, for the reasons before expressed, it was adjudged for the Plaintiff.

Mercer versus Charter, Pasch. 33 Eliz. Rot. 1618.

(26)

Attaint upon a Verdict in an Assise. An especial Verdict was found, which was imperfect in divers points, and how it should be remedied was much doubted, for they all resolved he could not have a Certificate, although a Certificate lies in the first Action; a new Venire facias also lies not, because no Venire facias lies in the Action, but it was a Jury the first day, but as they were now advised, they conceived that he should have a new Summons of the Jurors in the Action. And Anderson and Beamond held that he might discontinue this Action, and bring a new attaint; but Walmsley and Owen conceived that after a discontinuance by act of the party, he shall not have a new attaint, neither by the Common Law, nor at this day by the Statute of 23 H. 8. but that he shall be fined and ransomed, but they all resolved that after a Nonsuit he shall not have a new attaint neither by the Common Law, nor by the said Statute. Et adjournatur.

F.N.B. 108.D.
Co. Lit. 139.a

Baldwin versus Wiseman, Trin. 36 Eliz. Rot. 906.

(27)
1 Rol. 411. 2.

Trespas upon a special Verdict, it was found that Rich. Baldwin had issue, Richard and Henry, and two Daughters, and devised his Land to Henry in Tail, if he lived unto his age of Twenty four years, upon Condition that he should pay one hundred pound to his Daughters; and if Henry died without Heir, then if Richard did not pay the said hundred pound, that it should remain to his Daughters and their Heirs, and whether this were a Condition or a Remainder by limitation to the Daughters, was the question; and Walmsley and Beamond held that it was a Condition, and Beamond said, that a devise to J.S. paying one hundred pound to J. D. and if he fail, that it shall remain to J. D. as a void Remainder. So a devise to A. and his Heirs, and if he die without Heir, that it shall remain to B. is a void Remainder. But Owen e contra in the principal Case, for it is a limitation by reason of the intent. But being afterward moved again, it was adjudged according to the opinion of Walmsley ut supra, that it is not any Limitation but a Condition, and that Richard was in for the Condition broken.

Ant. 205.

Elizabetha

Elizabeth Countess of Rutland *versus* Isabel
Countess of Rutland.

ELizabeth Countess of Rutland, and other Executors of Edward Earl of Rutland, Executors of John Earl of Rutland, against Isabel Countess of Rutland: Action upon the case of Trover of divers Jewels and other Goods to the value of One thousand pound; and alledgeeth, That the Defendant knowing those Goods to appertain to John Earl of Rutland in his life time, and after his death to Edward Earl of Rutland, as Executor to John, and after his death to the Plaintiff as Executor to Edward, Executor to John, had converted them to their damage of One thousand pound. The Defendant pleaded Not guilty, and found guilty to the damage of Nine hundred and forty pounds. And it was now moved in Arrest of Judgment, That this Action lies not for an Executor upon a Trover and Conversion in the time of their Testator; for it is not within the Statute of 4 Edw. 3. as a Quare impedit, and an Ejectione firmæ have been taken to be within the equity thereof. Secondly, Because there is not any certain time shewn of the Conversion, whether it were in the time of the Testator, or of the Executor. Yelverton to the first Exception; The Action well lies for an Executor by the equity of the Statute, and so it was adjudged, Pasch. 33 Eliz. in Banco Regiæ, That this Action lies for Executors upon a Trover and Conversion in the time of their Testator; and it was one Drakes Case. To the second, the day of the Conversion is not material; for be it in the time of the one or the other, the Executor shall recover and have damages to the use of their Testator: But the Count is certain enough, for it is That the Defendant knowing the Goods to be the Goods of the said John Earl of Rutland, and intending to defraud the Plaintiffs, had converted them. So of necessity it is to be intended, that the Conversion was in the Plaintiffs time. And as to the first, all the Justices resolved, That an Executor may well maintain an Action for Goods converted in the time of their Testator, by the equity of the Statute of 4 Edw. 3. as well as a Quare impedit; and so is the common experience at this day. But as to the second, Beamond and Owen held it to be a material Exception; for the day of the Conversion ought to be expressly laid, although it be not Traversable; for it is matter of substance, and the point of the Action: and therefore the day and place of the Conversion ought to be expressly mentioned. And it hath been adjudged in the Queens Bench in Stranshams Case, and in Sir Thomas Pyllistons Case, That the place of the Conversion ought to be laid; otherwise it is ill: And as this case is, the Action may be brought of the Conversion in the time of the Testator, or in his own time. And it is doubtful in whose right it is brought, for want of the time certainly expressed: And in the one case he ought to have his Action upon the Statute, and in the other case by the common Law; wherefore it is not good. But Anderson and Walmsley held strongly to the contrary; for the Case being agreed, that the Executors shall have the Action as well for the Conversion in the time of their Testator, as in their own time; it is not material in whose right the Action be brought: For they

(28)
Owen 156.
Mo. 266.
1 Rol. 288.

Post. 387.

Post. 384.

Ant. 97.

1 Rol. 485.

1 Rol. 288.

are to recover damages to the use of their Testator both ways. And it is agreed on all sides, that the day laid down, is not Traversable; and not being expressed, it is not much material; nor the Inquest shall not have regard thereto: But the time is well laid down, for it is post mortem, intending to defraud: So of necessity it is to be intended, that the Conversion was post mortem. And as to the Cases cited, That the place of the Conversion is material in this Action; that is, because otherwise there cannot be any trial, if no place had been alledged: But as this Case is, being after Verdict, it is not any Exception to stay the Judgment; although peradventure it might have been an Exception, if there had been a demurrer thereupon; for that is not in default of substance, but it is to the manner only: Afterwards in this Term the Record of the Case of Russel and Pratt, which was Hillary, 21 Eliz. Rot. 410. in Banco Reginae was brought in and shewn. And in that it was proved. That an Action lies for an Executor for a Conversion in the time of his Testator, but nothing proved for the day. And it was said by Anderson, That the Lord Chief Justice, and Chief Baron were of this opinion; but further day was given till the next Term; and if any of the parties died, Judgment should be Tunc pro nunc: And afterward, the next Term it was adjudged accordingly for the Plaintiff. Nota, that in this Case, it was resolved, that three Executors bringing this Action, and the one being an Infant, and they all sued by Attorney, that it was good, because they all are but one person, and sue in autre droit, and not in their own right: And it is not reasonable, that one or two should sue by Attorney, and a third by Gardian or Prochine Aime.

*Walker versus Collier, Hillarii, 36 Eliz.
Rot. 906, or 306.*

(29)
Co. 6. 16. a.
1 Cr. 158.

Ant. 205.
Post. 498, 745.
1 Cr. 158, 159.
Ant. 146.

TRESPASS. Upon a special Verdict the Case was, the Land was devised to one for life, Remainder to the Plaintiff, paying Five and forty shillings to John S. And it was found, that the Land was worth three pound per annum. The Tenant for life died; and whether the Plaintiff had thereby a Fee, or for life, was the question: And all the Court resolved without any great Argument, That he should have it in Fee, especially when the money is not appointed to be annually paid. And Anderson said, That this word Paying, made his Estate Conditional; but the not finding whether it was paid, is not material, no more is the finding of the value. Wherefore it was adjudged ut supra for the Plaintiff.

Chomley versus Humble, Hillarii 35 Eliz. Rot. 2018.

(30)
Co. 1. 86. a.

TRESPASS. Upon demurrer the Case was such. A Feoffment was made to the use of one for life, Remainder to Henry Chomley in Tail, Remainder to another in Tail, Remainder over in Fee to the Lord Chamberlain, Lord Hunsdon, with this Proviso, That if any of them in Remainder in Tail, Go about to levy a Fine, or to do

do any act, whereby the uses limited shall not take effect according to the Limitation, or that there shall be any discontinuance; that then the Estate of him who so goeth about, shall cease; as if he were naturally dead, and no otherwise. And whether this were a good Proviso, and that the Estate shall cease by such an act done, was the question. And after argument by the Serjeants on either side, the Court delivered their opinion, that it was not good. Anderson, at the Common Law Cestuy que use had nothing, and an Estate of Inheritance at the Common Law cannot cease; and the Statute of Uses doth not help it: For the Statute cannot help any Use, where there is not any person who is seised to the use. Walmsly, The Proviso, that it shall cease, as if he were naturally dead, is void, and without sense: For if he were dead, it should descend to the Son, and he should be in, in the per by the Father, and it should come unto him ^{quasi} by degrees and steps; but that cannot be when the Father is in esse and living: Wherefore the words in the Proviso to this purpose, are void, and without any signification, and they are as if they never had been mentioned; and so it is an Estate-tail absolute and without Condition: But in entry into Religion, the Land shall descend to the Son; for the Law reputes him dead. But if an Act of Parliament had been made *ut supra*, it should be good enough, and should make a discent to the Son without death; but by conveyance there cannot any such discent be made. And an Estate of Inheritance in Land, Ant. 361. cannot be made to cease by any conveyance, without some other Act doing. Beamond *ad idem*: An Estate in Tail cannot cease at the Common Law, no more can it in Use at this day; for it is as an Estate executed at the Common Law; and the issue cannot have a Formedon, living the Father, and that Feoffees at this day should be seised to his Use is absurd. Wherefore, &c. Sed adjournatur, and not adjudged at that time: But afterwards in the next Term adjudged, that the Proviso was not good, and that the Issue could not have it for the forfeiture, 1 Coke 86.

Dyotto versus Curredale.

A Ccompt. Supposing that he was his Receiver at London to render Account. The Defendant saith, That he received it at Litchfield to deliver over to J. S. which he had delivered absque hoc. That he was his Receiver at London, and it was thereupon demurred, and without Argument adjudged for the Plaintiff; for the place of the Receipt is not Traversable; for the Receipt is not local, but transitory, which matter may be given in evidence in any place. But if the Traverse had been absque hoc, that he received it in another manner, it had been well enough. Wherefore it was adjudged *ut supra*. (30) Ant. 184.

Howlet *versus* Osbourn.

(31)

Post. 884.

A Sumpsit. The Case was, that one delivered ten pound to the Defendant to deliver to the Plaintiff; and the Defendant promised the Plaintiff to pay it unto him: And upon this the Plaintiff brought his Action, and ruled, That it lies not. But Walmley said, If the Plaintiff had given a day for the payment thereof, it had been a good consideration.

Eylet *versus* Lane & Pers.

E [(32)]

Ante 372.
Post. 391.
1 Rol. 506.

Post. 392.

T Respass. It was found by special Verdict, That the Land was demisable in Fee, or in Tail by the Custom; and that this Land was demised in Tail by Copy, and that the Coppelholder suffered a Recovery in a Writ of Entry in the Post, with Voucher over; and that such Recoveries were not used there before: And whether this should bind the Estate Tail or no, was the question. And the Court upon motion thereof conceived, That it should be hard to warrant such Recoveries, unless there be an especial custom to maintain it; and it is hard to maintain it, for a Warranty cannot be annexed to such an Estate. Quære. But afterwards it was adjudged, That this Recovery being against the Tenant in Tail himself, was at the least a Discontinuance, as it is of a Recovery against Tenant in Tail in possession at the Common Law: But whether it were a Bar to the Intail, or not, they agreed not in opinion. But for the cause of the Discontinuance, Judgment was given for the Defendant.

Price *versus* Williams.

(33)

Co. 10. 12. 79. b

D Ebt as Executor to the Lady Price upon an Obligation: The Condition was for the payment annually of forty pound, during the life of the Lady at the Feast of St. Michael, and the Annunciation, or within thirty days after every of the said Feasts. The Lady dies within the thirty days: Whether this shall discharge the payment due at the said Feast before her death. And the Court held, that it did.

Termino Hillarii, 37 Eliz. in Camera Scaccarii.

Percy *versus* Bardolf.

ERror upon a Judgment given in the Queens Bench : Debt was brought against Baron and Feme, for the debt of the Feme. Upon an Obligation made by the Feme dum sola fuit, upon Non est factum pleaded, and found for the Plaintiff. Judgment was, That the Baron shall be in misericordia, and that the Feme capiatur : And this being assigned for Error, the Judgment was reversed; for it should be capiantur for both. 34 H. 6. 23. 15 Edw. 4. 2. 3 Edw. 4. 24. 4. Edw. 4. 25. 1 Hen. 7. 25. 9 H. 6. 9. 1 Cr. 407. 513.

Termino

Termino Paschæ,

Tricesimo septimo ELIZABETHÆ,
in Banco Reginae.

Dudley *versus* Kington.

(1)
Mo. 401.

DEbt upon an Obligation. The Condition was, That if the Plaintiff had, possessed, and enjoyed the Office of Bedleship of the Court of Conscience in London, That then, &c. The Defendant pleaded, Quod habuit, gavisus fuit & occupavit, &c. Whereupon they were at issue, and the Jury found that the Plaintiff did exercise and occupy that Office from the time of the Bond made, until that time: But whether it were an Office de Jure, they knew not, Et si super totam materiam videtur curiæ, that that should be said to be an having, possessing and enjoying of the Office, they found for the Defendant; otherwise for the Plaintiff. And Harris Serjeant hereupon moved, That this Verdict is for the Plaintiff. For this occupying of the Office cannot be said to be an having and enjoying thereof; for a Deputy may exercise an Office; yet he hath not any Office, as 39 H. 6. is; and to that opinion Gawdy inclined. For it ought to be an having in interest, and not only an Occupation which shall make a performance of the Condition: But Popham, Fenner and Clench e contra. For Fenner said there was a diversity betwixt an Office in verity, and an Office in reputation only; for an Office in reputation which is not revera, one cannot have any other possession than by the occupation thereof; and the occupying thereof, is all the enjoying which may be of it: For it is not an Office in Interest, but only in the name and use thereof. And therefore there cannot be any interest thereof but by the using it: As to have the Office of Marshal or Cryer before the Justices of Assise, or the like. Wherefore, &c. And afterwards Judgment was given accordingly for the Defendant.

Girland *versus* Sharp.

(2)
Co. Lt. 271.b.

TRespals. Upon Demurrer the Case was, That one infeoffed his two sons to the use of himself for life, and after to the use of them and their Heirs, Ad ultimam voluntatem suam perimplendam And afterwards devised it to Sharp, the Defendant, in Fee; and whether Sharp shall hereby have the Land, or not, was the question. Gawdy conceived, That he should not; for an Use cannot be limited upon an Use. Then when he limits it to the Use of his two sons, and their Heirs, he cannot afterwards limit it to the Uses of his last Will. But the words Ad performandum ultimam voluntatem, as to limit

limit any uses thereby, are void words; and to that opinion Clench agreed. But Fenner doubted thereof; wherefore it was adjourned.

Thinn versus Chomley, Trin 36 Eliz. Rot. 842.

DEbt. And declares, That he let certain Land to Agar for one (3) and twenty years, rendering annually at the Temple Church, Gould. 129, London, Thirty pound at Michaelmas, and the Annunciation, Et si con- 186. tingat, That the said Rent should be behind, and not paid at the Mo. 357. days, &c. That then the said Agar, his Executors and Assignes, should forfeit nomine poenæ, three shillings four pence for every day which should incur after such default, until the said Rent and Arrearages should be paid. That afterward upon 28 February, 32 Eliz. the said Agar granted his Estate to the Defendant; and that after the grant at Michaelmas, Anno 33 Eliz. the Rent was arrear, and not paid, and it was in arrear for five hundred seventy six days after. And that at another Rent-day it was in arrear, and not paid, and remained in arrear for twelve days. Wherefore he had forfeited, &c. Whereupon he demanded three hundred pound sixteen shillings and eight pence. The Defendant thereupon pleaded Nil debet, and it was found against him; and it was now moved in Arrest of Judgment, that this Action lies not against the Assignee; for this penalty is merely founded upon the Contract, which is in privity betwixt the Lessor and the Lessee, and it runs not with the Land. But Gawdy and Clench held that it well lay, for the Land is charged therewith, and the Assignee for his own time shall be chargeable. But Fenner held e contra, for the penalty is quasi collateral. Fenner also moved, That the Declaration was not good; for he is not entitled to the penalty, unless the Rent be demanded, no more than he should be to the Forfeiture of a Lease for non-payment. Co. 70. 28. b. Gawdy, it is not alike; for the Condition which goes in Defeasance of an Estate, shall be taken strictly; but the penalty is in nature of the Rent. And as he shall have the Rent it self without demand, so he shall have the penalty. And to that opinion Clench agreed, Popham absente. Wherefore it was adjourned.

Goodale versus Wyet, Hill. 37 Eliz. Rot. 805.

Ejectione firmæ for Lands in Alisbury: Upon a special Verdict the (4) case was, That Sir John Packington by Deed indented, infeoffed Co. 5. 95. b. of those Lands one Woodliff upon Condition, That if he paid to 1 Rol. 408. 21. the Heirs, Executors, or Administrators of Woodliff one hundred Marks within a year after his death; that then Charta prædicta & feilina superinde deliberata foret vacua & nullius effectus. Woodliff Infeoffs J. S. thereof, and dies, and within a year after his death, Sir John Packington agrees with the Heir of Woodliff for thirty and two pounds to be paid in satisfaction of the hundred Marks. Nevertheless at the day he paid unto him the one hundred Marks upon his promise beforehand, to re-deliver all unto him but the two and thirty pound, and the Heir then returned back unto him all but the two and thirty pound: And hereupon Sir John Packington entered upon J. S. who entered, and let it to the Plaintiff. Popham; although the one hundred Marks were intirely paid, and so the Condition was performed

Ant. 6. 7.
Co. Litt. 209. b

formed in words, yet circumstance will make it to be no payment nor performance in Law. For Payments ought to be plain and true: But here there is not any true Payment of more than thirty and two pound; for of the residue there was not any Payment; for he that paid it, may thereof have an Account against him who received it: And it is as no Payment, but quasi a Receipt to render an Account: And to that opinion Gawdy seemed to agree. Gawdy also held, that the money ought to have been paid here to the Assignee; for he is the party, who is to have the loss, and therefore he ought to have the Payment: And although he be not named, it is not material; and for that purpose Vide 6 Rich. 2. Quid juris clamat. Wherefore they advised the Jury to find this matter specially, and so they did; Quere tamen de ceo Perkins 148. And after argument it was adjudged accordingly for the Plaintiff for the reason before specified. Note, That afterwards a Writ of Error was brought upon this Judgment, and the Error was assigned in point of Law; and affirmed, that they were good words of a Condition, and that this Payment being Covenous, was no performance; 5 Co. 95. b

Hill *versus* Prideaux.

(5)

Trespas: For that he chased his Cattel In tantum ita quod per fugationem interierunt. The Defendant pleads, That the place where, &c. is holden of him by such services, and he distrained those Beasts, and impounded them in a Pound overt; and that they died there de fame in default of the Plaintiff, the which is the same Trespass. And it was thereupon demurred, and without Argument adjudged for the Plaintiff; for when the Plaintiff alledged, that in tantum effugavit, quod per effugationem interierunt; and he pleads, Quod fame interierunt, that is not any Plea without a Traverse, Quod per effugationem non interierunt.

Ant. 94.
Ant. 30.

Jinkinson *versus* Mayne.

(6)

Moor 401.
Ant. 62.
Post. 470.

Action for these words, The Plaintiff deserved to have his Ears nailed to the Pillory. Adjudged that the Action lies.

Smith *versus* Vanger Colgay.

(7)

Ant. 377.

Trespas by an Administrator De bonis asportatis in vita intestati. After Verdict it was moved in Arrest of Judgment, That this Action is not given by the Statute of 4 Ed. 3. but ruled without Argument, That the Action lay by the Equity of the Statute; for it is in equal mischief, 14 H. 7. 13 Accord.

Earl of Pembroke *versus* Sir Henry Berkley.

Pasc. 36. Eliz. Rot. 351.

(8)

Moor 706.
2 And. 20.
Co. 2. 71. b.
Poph. 116.
Gould. 130.
Post. 56.

Action upon the Case, for disturbing him to execute his Office; and upon Demurrer the case was, That the Earl of Pembroke was seised in Fee of the Manor of Froomwood in the County of

of Somerset, with the custody of the Forest of Fromeswood thereto appertaining (the Forest being the Queens) he granted by Indenture to Sir Maurice Berkley, Father to the Defendant; and to the Heirs males of his body, the Office of the Lieutenantship of the Forest, and the custody of a walk within the said Forest called Stavordale walk, with all Fees thereto appertaining. Provided, and the said Maurice Berkley doth covenant, promise and grant for him, his Heirs, &c. That the said Earl, &c. shall have the command of the Game there. Provided also, and the said M. B. doth further Covenant, not to fell or cut any wood, but for necessary Browse, &c. Sir Maurice Berkley dies, and afterwards Sir Henry Berkley being his Heir, enters and cuts down four Oaks, whereupon the Earl claimed it for the Condition broken. And whether it were a Condition, or but a Covenant, and whether it were broken, and if the Estate of Sir Henry Berkley by this act done, be determined and forfeited, were the questions. Tanfield and Atkinson argued that it was but a Covenant, and not a Condition; for the words are all the words of the Lessee, and there is not any restraint imposed by the Lessor; and being conjoyned by the Lessee with the Covenant, are only of the nature of a Covenant, and not conditional. But if it had been Provided always, and it is Covenanted, &c. there peradventure it might have been a Condition; for they be the words as well of the Lessor as of the Lessee; and in proof thereof relied upon 28 H. 8. 6. and 13. 3 & 4 Phil. & Mar. 150. Gravenors Case. 5 Eliz. 222, and 318. That the word Proviso being coupled with a Covenant, and being spoken by the Lessee only, do not amount to a Condition, but to a Covenant only. But Pasch. 33 Eliz. Rot. 709. in the Common Bench betwixt Symson and Totterel, where a Proviso was, And it is Covenanted and Granted that the Lessee shall not assign his term, it was adjudged to be a Condition for the reasons before; and here be not any words which shew the intent of the parties to make the Estate conditional; but rather e contra. For the first clearly is not any Condition, but a Covenant only. And of the same nature is the second, for that is provided also, &c. which is in the same manner; and although the words in the Indenture are quasi the words of both, yet are they properly the words of him who speaks them. Coke the Queens Attorney, and Williams Serjeant e contra. For this Proviso sounds as a Condition, because it stands substantive; and it is to restrain the doing of a thing: And it is also a Covenant of the breach whereof Damages shall be recovered; but admit it were not a Condition, yet the cutting down of the trees was a forfeiture of his Office, by a Condition in Law annexed thereto, whereof the Earl shall take advantage, and not the Queen, as 39 H. 6. is. Gawdy, this Proviso here is not any Condition; for a Proviso of it self in a Deed which hath not any perfect sentence annexed thereto, is neither a Condition nor a Covenant. For the Conclusion thereof shews how it should be taken, but this is matched here with the words of a Covenant; so that the words which make it to have any perfect sense rest only in Covenant; for if it should be taken by it self, it hath not any meaning, and then it cannot make it a Condition; the words also spoken by the Lessee only, shall never make a Condition; and to that opinion Clench agreed, Popham & Fenner e contra; for the Proviso here hath a perfect Conclusion, for the words that the Lessee shall not fell Trees, refer to the Proviso and to the Covenant; so it sounds as well to the Condition as to the

Ant. 202.

Ant. 242.

Ant. 202.
Post. 483.

Co. Lit. 233. b

Covenant; and it shall be as if there had been several sentences; and there is not any difference betwixt this and the Case of Symphon and Tytterell before recited. And Popham said, that if there were not here a Condition in fact, the Defendant had forfeited his Estate by a Condition in Law annexed thereto; and that forfeiture is to the Plaintiff. For it is a Condition annexed, that he shall preserve the Game; and when he destroys that which is for the preservation of them, he thereby breaks the Condition in Law; and although the Woodward may by his Office cut down Trees and not be punished, yet the Law shall punish a Keeper who offends therein. And as to that which hath been said, that if it be a forfeiture, it shall be to the Queen, of the entire Office, that is not so; for there is a difference when a man hath an Office, and grants the intire Office to another for life, and the Grantee breaks a Condition in Law, the intire Office is forfeited. But if a man hath another inferior Office derived out of his Office, but not any part of the principal Office, but appertaining thereto, and in his gift, the forfeiture of the inferior Office is given to the Grantor, and it shall not be a forfeiture of both Offices, which is the reason of the Case, 39 H. 6. of the Case of the Duke of Norff. Gawdy, I do not remember any Book, that the cutting down of Trees is the forfeiture of the Office of a Parker; for the Condition annexed to his Office, is but to preserve the Deer, and therefore 5 Ed. 4. if a stranger kills the Deer, it as a forfeiture of his Office: But clearly it is not so if the stranger cut down the Trees; and as this case is, it doth not appear to be any forfeiture; for although the Defendant hath cut down four Trees, yet it appears not but that there is sufficient left for Browle and shade for the Deer, and for covert for them, wherefore, &c. Adjournatur. And afterwards upon conference amongst all the Justices of England, it was held by the greater part of them to be a Condition, and adjudged accordingly. 2 Co. 71. postea Pasch 39. pl. 17.

Post. 360.

Portman *versus* Willis.

(9)
Gould. 129.
Moor 352.

E JEctione firmæ, upon a special Verdict it was found, That the Bishop of Winchester. 26 H. 8. let the Land to Robert Hill for 99 years. That Robert Hill 1554 being possessed of that Lease made his Will, and thereby devised divers Legacies of Plate and other Goods to others; And afterwards therein devised All the residue my Goods, my Debts and Legacies paid unto Margaret my Wife, whom I make my sole Executrix, to see my Will performed; and I make Henry Portman my Overseer. Robert dies, the Feme enters generally, and deviseth that Term to James Hill, and dieth before the Debts paid. James enters by the Executors assent, and was a Suitor to the Bishop of Winchester, that he might surrender it to the use of Symms and his Heirs, who agreed thereto; afterwards James Hill in the Court of the Mannor of Taunton (whereof this Land was parcel) surrendered it to the Steward there, to the use of Symms and his Heirs in perpetuum; and afterwards the Bishop agreed to that surrender, and let that Land to the Plaintiff, and the Defendant (as a servant to Symms) entered; Et si super totam materiam. The first point moved was, whether by the devise of Omnia bona, this Lease for years did pass; for it was moved, that it was intended only of chattels personal, but not of real, and in proof thereof 4 Ed. 6. grants

grants 51. was cited, where by the grant of Omnia bona, Leases do not pass. But Catalla comprehends as well real as personal, as Stanford 45. and the Law regards this diversity betwixt them; for the Writ of fieri facias and other Writs mention Bona & Catalla, which they would not do, if Bona comprehended both. Secondly, when the Feme entred generally, whether she shall be said to be in as Legatory, or as Executrix; for if she took it as Executrix, her devise thereof is void. Thirdly, whether this surrender into the hands of the Steward, to the use, &c. and the Lessor agreeing thereto, be a good surrender to extinguish the Term, although it be a void limitation of the use. Gawdy, by the grant of Omnia bona mobilia & immobilia, Leases for years pass: So likewise it is of the grant of Omnia bona in general, and 39 H. 6. 35. is that a man had Rent for years, and granted omnia bona sua: and it was held that this Rent passed, and 7 H. 4. is that an Executor shall have an Ejectione firmæ by the equity of the Statute of 4 Ed. 3. de bonis asportatis, &c. So the Law accounts of them as Goods. But Popham and Clench held, that 4 Ed. 6. is Law in this point, that by the grant of Omnia bona Leases pass not; but they conceived that in Wills, they may well pass. For it is a Legacy whereof the Civilans are Judges, and they hold that bona comprehends all Chattels: And we in this point ought to Judge according to their Law. For the second point Gawdy and Popham held, that she ought to have made her election before she had it as Legatory, especially as this Case is, it being given by the name of the Residue. So as she ought to have shewn that there was sufficient to satisfy all Debts and Legacies, over and besides that Lease, and that she would have it by the name of the Residue, and it is here found that she died before all the Debts of the Divisor were paid, so as she cannot have it as the Residue until they be paid or satisfied. For the third point, of the surrender they said little thereto, Gawdy only conceived that it was not any surrender; for it was never intended to surrender to extinguish it, but to grant it to an use, which if it takes not effect, it is void to all purposes to make a surrender. Et adjournatur.

Ant. 379.

Ant. 343.

Co. Lit. 218.b

May *versus* Alvares.

Assumpsit, and declares, whereas the Defendant was possessed de diversis bonis of the Plaintiff, that the Defendant in consideration the Plaintiff would forbear the Goods, promised to deliver them within six months, and alledgeth in fact that he did forbear them for six months, and that the Defendant had not yet delivered them, upon non assumpsit, pleaded and found for the Plaintiff, it was moved in arrest of Judgment. First, that there was not any consideration, for it is that he should forbear; and he doth not shew for what time, which is not any consideration; for so he might forbear but for a quarter of an hour, and although it be alledged, that he forbear for six months, That helps not the consideration alledged. Secondly, he doth not shew what Goods they were, and so incertain. But the Court held it to be well enough notwithstanding these exceptions, for as to the first, it is a sufficient consideration, that he forbear; and he ought to shew for what time he forbore it; and when the Defendant saith, that he would deliver them within six months, therein is implied, that the other should forbear them for six months, and therefore it is sufficiently shewn that he forbore them for six months. Secondly, there need not

(10)

2 Cr. 683.
Post. 459.
Ant. 380.

any certainty of the goods to be shewn, for he is not to recover them in specie, but damages, &c. wherefore it was adjudged for the Plaintiff.

Barton *versus* Lever & Brownlow, who were Recoverers for Sir Rich. Shutleworth, Pasch. 23 Eliz Rot. 396.

(11)
Poph. 100.
Moor 365.
2 Rol. 394.
Post. 420.

Error. The Case was, that R. Barton Tenant in Tail, levied an erroneous Fine in Septimo Elizab. and afterwards upon the decimo Martii, undecimo Eliz. (which was the first week in Lent) a Writ of entry was brought against the Conusee, returnable Die Lunæ quarta septimana quadragesima proxim' futur'. Et in die Lunæ quarta septimana quadragesimæ of the same Lent, the Conusee appeared and vouched R. B. who entred into the Warranty and vouched over, and so a Recovery was suffered: R. B. dies, the issue in Tail brings error to reverse the Fine; and this Recovery was pleaded in Bar; and it was thereupon demurred. Atkinson argued for the Defendant, that it was a good Bar to the Writ of Error. The first question was whether this entry into warranty, and so a voucher over, and so a Recovery had, be a Bar to the issue in Tail to have a Writ of Error of the Fine; and he held that it was. For by entering into warranty generally a man shall lose all Rights and all Actions which he hath to the Land, all Rents, all Conditions, and every other benefit which he may have thereto; and for that purpose 2 Ed. 2 voucher 208. and 7 Ed. 2. voucher, That Rent is gone by a general entry into warranty. So 3 Ed. 3. 51. 5 Ed. 3. 11. That a Condition is gone; so 50 Ed. 3. that his Action is gone although he would save it by protestation; and 13. Assise Plea, that a Baron by his entry into warranty with his Feme shall lose his own Action, 19 H. 6. By a partition betwixt Coparceners, the Writ of Error is gone. And although it were said that this Writ of Error is but only an examination of the Record, which is not gone by the entry into warranty; that is not so, for by his entry into the warranty, his Title to have restitution is gone; and if he should reverse that Fine, he is to have restitution; so by consequence the Land is demanded, which is gone by this entry into warranty, and voucher over. Secondly, whether this Recovery were good, or but voidable or merely void, which rested only whether these words proxim' futur' shall refer to the Lent after following, for if so, here is a Recovery suffered before the return of the Writ; and he held that it should refer to die Lunæ in quarta septimana in the same Lent and shall not refer to quadragesimæ although it were last mentioned. For Relatio shall not be ad proximum antecedens in all Cases; and in proof thereof vouched, 22 Ed. 3. and 28 H. 8. Boulds Case was cited to that purpose. Hutton e contra, to the first, he conceived it is not any Bar, because by the Fine he had neither jus in re nec ad rem, and then this intended recompence cannot go to this title in Tail which he had not; and to this Writ of Error the issue in Tail is entituled, and is not to be barred by any Act of his Ancestors. And therefore 2 and 3 Elizab. 188. Dyer, Tenant in tail releaseth Errors, and after is barred in a Writ of Error, it shall not bind the issue in Tail. F. N. B. 108. F. Tenant in Tail brings an Attaint and is nonsuited, yet the Issue shall have the Attaint, and here he hath not any right to the Land by the Fine levied with Proclamations, wherefore he cannot have any recompence in value to bar it. And there-
fore

foze 25 Eliz. it was adjudged in the Lord Norris's Case against Braybroch, that where Tenant in Tail was, remainder over in Tail to Lionel Norris, the Tenant in Tail suffered an erroneous recovery, and died without issue, Lionel in remainder was attainted of Treason, and all his Lands, Rights, Actions to Land, were given by Parliament to the Queen, and afterwards he was restored in blood. This title to have a Writ of Error was not thereby given to the Queen, for it was not an Action nor Right to the Land, but a cause to examine the Record, wherefore, &c. As to the second, he conceived that of necessity futur' ought to refer to quadragesima, and not to quarta septimana, and therefore there is an apparent fault in the Writ, and it is meerly void; for it is suffered by them who have not any day in Court; for they come in and suffer this recovery a year before the Writ is returnable; for the Writ bears Test in prima septimana quadragesimæ, and it is returnable, Die Lunæ quarta septimana quadragesimæ proxime futur', which words of necessity ought to refer to quadragesimæ, and not to Die Lunæ, nor to quarta septimana, for the rule is ad proximum antecedens fiat relatio, and in proof thereof relied upon 4 Ed. 3. 3. 16 Ed. 3. B. R. 652. 5 Eliz. 224. and 23 Eliz. 376. wherefore this Recovery is erroneous for this apparent fault in the Record, and so no bar of the Writ of Error. But afterwards the whole Court resolved for the Defendant in both points. For to the first, when Tenant in Tail levies an erroneous Fine, he hath yet a right in the Land, which by his entry into the Warrant, and receiving thereby an intended recompence in value is barred. For although Tenant in Tail cannot by Deed release Errors to bar the issue in Tail; for as he is entituled to the Land, so he is to the Writ of Error, which Tenant in Tail cannot release or extinguish no more than he can give the Land; yet as by Fine or Recovery, he may bar the Tail it self; so may he bar the Writ of Error, and here when he enters into the Warrant, and vouches over, and hath recompence, he is in by his Warrant of all Estates; and the recompence in value is a sufficient bar for all Estates and Rights; and as that shall be a bar for the Land it self, so shall it bar his Action also and give away all his right to the Land. And to the second matter they held that this recovery is not void nor erroneous. For these words proxim' futur' shall not be referred to quadragesima, but to Die Lunæ quarta septimana. For these words proxim' futur' being written in a short hand, are indifferent to which they shall be referred, and if it be construed proxima futura then it agrees well with quarta septimana, and if it be proximo futuro, then it agrees well with Die Lunæ, so in these two senses it may be construed, that the Recovery shall be good: But if it be proxime futuræ, then that refers to quadragesimæ, and the Recovery is void, for that it was a Judgment upon the voucher; and a recovery in value before the Writ was returned, which cannot be: We must then construe it in such a manner, ut res magis valeat quam pereat; and according to both their intendment, and according to what seemeth most likely. For it is not to be supposed that either the Plaintiff or Court intended, that the Writ which was sued for his benefit, should be made returnable a year after; the presidents also have been there viewed, whereof divers of them are in this manner, whereunto regard ought to be had, that they be not construed to be void and erroneous, when by any construction they may be made good. Wherefore,

Co. 3.2. a

1 Rol. 789.

fore, for these reasons in Mich. 37 and 38 Eliz. they all delivered their opinions absolutely for the Defendant. And Popham said he would have the Auditors and Students to observe these points agreed by the Court: First, that a Recovery had after an erroneous Fine, shall bar the issue in Tail, from having a Writ of Error to reverse that Fine: Secondly, that a Recovery, although erroneous, shall bar also a Writ of Error of the Fine until it be reversed. Thirdly, that a Recovery which is void, is not any Bar. Fourthly, that the Recovery here is not void nor erroneous, because the Writ shall be intended returnable the same Lent; wherefore, &c. But there was never any Judgment entered in this Case, because the parties were moved to compound.

Pearce *versus* Bacon.

(12)

Post. 531.

Ant. 353.

Action upon the Case for disturbing him in using his Common. And where *usitatum fuit, &c. infra manerium prædictum*. That every Copyholder within the Manor should have Common in such a waste of the Lords, for two sheep for every Acre of arable Land. And that the Defendant being Lord there, had digged holes and burroughs therein for Conies; and so had disturbed him of his Common. After not guilty pleaded and found for the Plaintiff, it was alledged in arrest of Judgment, that this prescription for a Copyholder against his Lord is not allowable. For every prescription by a Copyholder to have Common, ought to be that the Lord hath had for him and his Tenants, &c. so he cannot prescribe in this manner. But all the Court resolved that the prescription was good. For there is difference, where he prescribes against a stranger, there he ought to alledge the prescription in the Lord. But where he prescribes against the Lord himself, he ought to alledge it by way of usage, and although in ancient time, they were accounted only but as Tenants at will, and so might not prescribe against their Lord; yet now they be accounted in an high regard, and as well as they may prescribe for their Estate in the Land it self against the Lord; so may they do for collateral things for the benefit of their Estates, as common, &c. wherefore it was afterwards adjudged accordingly for the Plaintiff. V. 4. Co. 31. b.

Atkinson *versus* Atkinson.H(13)
Moor 402.

Ant. 238.

Detinue of goods. The Plaintiff had Judgment, and after the year the Plaintiff sued a *scire facias* to have execution; the Defendant pleaded that upon a Writ of *distringas* awarded to the Sheriff upon that Judgment, he delivered such Goods to the Sheriff; and for the residue that they were appraised at so much by an inquisition taken by the Sheriff; and that he delivered the money to the Sheriff; but he doth not aver this matter to be returned by the Sheriff; and hereupon exception was taken, that this was not a Plea to extort Execution upon such a surmise; and of that opinion at the first was Popham Chief Justice; for then by such a feined Plea, any one who hath Judgment to recover a Debt, shall never have execution. But Gawdy held that he very well may plead it, for otherwise the Defendant should be prejudiced; for he might have 20 several Executions served against him upon one Judgment; and he should be put to his remedy against the Sheriff only, who peradventure is not worth it; and it is a lesser mischief to enforce the Plaintiff, if his Plea be true, to take his Action for it against the Sheriff

Sheriff; and if it be not true, to take issue thereupon: afterward it being moved again, all the Court was of that opinion; whereupon he took issue accordingly, 44 Ed. 3. 18. 20 H. 6. 24. 21 H. 6. 5. 19 Ed. 3. Scire facias 120. and afterwards issue being joyned, the Jury found for the Plaintiff that the Goods were not delivered, but nothing concerning the payment; and it was held for that cause to be an ill Trial, and that the Plaintiff could not have Judgment for that which was found, but that he ought to try it de novo.

Clun versus Pease & Turner, Mich. 36 & 37 Eliz. rot. 1817.

TRespals. It was found by special Verdict, that the place where is parcel of the Mannor of Brettenham in Essex, and Cophhold Land demisable in Fee, in Tail, or for life; and that one Henry Smith was a Cophholder thereof in Tail, the Remainder to Edward Smith in Tail; and suffered a Recovery with Common voucher in a plaint in nature of a Writ of entry, in the Court of the Mannor (and that under it the Plaintiff claimed) and that afterwards he died without issue; and that the Defendant in right of Smith entered: And further they found, Quod nulla fuit consuetudo pro communibus recuperationibus ante usitat. within the said Mannor, Et si, &c. Warberton for the Defendant; It is first found expressly, that it is an Estate tail, and then it is not barred by this recovery. First, a Warranty cannot be annexed to a Cophhold: for he to whose use the surrender is made, is in by the Lord: And he who would have a Warranty, ought of necessity to be in by the party. Secondly, a Warranty is at the Common Law, and the Estate in the Land is by Cophhold and Custom; and therefore the Warranty cannot be annexed thereto. For those Estates be created, and they be Demesnes, and to be defeated by the Custom of the Mannor; and therefore there shall not be a Tenancy in Dower, nor by the courtesie of them without an especial Custom. Then without a Warranty there cannot be any voucher nor recovery in value; and without a recovery in value there cannot be any bar to the issue in Tail; wherefore, &c. Glanvil held, that it should bind. Writs of entry are allowable, be they with Title, or without Title; and there be ancient presidents, that there have been Recoveries there in nature of real Actions and Receipts, and other courses as at the Common Law. And the Lord Keeper who now is, about Twenty six years since purchased a Cophhold within the Mannor of Castobury in the County of Hert. which was entailed, and upon great advice he was to have a Recovery. And whereas it was said that Warranty cannot be annexed, true it is, it cannot be annexed at the time of the surrender, but it well may be by a Release or Confirmation afterwards. And admitting it could not be, yet none could counterplead it but the Vouchee; and if he enters willingly into the Warranty, that shall bind him when the Recovery is had, and if it be not good to bind in perpetuum, yet clearly it is a discontinuance, wherefore, &c. But all the Justices held that this Recovery should not bind the issue in Tail; for it shall not bind upon an expectancy of a Recovery in value, which is the reason that it binds for Land at the Common Law; and here he cannot have any Land in value, for he cannot have any Land at the Common Law; and he cannot have customary Land; for if it should be so conveyed, the Lord thereby should lose his Fine, and one should hold his Land as a Cophholder without admittance

(14)
Co. 4. 23. a
Post. 717.

Ante 372.
Ant. 380.
1 Rol. 506.

Ant. 386.
1 Rol. 506.

Ant. 380.

mittance or grant from the Lord, which is contrary to the nature of Copyhold, and contrary to the prescription, which is to hold by Copy, &c. But it is a discontinuance clearly, which cannot be defeated by entry; wherefore they gave day to speak to that point. But afterwards it was adjudged for the Plaintiff; but *quære* whether upon the principal matter or not, v. Hill. 37. placito 17.

Brown *versus* Foster, Mich. 36 & 37 Eliz. Rot. 2892.

(15)

R Eplevin. The Defendant avows for Damage-Feasant; the Plaintiff makes Title as Copy-holder, and shews that within the Mannor of A. time whereof, &c. *Talis habebatur & habetur consuetudo*, that any Copy-holder of the Mannor may surrender in any place within the Mannor, into the hands of two of the Copyhold Tenants, &c. and that there is another Custom, that if any surrender to the use of another, without expressing any Estate, that the Lord may grant it in Fee to him to whose use the surrender was made. And the Plaintiff by Copy (granted in this Mannor) made his claim; and the Defendant thereupon demurred. But note that the Defendant in his Avowry claimed by Copy granted by the Steward of the Mannor, but he doth not express the Stewards name. Williams for the Defendant moved, First, That the first custom is not well pleaded, for it is pleaded by usage and custom: But he doth not plead that ever it was put in ure in that manner, which ought to be alledged, 21 Ed. 4. 28. and 22 Ed. 48. and so it was held in this Court in Sir William Hattons Case, where it was pleaded, *Quod talis habebatur consuetudo*, within a Mannor, *Quod licebit feneschallo* to impose a Fine, &c. And the second Custom is unreasonable and void; for it is to limit and charge the Land with a greater Estate than the Copyholder gave, which is unreasonable, the Lord being but the person and means of conveying it, &c. Yelverton e contra, First the avowry is ill, because he claims by Copy granted by the Steward, and he doth not shew his name, which is issuable, And as to the Custom it is good and reasonable when a Copyholder surrenders and shews not any Estate, that the Lord may grant it in Fee to him to whom the surrender was made, for he is a Chancellor in his own Court to dispose thereof when the Tenant leaves it uncertain; and therefore it was ruled here betwixt Lippingwell and Bunting, that where a Copyholder bargained and sold his Copyhold (but he shewed not what Estate) and surrendered it to the use of the Bargainee, and the Lord granted it to the Bargainee in Fee, it was good, and the Bargainee should retain it in Fee, and of that opinion was the whole Court in this Case, that this Custom was good and allowable being used, so as when the Tenant doth not appoint the Estate of Cesty que use, that the Lord may, the Interest of the Land being betwixt the Lord and the Copyholder, it is not unreasonable that upon such an incertainty, the Lord should ascertain it; but for the Plea they held, that the first Custom was not well pleaded; for it is not sufficient to alledge a Custom that one might do such an Act, but that he used to do it, as to alledge *Dimissibile & dimissum*, &c. They also all agreed, that the not naming of the Steward made the Avowry to be ill; and then they held that the Avowry being ill, although the bar to the Avowry were ill, yet he cannot have return, whereupon the parties agreed to plead *denovo*, and so the matter in Law was not resolved.

Co. 4. 29. b.

Ardern

Arderin versus Darcy.

WAsTe. The Plaintiff prayed a Writ of Estreapment against the Tenant and his Servants. Anderson doubted, Whether it lay or no, because the Plaintiff is therein to recover his damages. But Walmsley and Beamond held clearly, that it well lies: For it may be the damages be more than the Tenant can recompence if he had destroyed the House and Woods; and they relied upon 4 Ed. 3. 32. 12 Rich. 2. Estreapment plac' ultimo, & N.B.R. 61. Which Authorities are directly, that an Estreapment lies in this Action. And Brownlow the Prothonotary said, that there was not any president as he remembred, that it had been awarded in a Writ of Waste; but he said he could shew presidents where it was awarded in a Writ of Entry sur deisin. And the Court said, they were all one; for there damages are recoverable: The Court also commanded them to search presidents, whether it lay against Servants, for they doubted thereof; but it was afterwards awarded.

(16)

Co.'s. 115. b
Post. 84.*Vaughan versus Beal.*

PROhibition being prayed for suing in the Spiritual Court, for the Tythes of Lands holden of the Queen in capite. It was now moved, that consultation should be awarded; for that there is not any cause to grant a Prohibition; for then he never should have any remedy for them: for if he may not sue for them in the Spiritual Court, he cannot sue for them here. And all the Court held, that a Prohibition lay not: For although N. B. R. 401. is, that a Prohibition lies in this Case, yet that is to be intended where it is sued in Chancery, where peradventure they may give remedy for the Tythes. But because they were informed, that there be the like Presidents in the Queens Bench, they said, they would further advise.

(17)

Hutchinson versus Lewson.

DEbt upon an Obligation conditioned. Whereas the Plaintiff was obliged in such Obligations for the Defendant, That if he were charged or molested in his body or goods for those Obligations, he would within a month satisfy him for it. The Defendant saith, That he had paid him such a sum for all his charges within a month: And it was thereupon demurred, and without Argument adjudged for the Plaintiff: For he ought to shew how the Plaintiff was molested, and that he had satisfied so much; or that he was not molested: As if one be obliged, that he shall make such assurance as the Plaintiffs Counsel shall devise. It is not sufficient to say, that he made such an Assurance; but he ought to say, that the Plaintiffs Counsel devised such an Assurance,

(18)

Ant. 253.

E e e

which

which he had made : Wherefore without further argument it was adjudged for the Plaintiff. Vide 5 Ed. 4. 8. 22 Ed. 4. 15. 35 Hen. 6. 10.

VVard *versus* Lambert, Hill. 35 Eliz. Rot. 34.

(19)
2 Rol. 783.
1 Vul. 132. 94.
Aut. 71. 166.

Co. 1. 176. a

Co. 7. 40.

UPon an especial Verdict the Case was, That one reciting by Indenture, that whereas J. S. was bound in a Recognisance and other Bonds for him ; now he for divers good considerations, bargained and sold the Lands to him and his Heirs : The Deed is inrolled within the six months, but it was found there was not any money paid. And whether this was a good bargain and sale, or not, was the question upon demurrer. Anderson : Every owner of Land may part with it as he pleaseth, if it be according to Law : And here it is not shewn that the bargain and sale was, because the Vendee was bound for him ; and if he were, yet it cannot be a good bargain and sale : But if there had been apt words, he might thereby have raised an use by way of Covenant, but clearly not a bargain and sale. Walmsley accord : In every bargain and sale there ought to be a Quid pro quo : But the Vendor here hath nothing for his Land, and therefore it is void, but it might have risen by way of Covenant ; but there ought to have been apt words (viz.) a Covenant to stand seised to uses : For if I give Land, or bargain or sell Land to my Son, no use ariseth thereby ; and to that opinion the other Justices inclined, That it is not good by way of bargain and sale, but that it had been a good consideration to raise an use by way of Covenant. Wherefore it was adjudged accordingly.

Anonymus.

(20)
1 Cr. 288.

Aut. 135.

Action upon the Case was brought for these words, Thou art forsworn, and I will make thee Flowre the Pillory, or else it shall cost me a hundred pound. Et per totam curiam, an Action lies not ; for Anderson said, there is a great difference betwixt the words forsworn and perjured. For forsworn is, where he swears against the truth in ordinary discourse ; but perjurium est quando jus alterius pervertitur, which is to be intended in a Judicial Proceeding : And this difference hath been allowed of, Quod curia concessit. But to say, He was forsworn in such a Court, or betwixt such parties, an Action lies. Wherefore it was adjudged for the Defendant.

Jackson *versus* Neal, Trin. 36 Eliz. Rot. 2987.

(21)

Ejectione firmæ ; It was found by special Verdict, That the Lord Hunsden was seised of the Mannor of Paris-Garden in the County of Surrey, wherein he divers Copyholds, and made a Lease to two of the Copyholds, and of the Court Baron for two thousand years, saving to himself the other Demesnes and Services. The Lessees kept Court there, and a Copyholder surrenders to the use of A. in

in Fee. A. obtains licence in Court to let it for one and twenty years, from Michaelmas last past: he makes a Lease afterward for one and twenty years to begin at Christmas following to the Plaintiff, who entred, and being ousted by the Defendant, brings an Ejectione firmæ. And whether this were a good grant by copy, and this Lease by the Copyholder allowable or not, was the question; and all the Court held, That it was a good Copy; for Anderson Ant. 103. said, this Case hath been often in question; for it was the Case of the Lord Batton for his Tenants of Wellingborough, and of divers others since that time. And it hath been oftentimes held, that the Court may well continue as to that purpose for admittance of Copyholders; for otherwise every one of his own act might destroy his Copyholders Estate. And secondly, they conceived that the Lease is not warranted by this License, and then no Ejectione firmæ Ant. 288. lies upon this Lease. Afterwards in Trin. 37 Eliz. Judgment was given for the Defendant upon this point of the Lease.

E e c 2

Termino

Termino Trinitatis,

Tricesimo septimo ELIZABETHÆ, in Banco Reginae.

Grenningham *versus* Ewer, Hill. 37 Eliz. Rot. 806.

(1)
1 Rol. 447.
Gould. 142.
Moor 395.
Poph. 98.
Post. 539.

DEbt upon an Obligation conditioned, That if the Defendant delivered unto the Plaintiff three Obligations, wherein the Plaintiff was obliged unto him, or sealed and delivered to the Plaintiff a Release of them, as should be devised by the Plaintiffs Counsel before Michaelmas, That then, &c. The Defendant pleads, that neither the Plaintiff nor his Counsel did devise any Release before Michaelmas. Judgment Si Actio, &c. And it was thereupon demurred. Gawdy held it to be a good Plea: For there is a Rule in Law, That the Conditions of Obligations are always for the benefit of the Obligor, and shall be expounded liberally for him; then there be two things to be done, viz. To deliver the Obligations, or to make a Release; and a Release cannot be made by the act of the Obligee, because he did not devise it: So by his act, part of it becoming impossible to be performed; the Law shall discharge him of the other part; and it may be he had lost the Obligations, so as they might not be delivered: And the intent of both, was but only to have them discharged, which may be by a Release made. Wherefore, &c. Clench: Without doubt he ought to do the one, or the other, or at least-wise to offer himself to the Obligee, that he is ready to make the Release, so as there be not any default in him; for he ought to do the first Act: For it may be, the Obligee would have required him to have made the Release, and he would not be found; so he by his own act would have avoided the Obligation, which is not reasonable. Fenner accord: First, it is plain if both things rest in the power of the Obligor to perform, he may perform the one or the other at his Election; and if before the day of performance, it becomes impossible to perform the one thing or the other, by the act of the Obligee or of God, that he is discharged of the Obligation; and so it was adjudged 4 Edw. 6. in Bendlows Report; although it becomes impossible by the act of God. But here the Obligor hath not election to do the one, or the other; but he hath power of himself to do the one thing, viz. to deliver the Obligations; and of the other by a contingent act to be done by the Obligee at the election of the Obligee, if he will advise it: But soasmuch as the Obligee hath not advised it, the Obligor is now bound to deliver the Obligation; the non-performance whereof is a forfeiture of the Obligation. Popham accord: If it were dis-junctive and absolute to perform

Post. 399.

form the one or the other at the election of the Defendant; and one part afterwards becomes impossible to be performed by the act of the Obligee, the Obligation shall thereby be discharged; but it is not here dis-junctive at the first: But upon a possibility afterwards, it may come to be dis-junctive, viz. If the Obligee devise the Release; the which devise not being made, the Condition is single and absolute, to deliver the Obligations: As if A. were obliged to Infeoff me of certain Land, or upon the return of B. from Rome to pay me twenty pound; if B. never returns, yet he shall Infeoff me. And it is clear, if the second part of the Condition had been, That he should make me such a Release, as J. S. a stranger should devise, and he did not devise any, that the Obligor ought to have performed the first part of the Condition. But here because the Obligee himself did not devise the Release, the question is, whether he shall have advantage of the Obligation? and I conceive it to be all one with the case of 4 H. 7. If one be obliged to Infeoff me of such Land, or to marry A. S. before such a day, and a stranger marries A. S. before the day, yet he ought to make the Feoffment: But if the Obligee married with A. S. before the day, the Obligation is discharged. The reason there is, because there is an absolute dis-junctive Condition at the first; and when the Obligee himself dispenseth with the one, the Obligation is discharged. But here it is but a simple Condition, without the act subsequent of the Obligee. Which act not being done, the Obligation remains always on the one part to be performed; which not being performed, it is forfeited. Wherefore, &c. Residuum, Hill. 36 Eliz. placito 1.

Collet & Marsh. Quod vide antea Hill. 37 Eliz. B. R.
Plac. 14.

It was now moved again; and Gawdy held it to be erroneous, (2)
and that it might well be assigned for Error: For against any
thing done or returned by the Sheriff as an Officer, there may
be an Averment, as 6 & 7 Eliz. Dyer 234. A Bishop certified, That
he offered the Oath to an Ecclesiastical person, according to the
Statute of 1 Eliz. cap. An Averment may well lie against it, that
he did not offer it: So if a Bishop certifies a refusal of the pay-
ment of Tythes, yet an Averment lies against it; and the Sta-
tute of 31 Eliz. is, That the Summons shall be made at the
Church-door and returned: So it is in the Copulative, That the
Proclamation of the Summons shall be made and returned;
and it is not sufficient to be returned, for then the Statute is of
little purpose: But all the other Justices, e contra. For at the
Common Law, if the Sheriff returned the party summoned,
where he was not; and thereupon a Grand Cape was awarded, there
was not any remedy, but a Writ of Deceit, and not Error; for
the Justices ought to credit the Officers, and it is not any Error
in them to award a Grand Cape. So here, forasmuch as it is of
Record before them, That the party was summoned according to
the Statute, they are bound to award a Grand Cape, and no Error
in them. And this Statute doth not intend to give other remedy
than was at the Common Law for the Tenant: And it is not
reason, that this awarding of a Grand Cape, upon this Summons
returned, and default recorded, should be said to be erroneous in
the

the Court. Wherefore the Judgment was affirmed. But Popham and Fenner conceived in this Case, That the party might have a Writ of Deceit, if the Proclamation of Summons were not made according to the Statute; for now he is not summoned according to Law. But Clench and Gawdy e contra, because it is a good Summons by the Summoners upon the Land. Wherefore, &c.

Day *versus* Austin, Hill. 37 Eliz. Rot. 295.

(3)

DEbt for Rent upon a Lease for years. The Defendant pleads; That before the Lease, a Judgment was given in debt against the Plaintiff, at the suit of J. S. and afterwards he made this Lease; and afterwards, this Land was extended and delivered in Execution by Elegit. Before which Extent, there was nothing in arrear; and it was thereupon demurred, and without Argument adjudged to be a good Plea.

Stroud *versus* Marshall.

(4)
Post. 622.

Co. Lit. 247. b
F.N.Br. 202. d.

DEbt upon an Obligation. The Defendant pleads, That at the time of the Obligation made, he was De non sane memory. And it was thereupon demurred, and adjudged to be no Plea; for he cannot save himself by such a Plea, and the opinion of Fitz-Herbert held to be no Law. Wherefore it was adjudged for the Plaintiff.

Eaton & Monox *versus* Laughter, Trin. 36 Eliz.
Rot. 407.

(5.)
Moor 357.
Poph. 98.
Co. 5. 21. 2.

DEbt upon an Obligation of Four hundred pounds conditioned, That if one Rainsford aliened his Wives Lands; if then during her life, he purchased other Lands of as good title and annual value to his wife and her Heirs; or do or shall leave her by his last Will so much in value, by making her his Executrix, or in a Legacy; that then, &c. The Defendant pleads, That the Feme was dead, and that Rainsford is yet alive. The Plaintiff by Replication for breach, shews the time of the death of the Feme; and that the said Rainsford, neither in her life, nor since her death had purchased Land of such a value; and it was thereupon demurred. Atkinson and Coke argued for the Defendant, That the Obligation was not broken; for it is in the disjunctive, that he shall leave so much to his Wife by his Will, or purchase Lands, &c. And the first is become impossible to do by the Act of God: Therefore he is discharged of both; and in proof thereof, they relied upon 15 Hen. 7. 2. 2 Edw. 4. 2. 16 Hen. 6. Action upon the Case 44 & 9 Eliz. 262. The other part is also impossible to perform according to the Condition viz. To purchase Lands to the Wife and her Heirs, the Wife being dead, and the purchase need not to be made to the Heir: For the Heir is not named, but to take by way of Limitation, and not otherwise; as in Bret and Rigdens Case. And if it ought to be made to the Heir, yet the Obligation is not forfeited; for Rainsford is yet alive, and hath time, during his life, to perform it. Hutton and Tanfield e contra. Although

Liml. Sect. 352.

though the Defendant hath a dis-junctive Condition, he ought to perform the one, or the other at his peril; and so is ^{21 Edw. 3. 29.} And although the Husband had time, during all his life, to perform it, yet it ought to be done, during his Wives life, for otherwise the Obligation is forfeited. As to infeoff, to reinfcoff the Feoffer, ^{Co. Lit. 219. b} he at his peril ought to do it, during the Life of the Feoffer; for that the time being uncertain, he ought to perform it: But if there had been a certain time to do the one thing or the other, and it is become impossible by a subsequent Act, That the one of them should be performed before the day, he is discharged of both. And Hutton cited a Case, Mich. 35 & 36 Eliz. Rot. 1227. One Glens Case to be adjudged in the Common Bench; where A. promised to B. That if C. did not appear at Westminster such a day, that he would pay unto him twenty pound; and pleads that C. died before the day, and ruled to be no Plea; for he ought yet to have payed the twenty pound. So 18 Eliz. in Justice Rhodes Reports, Barbers Case in the Common Bench; That where one was obliged that A. should appear the first day of the ensuing Term in the Star-Chamber, or otherwise he would pay twenty pound. A. dies before the day, so as by the act of God he could not appear: Yet it was ruled, that the twenty pound should be paid, or otherwise the Obligation should be forfeited; and Mich. ^{Ant. 277.} 34 & 35 Eliz. in the Common Bench, this Case was betwixt Trop and Bedingfield. A. was obliged in One hundred pound upon Condition, That he should stand to the Award of J. S. if he made any before the Feast of M. or otherwise at the said Feast of M. to be at such a place; so as he might be arrested at the suit of the Obligee, or else to pay twenty pound at the said Feast of M. No Arbitrament was made before M. A. died, and the twenty pound was not paid at M. ^{Post. 864.} It was adjudged that the Obligation was forfeited. Popham: It cannot be so as you put the Case: But if it were that he should appear, or that he should appear there; or otherwise that he should pay twenty pound, and he died before the day, yet the twenty pound ought to be paid. For there is not any dis-junctive Condition, that he should do one of the two things at any time before: But until Michaelmas he is obliged only to appear; and if he appears not, then comes the second Condition to have his essence, viz. to pay the twenty pound; so it is not to be paid, but upon the Non-performance of the other. And afterwards in the principal Case, all the Justices resolved, That the Obligation was not forfeited: For by the express words of the Condition, it is limited to Rainford to perform it at any time during his life; and the impossibility thereof cometh by the act of God, which shall not turn the Obligor to any prejudice: So as now, being prevented of part of the time, he is discharged from performing it. But when the Law appoints a man time to do a thing, during his life, he ought at his peril see it be performed, otherwise the Obligation is for- ^{Ant. 395.} feited. And when a man hath election to do one thing or another before a certain time, and by the act of God it is become impossible that he should perform the one, the Law shall privilege him for the other, that he shall not forfeit any Obligation by the non-performance thereof. And so Fenner said it was adjudged in 4 Ed. 6. in Benlows Report. And they all (besides Gawdy) held that the Obligation was forever discharged. But Gawdy conceived, that the Obligation was not yet forfeited, but that he ought, during

during his life, to purchase Lands to the Heir of his wife, otherwise the Obligation should be forfeited; but the other Justices were against him in that point. Wherefore it was adjudged for the Defendant. 5 Co. 21. b. 22.

Welcome *versus* Gryll, Mich. 36 & 37 Eliz.

Rot. 354.

(6)
Moor 366:
Gould. 124.

1 Cr. 463.

Error upon a Judgment in the Common Bench; the Error assigned was, For that a Writ of Debt was brought by Thomas Welcome; and the Judgment entered, Quod prædictus Johannes Welcome recuperet, &c. where it should have been Thomas. And it was prayed, That it might be amended; for it was but a Mistake and Mistake of the Clerk. Sed non allocatur. But the Judgment was reversed.

Meggs *versus* Griffith.

(7)
Moor 408.
Gould. 138.

Post. 645.

Action for these words, One told me, that he heard say, that Mistress Meggs had poisoned her Husband: Ubi revera nullus dixit, &c. And upon Not-guilty pleaded, it was found for the Plaintiff; and now alleged in Arrest of Judgment, that an Action lies not for these words; for it is but a Report of an Hear-say, which cannot be any discredit; but notwithstanding it was adjudged for the Plaintiff. For it is a great Defamation, and is a cause of drawing her name and life in examination. Wherefore, &c.

Howel *versus* Williams, Pasch. 36 Eliz.

Rot. 333.

(8)
F. N. Br. 207.

Error upon a Judgment in a Writ of Entry ad communem legem; The Error was assigned, in that it was not shewn in the Count, That the Tenant by the Courtesie (who aliened) was dead: For otherwise this Writ lies not, but the Writ of Entry in consimili casu, sed non allocatur. For although this Action lies not in the life of Tenant by the Courtesie, so that if he be alive, the Plaintiff hath not any cause of Action; yet it shall be so intended, especially when the Tenant hath pleaded thereto, and admitted it, and if he were alive, the Tenant ought to have alleged it. Wherefore the Judgment was affirmed.

Sir Humphrey Ferrers and others *versus* Wignall,

Hill. 37. Eliz. Rot. 848.

(9)

Trespas, as Executor of Edward Holt, for the taking of an Dr. The Defendant justifies as servant to John Arden, for that Sir John St. Leger was seised of the Mannor of Bardesley, within which Mannor is such a Custom, that every Tenant of a Messuage within

within the Mannor, dying seised thereof should pay an Harriot (viz. his best beast) and that the Lord might seise it; and that one John Holt was Tenant of a messuage within the Mannor; and that Sir John Saint Leger infeoffed of that Mannor one Corbert and Lewson to the use of the said John Arden, and that afterwards the said John Holt died seised of that Messuage which descended cuidam Edvardo Holt, and that he died seised, being possessed of that Or; thereupon he as servant to the said John Arden, and by his command took it as an Harriot, &c. And it was thereupon demurred. First, for that he entitles John Arden to the Mannor as a Purchasor, viz. by Feoffment, and sheweth not the Attornment of John Holt the Tenant, whose services are demanded; for otherwise he cannot entitle him to the services of that Tenant; and although a man may plead the Feoffment of a Mannor; and that by force thereof, he was seised of that Mannor, without shewing the Attornment of the Tenants (for it is necessarily to be intended, as Livery, without pleading it) yet when he will entitle himself to the services of any particular Tenant, he ought expressly to shew his Attornment. Sed non allocatur; for the Court said there was not any difference in the pleading of the one case more then of the other; but that the Attornment may be well intended; and if he did not Attorn, the other ought to have pleaded it; and they all here agreed, that by the Feoffment of the Mannor, the services passed not without an express Attornment; but that may well be intended in the pleading if the contrary be not shewn. Another exception was taken, for that he pleads this Messuage to descend Cuidam Edvardo Holt, and doth not say prædicto Edvardo Holt testatori; So it shall be intended to a strange person, and then the Plea is not good, sed non allocatur; for he justifies the taking after the death of Edw. Holt the Testator and to him it shall be intended to be referred, and not to any other; wherefore without any great argument, it was adjudged for the Defendant.

Co. 8. 82. b.
Yelv. 135.

Yelverton *versus* Yelverton, Hill. 35. Eliz. rot. 272.

UPON Demurrer the Case was: The father covenanted by Indenture in consideration of natural affection, to stand seised of all his Lands which he had, and which he afterward should purchase, to the use of himself for life, and after to his youngest son and his heirs; afterwards he purchased Land and died; and whether the eldest or youngest son should have it, was the question. Bacon argued for the youngest son that he should have it, for this covenant shews his intent expressly, and is to work in futuro, and therefore good enough; as if a man deviseeth Lands which he hath not, and after purchaseth them; so if one covenants that he will purchase Lands before Mich. and that before Easter following he will levy a Fine of those Lands which shall be to such uses; and he levies a Fine and doth not limit any uses, it shall be according to the covenant before the purchase, Quod fuit concessum per curiam, for they shall be as uses declared upon that Fine whereof he shewed his intent before. But in the principal case all the Court held, that this covenant vests nothing in the younger son, and is not sufficient to vest any use in him of this Land; for a man cannot by a

(10)
Noy 19.
2 Rol. 790. 1.
Moor 342.

Post 423. 493.

covenant raise an use out of Land which he hath not; for no more then a man may charge, let, or grant a thing which he hath not; no more may he limit an use out of Land which he hath not. Also upon every Feoffment or purchase, the Feoffor or Donor from whom the Land passeth, is to limit the uses to the Feoffee or purchaser; then before the purchase one cannot limit how the use shall be, viz. that it shall be to his youngest son, where the Feoffor hath limited it to the use of him and his heirs, which should be to limit an use out of an use which the Law will not suffer; therefore judgment was given accordingly for the eldest son; and here a case was cited in 20 Eliz. (but neither the name, nor in what Court were mentioned) that a Morgager intreated a stranger to redeem the Land at the day, and covenanted by Indenture that after such redemption the stranger should have the Land to him and his heirs; and that he in consideration of such a sum would stand seised to the use of him and his heirs; the stranger redeems the Land at the day; the Morgager enters, the Deed is enrolled within the six months, yet ruled that nothing passed, because he had not any estate or interest therein at that time to contract for it.

Beswick *versus* Cunden Hill. 35 Eliz. rot. 493.

(11)
Mo. 353.
Post. 520.

F. N. B. 124.
Co. 5. 101. a.

Action upon the Case, for that the Defendant levied a Damnum in such a River such a day, whereby it surrounded the Land of J. S. who afterwards Infeoffed the Plaintiff thereof; and that the Defendant adhuc malitiose custodivit the said Damnum, whereby the Plaintiffs Land is surrounded. Upon this Declaration it was demurred in Law. Pelham, the Action is not maintainable, in regard the Plaintiff had not any thing in the Land at the time of the nuisance erected, and there is not any new thing done to his injury; and in proof thereof cited 4 Aff. 3. 2 H. 4. 11. 18 Ed. 2. Aff. 374. But the case in 14 and 15 Eliz. Dyer 319. is good Law; for there the Lady Brown made a new nuisance by every turning of the Cock, for which she was punishable, although she made it not at the first; but here the Land was surrounded by the levying of the damnum, and continued surrounded. So the first nuisance continues till this present; and therefore the Feoffee shall not have his Action. Foster *e contra*, The Action is not brought for the levying of the Damnum, but for the continuing thereof from such a day to such, which was after the Plaintiffs purchase: And Fitz. N. Br. 11. That the heir of the Feoffee shall have it against the Feoffee of him who levied it; and in Pasch. 25 Eliz. It was adjudged in this Court in Rolfs Case, where one erected an house so neer to anothers, that the rain descended from the new house, &c. And the heir brought an Action upon the Case for the nuisance made by building the house in his fathers time, and recovered by Judgment. Gawdy, the Action is well brought for continuing of the first nuisance, but not for the levying thereof, and therefore the Action is well brought for the keeping it up in his time, and not for the levying thereof. Popham, there will be a difference when there is not any profit remaining unto him, to whom the nuisance is levied. Then it is cleer that none shall have the Action but he to whom it was done; as if I have pot-

pot-water running from a River to my home, and T. S. stops it in his Land before it comes to my Land, and I die, or make a Feoffment over, my heir or Feoffee have not any remedy for this Tort made before their time. But where any profit remains which comes to the Heir or Feoffee after the nuisance done; there for so much of the profit as is come unto them, and is taken from them by the continuing of the nuisance, they shall have their Action; then here by the levying of the Dam, the inheritance of him to whom it was leased, is not taken away, but although his Land be surrounded, some profit remained unto him which he hath conveyed to the Feoffee, which being taken from him by the continuance of the nuisance, it is reason that the Feoffee should have his Action: And therefore if one levies a Bank in a River, whereby part of my Land is surrounded, and afterwards I make a Feoffment of my Land to J. S. and afterwards another part is surrounded by reason of that Bank, he shall have an Assise of nuisance, Quod fuit concessum; so here for that the Land of the Feoffee grew a malo ad pejus de die in diem, by reason of the inundation made by this Dam, it is reason the Feoffee should have his Action. The same Law is for a non fealsance, viz. for not repairing of a Bank, where, &c. Clench and Fenner e contra, Because the Tort before made is extinguished by the Feoffment, and there is not any thing done since the Feoffment which the Feoffee could punish; wherefore, &c. But afterwards in Mich. 37 and 38 Eliz. being moved again, all the Justices agreed, that the Action was well brought; wherefore it was adjudged accordingly for the Plaintiff. Ant. 191.
Post 520.

Brook *versus* Watson.

Action upon the Case and declares, Whereas he was an Alderman and a Merchant in York, and had always kept a true Debt book, that the Defendant spake of him these words, He is a false Knave and keepeth a false Debt-book, for he chargeth me with the receipt of a piece of Velvet, which is false. After not guilty pleaded and found for the Plaintiff, it was moved in Arrest of Judgment that an Action lay not for those words. Hubert for the Plaintiff moved that the Action was maintainable, because they touch him in his Trade of living, for in a Merchant fidelity in his trade is requisite; for he many times buys and sells his wares upon trust; but all the Justices held that the Action lay not. For, for the first words, He is a false knave, It is clear that an Action lieth not. And for the second part, That he keepeth a false Debt-book, it is not actionable, for it is not any discredit unto him; for it may be his servant keepeth it or that somewhat might by oversight be mis-entred therein. And it is not of necessity that every Merchant should have a Debt-book; and by that discredit there is not any discredit to his trade, as to say of a Counsellor, That he mis-enters the name of his Client in his book, viz. the Plaintiff for the Defendant, is not any cause of Action; but to say, That a Counsellor gives ill counsel, or that a Merchant is a bankrupt, an Action lies, because it toucheth them in their profession. Popham also said, That the Action was not maintainable; because the Defendant spake only of a grievance unto himself by that false Entry, and not in general words (12)
Moor 409.

words to discredit him ; for if he had said to others, Take heed how you deal with him, for he keepeth a false book ; then peradventure an Action would lie, because he drew other customers from him, therefore it was adjudged for the Defendant.

Stringar *versus* Stanlack, Hill. 37 Eliz. rot. 325.

(13)

False Imprisonment. For that he took and imprisoned him for the space of an hour ; the Defendant pleaded that a Capias ad satisfaciendum at the suit of J. S. issued to the Sheriff of Wilts against the Plaintiff, who made his warrant to the Defendant to Arrest the Plaintiff, whereupon he by vertue thereof Arrested the Plaintiff. Et hoc, &c. The Plaintiff replies, that after the Writ of Execution Awarded, and before the Caption and Imprisonment, he satisfied the Sheriff of the moneys, &c. whereupon the Sheriff made his Warrant directed to all his Bailiffs, &c. that they should surcease the Execution ; and that he delivered it to the Plaintiff, and that the Defendant Arrested him, and presently after the Arrest he shewed unto him this discharge, and yet notwithstanding he detained him in prison for the space of an hour ; the Defendant rejoyns that he was illiterate, and presently after the delivery of the Warrant of Superedeas from the Sheriff, he went to a literate man to know the effect thereof, and in the interim detained him in prison, and as soon as he was informed of the contents thereof, he set him at large ; and it was thereupon demurred ; for it was said, that he taking upon him the Office to be a Bailiff, ought not to be ignorant thereof, or what he is to do ; and that pretence of ignorance shall not excuse him, but at his peril he is to take notice of this discharge, &c. Fenner ; When he is once taken by force of a Capias ad satisfaciendum, the Sheriff himself could not have discharged the prisoner without offence to the Law, although he had received the monies ; for the Writ is Capias ad satisfaciendum, ita quod habeas Corpus ejus, &c. So although he pays the money, yet the Sheriff ought not to discharge him ; and if he do, he is chargeable with an Escape ; wherefore his Warrant is no Warrant to the Bailiff after he was once Arrested, to discharge him ; and the Defendant did well, and no Tort in detaining of him ; and of that opinion was Popham Chief Justice ; but Gawdy and Clench held, that in regard it was but a Writ of Execution, and to have the money in Court, he having received the money, ought not to have Arrested the party ; and if he hath Arrested him, might well discharge him. V. 33 H. 6. 48. per Danby 13 H. 7. 16. 21 H. 7. 23. But as to the point of the Bailiffs ignorance they delivered not any opinion ; but Fenner held that he well might take time to be informed thereof, and he is not compellable to take notice of it ; but Popham doubted thereof. Gawdy then moved an Exception to the Replication ; for it is that after this Warrant of Superedeas from the Sheriff delivered unto him, he detained him in prison, and so complains of the Tortious imprisonment ; but speaks nothing of his caption, whereof he complained in his Declaration ; so there is a manifest departure as to it ; for it maintains not his Count ; and so for this cause only it was adjudged for the Defendant.

Ant. 9.
2 Cr. 180.

2 Vul. 94.

Peter Caryes Case.

Peter Carye was Indicted for drawing his Sword in Aula Westmon. (14)
 sedentibus curiis, and in disturbing the Sheriff in making an Arrest upon one T. by force of a Bill of Midd. And being arraigned and found guilty, had judgment of perpetual imprisonment, and to pay a hundred pound to the Queen. And Note, upon the Evidence it appeared to be upon the Stairs ascending the Court of Wards, and so out of the view of the Courts. But Popham said, although it were out of the view of the Courts, yet if the Indictment had been as it ought to have been (and as we have precedent thereof in Ed 4.) viz. Coram Domina Regina, the Judgment should have been, that his right hand should have been cut off, and that he should forfeit all his Lands and Chattels, and have perpetual imprisonment. 3 Inst. 140.

Gray *versus* Fletcher, Hill. 37 Eliz. rot. 601.

Replevin; The Defendant justifies for Damage Fesant; The Plaintiff claims common in the place where, &c. and issue thereupon; and the Jury found the prescription. But further (15)
 found that he and all those whose Estate, &c. had used, &c. to pay for the said Common every year, an Hen and five Eggs; and if, &c. They prayed the discretion of the Court; and it was thereupon moved, that it was found against the Plaintiff, for it is not found as he alledged; for he alledged it as absolute, and it is found conditionally, viz. if he paid for it, &c. Popham, I was of Counsel with a Devonshire case, where a man prescribed to have Pot-water out of a River, and issue thereupon, and found that he used to have it, paying six pence by the year, and adjudged that it was found against him who prescribed; but that is not like to this case, for there was a condition Executory every year with the prescription, and therefore it ought to be intirely alledged. But here it is a thing collateral from the prescription, and the prescription is perfect without alledging it; wherefore it is well enough found for the Plaintiff; and Gawdy said, that if the Hen and Eggs were not paid, in this case he might distrain the Plaintiffs beasts going upon the Common, although it were upon his own Land; Quod Popham concessit; wherefore it was adjudged for the Plaintiff, 26 H. 8. 5. V. 5. Co. 76. b. Post 415. Co. 9. 78. Post 546.

Wilcocks *versus* Watson, Hill. 37 Eliz. rot. 1011.

Debt upon an obligation against him as Executor of A. the Defendant pleads plene administravit, and issue thereupon, the (16)
 Jury find a special Verdict, that A. made E. his Executrix, and died possessed of divers goods, which E. made a fraudulent gift of all her goods to J. S. &c. and continued in the possession of them, and Mo. 396.

Post 565.

1 Cr. 89.

and took the Defendant to husband and died; that the Defendant is possessed of part of those goods to the value of, &c. and payed Legacies; and if those goods should be found to be Assets in his hands, they found for the Plaintiff; and if, &c. for the Defendant. Fenner held that they should not be Assets; for although being but fraudulent, it shall be said to be a void gift against the Donor and Creditor, and so liable to his Debt; yet it is good betwixt the Donor and Donee; and shall not be said Assets in the hands of any but the Donor or Donee; but here the husband is a meer stranger thereto; wherefore, &c. But all the other Justices e contra, for they by the Common Law (the gift being fraudulent) are liable to the Plaintiffs Execution: And Popham said, if the gift were good against all but Creditors (as it is) then they belong to the Donee, and in his hands are liable to this Debt; and if the gift be void, they remain to the Executors of the Feme; and then the Baron having taken them and payed Legacies, is chargeable by reason thereof, as Executor de son tort demesne. And so those goods Quacung; via data, are liable to this Debt in whosoever hands they come, unless by title paramount, or by sale bona fide; wherefore it was adjudged for the Plaintiff.

VWheeler versus Collier, Hill. 37 Eliz.

(17)
Moor. 419.

2 Cr. 110.

Hob. 68.

Ant. 91: 102.

A Sumpsit: And declares that the Baron of the Defendant was indebted to the Plaintiff in fifty pound for Beer, and died intestate, and Administration, &c. was committed to the Defendant; and that afterwards the Defendant in consideration that the Plaintiff would deliver unto her six barrells of Beer, assumed to pay to the Plaintiff as well the fifty pound due by the Intestate, as for the six barrells delivered unto her self; and that he there upon had delivered to the Defendant six barrells of Beer, &c. And after non Assumpsit pleaded and found for the Plaintiff, and intire Damages Assessed, as well for the one Debt as for the other; it was moved in Arrest of Judgment, that the Plaintiff should not recover, because for the Intestates Debt, the Judgment should be against the Defendant de bonis testatoris, and for the Beer delivered unto her self de bonis propriis, and therefore the Plaintiff ought not to have joyned them in one Action, or at least wise, that damages ought to have been severed by the Verdict. Popham, it is clear that one cannot joyn in one Action an Assumpsit of the Testator, and an Assumpsit of the Defendant for his own Debt; but here the Defendant assumed for the Debt of the Intestate and her own Debt; and if several Judgments be to be given, it is cleer that there ought to have been several Actions brought for them. And I conceive that several Judgments shall be given, viz. for the Intestates Debt, if he hath, &c. Et si non, de bonis propriis; For, if Judgment should be given de propriis bonis generally, then she notwithstanding she had no more goods of the Intestates then to satisfy that Debt, should be bound to pay Legacies, and that payment should not excuse her, which is not reasonable; but all the other Justices e contra, because this Action is brought against her of her own Assumpsit; the Judgment shall be general in both cases de bonis propriis; for it is a charge by her own Act; yet if it had been

been de bonis Testatoris, She should have paid it to them, and it should have been allowed unto her; and here by her Assumpsit as Administratrix, it is become her own proper Debt, as if she had entred into an obligation: wherefore, &c. afterwards, Mich. 37 & 38. It was adjudged for the Plaintiff.

Bateman *versus* Spring, Hill. 37. Eliz. rot. 363.

Assumpsit in London: The Defendant pleads a concord in Suff. of all matters, trespasses, &c. but in London, Absque hoc that he assumed in London; the Plaintiff maintains his Declaration and Traverses the concord, and it was thereupon demurred; and after Argument it was adjudged to be a good Travers; for otherwise by a false plea a man should make all actions transitory to be local, which is against Law; and of that opinion was the whole Court; wherefore it was adjudged for the Plaintiff.

(18)
Ant. 99.
Co. Litt. 282. b.

Termino Trinitatis 37 Eliz. in Communi Banco.

Christopher Baker *versus* Searle,

Hill. 37 Eliz. rot. 1144.

Ejectione firmæ: Upon not guilty pleaded, a special Verdict was found that Edw. E. of Bedford was seised in tail of the Rectory of D. & de decimis inde, &c. (which are the Tithes in question) and let it to John Willet and his Assigns for the lives of Christopher Baker, Joan Baker his Feme, and Christopher W. And that the said John Willet Demised the said Rectory and Tithes to one Danbury and his heirs, to the use of Christopher Baker the Plaintiff for eighty nine years, if any of the cesty q. vies should so long live, Virtute cujus dimissionis idem querens fuit possessionatus; until the Defendant entred, &c. And it was hereupon moved for the Defendant. First, That the Verdict was not good for the Plaintiff, because he doth not shew the beginning of the Estate tail, which is the particular Estate: and that the Court held to be an aparant fault; Also he doth not aver the life of the Tenant in tail: So the Lease of the Tithes which consists in grant was determined by his death. As also for that the use is not limited to B. but for years only; so the remainder of the use is in Danb. and the life of Danb. is not averred; And if he be dead, Christopher Baker the Plaintiff is in as an occupant, and then no Ejectione firmæ lies in the case; but the Court held clearly, That there is not any use limited but for the years, because the residue of the Estate is in W: the Grantor and not in Danb. And it is all one as to this purpose, with a Feoffment to the use of one for life; the use for the residue of the Estate is in the Feoffor. And clearly there cannot be any occupancy, because it is granted to D. and his heirs, which excludes the occupancy. Another Exception was taken by Walmsley, for that he saith, virtute cujus dimissionis, where he comes in by the limitation of an use;

(19)
Ant. 118.

Co. Litt. 44. b
2 Cr. 112.
2 Rol. 446.
Post. 440.

Post. 442;
Ant. 131. 2.

use, so it ought to have been *Et virtute Statuti*, &c. And this was held to be an apparent fault in substance and not in form; wherefore it was adjudged for the Defendant.

Mathewson *versus* Lydiate.

(20)
Post 470. 546.
2 Rot. 30.
Co. 5. 22. 3.

2 Rot. 30.

DEbt was brought upon a Charter party Indenture: The Case was such; Indentures were made betwixt the Master and three others of a Ship on the one part, and G. Lydiate and six other Merchants on the other part, whereby the Owners of the Ship Covenanted with the Merchants to Ship such Merchandises to such a Port beyond Seas; and to recarry from the said Port, certain other Merchandises to some Port in London, whereby every of the Merchants Covenanted severally to pay for every Tun brought to London, to any Port there, Thirty shillings, and if they made default in payment, to pay Three pound for every Tun, and for Twenty Tun brought to a Port at London, and not paying Thirty shillings for every Tun he demanded Sixty pound. The Defendant pleads that the Seal of one of the Merchants was debrused from the Deed, and it was thereupon demurred. Glanvil, This Deed is several for every of them; and although the Seal of one of them is debrused, it is not material; for it remains good against the others, and it is not like to the Case, 3. H. 7. 5. for there the Obligation is joynt and several. And this case is common in London, for they Covenanted severally; and when any one of them have performed his part, the manner is to pull off his Seal, and then the Deed is Cancel'd against him, and remains good against the others. And this very point was adjudged before Daniel Serjeant in London; and afterwards Debt was brought thereupon in this Court, and the Plaintiff recovered (which Daniel being present affirmed, and that he adjudged it upon conference with some of the Justices) but in the principal Case the Record was viewed, and it appears that he alledged, that he brought the Merchandize to Ratcliffe within the County of Middlesex, and so he hath not shewn that it was brought to a Port in London, and although Ratcliffe is one of the Ports of London, yet it is not so averred, wherefore without regard to the matter in Law, it was adjudged for the Defendant. V. 5. Co. 22. b. V. Post Hill. 38. C. B. placito 22.

Snelling *versus* Norton.

DEbt against him as Administrator to one Norton upon an Obligation; the Defendant shews the Custom of London to be, that if a Contract be made by a Citizen to pay money to another Citizen; and he who made the Contract dies, that his Executors or Administrators shall be chargeable therewith, as if it were upon an Obligation; and shews further how the intestate was indebted upon a Contract to one A. who had recovered against him; and that he had *Riens ouster en ses manes*, &c. And it was thereupon demurred. Glanvil moved that this Custom was not good; for first it is against Law that an Executor or Administrator should be charged upon a simple Contract. Secondly it is against Law, that a stranger should be barred of his Debt upon speciality, by reason of a Debt upon a simple Contract; wherefore, &c. *Daniel e contra*. The Custom was always to bind the Executors or Administrators to pay Debts upon Contracts; and Customs in London are confirmed by Parliament, and are now as strong as a Statute. And therefore in London they prescribe to give Land in Mortmain, which is against Statute Law; and there is not any Custom but that it deprives, and is against the Common Law in some point. And this Custom is reasonable; for a Debt upon a Contract is as well due as a Debt upon an Obligation; and therefore there is as great reason for the payment of the one, as of the other, although the Law hath given a greater prerogative, viz. a priority of paying the one, rather than to the other; And although it might seem hard to have allowed this Custom in this Court, if it had been originally pleaded here, yet when the Custom hath been executed against the Administrator by the Laws of the City, whereto he is subject, it would be mischievous unto him to be disallowed it here. For then he should be twice charged without remedy; and this difference is taken in 1 Edw. 4. 8. Owen Justice, the Custom is reasonable; for the Executor in Conscience is bound to pay Debt upon a Contract as well as upon speciality. And such a matter was about four years since in this Court, but not adjudged; and of that opinion were the other Justices, especially as this Case is, being executed against him, who is liable and chargeable by the Customs of London; and afterwards in Mich. 37 and 38 Eliz. it was moved again: and another exception taken, for that the Custom cannot be to bind the Administrator, because he begins to be chargeable by the Statute of 31 Ed. 3. and no Action lay against him at the Common Law; but it was denied *per totam Curiam*; for an Administrator was chargeable; and to be sued at the Common Law; but he might not sue; and the Statute was but in affirmance of the Common Law; and they were sued as Executors at the Common Law. And so it is 19 Ed. 3. Covenant 24. And

(21)

Co. s. 82. b.

Post 843.

Co. s. 82. b.

Ogg

the

Co. 5. 82. b.

2 Cr. 35.
Post 658.

the Case of 8 Eliz. 274. That an Action lies not against them at the Common Law, is not Law in this point. The Plaintiff would then had been Non-suited, Sed non potuit (for as much as two of the Justices had delivered their opinion) no more then after a verdict; wherefore it was adjudged for the Defendant, 5 Co. 82. b.

Termino

Termino Michaelis.

Tricesimo septimo & tricesimo octavo
ELIZABETHÆ,
in Banco Regina.

Vicary *versus* Farthing.

T Respass. The parties were at Issue, and at the tryal by Nisi prius in the County of Devon, to prove the Nonage of the Plaintiff at the time of the Lease made (which he would avoid) a Church Book was given in evidence, and after the Juries departure from the Bar, and before they had agreed upon their verdict, the Plaintiffs Solicitor delivered to the Jurors the said Church book: and afterwards they found for the Plaintiff; and all this matter being examined before Walmley Justice of Assise there, he returned this verdict, and all this matter upon the postea. And now for this cause it was moved by Serjeant Heale, that Judgment should be stayed, and in proof thereof cited, 11 H. 4. 18. 35 H. 6. Examination 17. 14 H. 7. 2. And also one Medcalfs Case which was in the Common Bench, Anno 34 Eliz where a witness examined gave evidence to a Jury; and afterwards one of the Jury when they were conferring upon their verdict, called him to recite his evidence again, which he did, and affirmed upon his Oath upon his examination, that he did not speak more or less then before; and yet this matter being returned upon the postea, it was resolved that no Judgment should be given upon that verdict; and Hugh Wiatt said that in this Queens time it was ruled in one Pickering's Case, That where Letters Patents were given in evidence to the Jury, and afterwards when they were conferring upon their verdict, the Plaintiff without the Courts direction delivered unto them the said Letters Patents, which were given in evidence, that Judgment was for this cause stayed upon the verdict. Gawdy and Popham denied that Case; but Gawdy said, that as this Case is, the Justice of Assise might have refused this verdict. And it is also clear, that Writings or Books which are not under Seal, cannot be delivered to the Jurors without the assent of both parties, but being delivered by the Court without the assent of the parties, neither of the parties can avoid the verdict, in regard they were given in evidence before; and the Court had given direction to the Jury concerning their validity, especially being evidences in writing, which cannot be altered, nor by intendment cannot induce the Jury further to their verdict, then the shewing of them in Court had done before; but

(1)
Moor. 451.
1 Rol. 715.

Post 616.
Ant. 189.
2 Rol. 715.

Co. Lit. 227.b.

2 Rol. 715.

Medcalfs Case might well be, because it being but evidence by parol, the witness might peradventure alter his Testimony before given, by a greater intorcement, or otherwise, then he said before (although upon his examination he would not confess so much) which peradventure was the cause to move the Jury to give their verdict, wherefore it shall be a good cause to stay the Judgment, and of that opinion were Popham and Clench. For otherwise it would be very mischievous to the party for whom this verdict passed, if the delivery of evidence by the contrary party, or peradventure by a stranger, without his privy, should stay his Judgment, which is the reason that eating and drinking by a Juror (unless it be at the costs of the party for whom the verdict pass) shall not avoid the verdict. But Fenner e contra, because there might be some matter in this book to induce them otherwise then they intended before; and because it was delivered on his part, for whom the verdict passed; wherefore it was adjourned; but afterwards in Trin. 38 Eliz. it was adjudged for the Plaintiff.

Co. Lit. 227. b

Courtier *versus* Barret and Sampson, Hill. 36. Rot. 496.

(2)

Error upon a Judgment in the Common Bench in a Replevin; the Defendant avows for Damage Feasant; the parties were at Issue, and the Plaintiff was Non-suited after evidence; and the Jury assessed Damages for the avowant, and now the Plaintiff brings Error, and assigns for Error a discontinuance, for that the Plaintiff declared in Michaelmas Term, and the Defendant imparled until Hillary Term, and from Hillary Term till Easter Term; and there is not any continuance; and then the Plaintiff declared again, (as the manner there is) and the Defendant pleads thereto, and Issue there joyned; it was moved that this now was not to be assigned for Error, because it is after verdict, and so aided by the Statute of Jeofails. But it was ruled by the whole Court, that it was not aided; for here the Plaintiff being Non-suited, there is not any verdict given; but in that whereof the Jury are to enquire of Damages, their verdict is but an office of Inquest, and no verdict whereof, &c. And it was cited to be here adjudged so betwixt Busty and Ireland. Secondly, it was moved, that here was not any discontinuance; for the second Declaration is a new declaration of it self, and doth not refer to the first, and there ought not to be any continuance of the first. For it is not an Alias prout patet, &c. so it cannot be intended to refer to a former; but it was thereto answered, that it is not the manner to make such entries in the Common Bench; yet it may be well intended to refer to the former proceedings; wherefore they sent for two of the Prothonotaries of the Common Bench, who came and informed the Court that their course was not to make an alias prout patet, but to make all their Declarations de novo, and yet they referred to the first Record; wherefore for this discontinuance the Judgment was reversed.

Post. 416:

Hoc *versus* Taylor, Pasc. 37 Eliz. Rot. 369.

ERror upon a Judgment in the Common Bench in Trespass, for cutting down underwood. The Defendant Justifies by reason of a Lease of the Land made unto him by J. S. for years, the Plaintiff shews that the said J. S. was seised of the Mannor of Milford, whereof that place, &c. And that the underwood growing in the place where, &c. had time whereof, &c. been demised by Copy, and that the said J. S. before the Lease to the Defendant, granted unto him, and his Heirs by Copy, &c. the underwood therefrom time to time growing; to be cut down by the Plaintiff and his Heirs, quolibet anno, four or five acres annuatim, &c. Whereupon he was thereof seised, secundum consuetudinem, &c. until the Defendant entered and made the Trespass; and thereupon the Defendant Demurred in Law; and after argument, it was there adjudged for the Plaintiff; and now was assigned for Error. First that underwood growing cannot be demised by Copy; for here the soyle it self is not let, but only the underwood annually growing, which was agreed by the Court, that the Land it self here was not demised by the Copy. Secondly, that notwithstanding this grant to the Lessee, that the Lessor might well cut down the underwood, for it is but in nature of the grant of Estovers, where the Grantor may take Trees with the Grantee: But the Court resolved for the Plaintiff, that the Action was maintainable; for this underwood is a thing of Inheritance and perpetuity; for after every cutting down, they will grow again from the stubs; and so may be well demised in Fee by Copy; and as Estovers might be granted in Fee, so might this also. And Fenner said that he knew a Market within the mannor of Crookehorne in the County of Somerset to be demised by Copy; and it was said here that Sir John Bourne's Case was adjudged, that a grant of Tythes by Copy was good. They also held that the Grantor here could not meddle with the Woods, nor his Lessee, for he hath intirely granted the underwood, and not Estovers, or so many loads of Wood; wherefore the Judgment was affirmed. V. 4. Co. 30.

(3)

Mo. 375.

Co. 4 30. b.

Co. Lit. 48. b.

1 Rol. 498.

Co. 4. 31. b.

Post. 814.

Co. Litt. 272. 2.

Sir Christopher Blunts Case.

IN an Information upon an Intrusion by the Queen against Sir Christopher Blunt, a Juroz was challenged for not sufficiency of Freehold; and by the examination of the Juroz it appeared that he had Freehold of the value only of Fifteen shillings per annum, Yet it was ruled by the Court that he had sufficient to pass on that Jury; for at the Common Law, if a Juroz had any Freehold it was sufficient. But by the Statute of Primo Henry 5. he ought to have Forty shillings per annum, and by the Statute of 27 Eliz. he ought to have four pound per annum, where the Damages exceeded forty marks per annum. But the Statutes speak only betwixt party and party, which extends not to the Queen; wherefore the Juroz was sworn, but it was ruled that he ought to have some Freehold; and therefore one who had not any Freehold was there challenged and withdrawn.

(4)

Hardy

Hardy *versus* Seyer, Pasch. 37 Eliz. Rot. 254.

(5)
 Popham 99.
 Owen 107.
 Gould 179.
 1 Rol 410.
 Moor 400.

E Jectiōe firmæ; upon a special verdict the Case was, a Lease was made to a Widow for Forty years, Sub hac tamen conditione quod si tam diu vixerit sola & inhabitaverit, within the said house: the Widow continues unmarried in the said house all her life time; and dies within the forty years, and whether the Term was determined was the question betwixt the Executor of the Widow, and him in reversion. For if those words were a Condition meerly, and not a limitation, the Term remains; for she performed it during all her life, untill it became impossible by the Act of God, which shall not turn to her prejudice; but if it were a limitation, if she should so long inhabit therein, it is otherwise. Gawdy, Clench and Popham held that the words Sub conditione. quod si &c. are void words, for they are insensible, and be neither limitation nor Condition; for all Conditions shall be taken strictly, and no words shall be supplied by Intendment to make a Condition to devest or to destroy an Estate; and it is no more here then that a man makes a Lease for years rendring Rent, Sub Conditione. quod si, &c. The Rent be not paid, and says no more, which is without sence; for it may be intended that he should forfeit a pain, or that the Lessor should re-enter, which is uncertain; and every quod si ought to be answered with the words quod tunc, thereby to make the intention of the parties full, what shall be done; for otherwise we cannot Judge of their intention; for it may be they intended that then she should forfeit a penalty, or parcel of the Term, or part of the profits. And for this incertainty it is void and of none effect; and the Lease is absolute; but if the words were that the Lease was for Forty years if she so long live unmarried, and inhabited therein; Popham held it to be a limitation, and to determine the Lease by her marriage or death, so that she cannot inhabit therein; and so Bromley affirmed was the intent of the parties, and the truth of the Case; and that it was mistaken in drawing the verdict; for the words Sub hac conditione quod were not in the Lease. But Fenner held that the words Sub conditione are full enough to make a Condition of Re-entry without any other, and supplies the defect subsequent; and are a Condition and not a limitation; and that this Condition is well performed, and the Lease remains absolute; wherefore it was adjudged for the Plaintiff.

Co. 5. 9. b.

Evington *versus* Brimston, Trin. 36 Eliz. Rot. 86.

(6)
 Moor. 356.
 2 Rol. 83.
 2 Cr. 382.

T Respals of his Beasts taking. The Defendant Justifies as a distress for an Amercement in a Leet in Spalding, because he left his gate open ad Nocumentum Inhabitantium, &c. Et per totam Curiam is not a Nuisance inquirable; for it is a private Injury, and the amercement thereof ill; And Judgment given for the Plaintiff.

Buskin *versus* Edmunds, Trin. 37 Eliz. Rot. 628.

DEbt upon Demurrer. The Case was, that A. let Lands to B. in the County of Bucks, rendering Rent at the Receipt of the Royal Exchange in London; and for non-payment a re-entry. The Rent was not demanded nor tendered at the day, the Lessor entered; and whether his entry were congeable or not without demand, was the Question. Gawdy held that it was; for being reserved out of the Land, there needed not any demand, as the Abbot of Hydes Case is, and in 16 Eliz. Dyer in the Bishop of Exeters Case, where Issue was taken upon the Tender, which proves that a demand is not requisite; but all the other Justices held that there ought to be a demand at the place where it is payable; for it remains yet a rent, which in its nature is demandable by him who would have it; and they said that so it hath been adjudged before these times. Wherefore it was afterwards adjudged accordingly, that the Entry of the Lessor was not lawfull; Postea, Mich. 40. & 41. B. R. p. 33.

(7)
1 Rol. 459.
Moor 408.
Post 636.

1 Rol. 459.
Ant. 167.
2 Rot. 420.
Co. Lit. 202.2.

Boraston *versus* Hay, Trin. 36 Eliz. Rot. 1101.

TRespals. The Defendant pleaded that the Land was Copyhold Land, parcell of the Mannor of Abberley in the County of Worcester; and that the Custome there is that if a Copyholder in Fee hath a Wife at the time of his death, and two sons or more, that the Wife shall have that Land during her life as a Frank bank. And that if the eldest son dies, living the Wife, although he hath Issue, his Issue shall not have it, but the second son; and shews that Robert Boraston Grandfather to the Plaintiff was a Copyholder of that Mannor, and died before his Wife, having Issue the Plaintiffs Father, and one John Boraston his second son; that the Wife held her self in her Freebank; and that the eldest son died, living the Wife; and that afterwards John Boraston the younger son was admitted, and surrendered to the Defendants use, &c. and Issue was taken upon this prescription; and the Jury found the Custome as before, and that the younger son should have it, unless the eldest son was admitted thereto, as to the reversion, or made Fine for it with the Lord in his life time. Et si super totam materiam, &c. the Court shall adjudge the Defendant guilty; they found the Defendant guilty; if otherwise, not Guilty; and upon this verdict it was moved by Tanfield, that it was found for the Plaintiff; for the Custome is not found in that manner as he pleaded it; and therefore it is found against him who pleaded it; for he pleaded a general Custome without exception; and the Custome found is with an exception and special; and of that opinion were all the Justices, that the Custome found, is not the Custome put in Issue; wherefore it is found against the Defendant, as the Case in 2 Eliz. Dier 192. where a Custome was pleaded, that a Feme should have it during her life; and it was found that she should have it durante viduitate onely; afterwards Popham said, it is a Common Case, that if there be a prescription to have Common, for all his Beasts, and it is

(8)

Moor. 359.
Ant. 408.
Post 546.

is found, that he ought to have Common for all his Beasts, Levant and Couchant. It is found against him who pleaded it; and Fenner was of opinion to give Judgment presently for the Plaintiff; but it was then moved that here was not any verdict found upon this Issue; for they concluded their verdict, li &c. They found the Defendant guilty, if otherwise, not guilty, &c. And so there is not any conclusion of the point in Issue; and of that opinion were all the Justices upon view of the Record; and that for this Cause it was insufficient and a gross fault; whereupon a venire facias de novo was awarded.

Warner *versus* Winch, Pasc. 37. Eliz. Rot. 53.

(9)

Ant. 412.
Post 507.
2 Cr. 537.

Error of a Judgment in Debt in the Common Bench. The Error assigned was, that the Plaintiff declares for a Debt upon an Action of Twenty pound; and after imparlance declares de novo, and therein demanded a Debt of Eighteen pound; and had Judgment to recover; and it was held to be erroneous, for that there were but one Original and two declarations, and the one varying from the other: and therefore it was adjudged here Mich. 36 and 37 Eliz. where in Debt upon an Obligation dated 1 Maii. The second Declaration was upon an Obligation dated 2 Maii, and thereupon Judgment, that it should be reversed: Whereupon the Judgment here was afterwards reversed.

Goodwin *versus* Grudge.

(10)

Post. 706.

Error upon a Judgment in Debt, where the Judgment was affirmed, it was held by all the Justices, and so the Clerks said was their usage; that the Defendant in the Writ of Error shall have Execution presently without a Scire facias, although the year and day be passed since the first Judgment. Vid. 15 H. 7. 5.

Badcock *versus* Atkins.

(11)

Post 429.

Action for these words, Thy Father (Innuendo the Plaintiff) hath stolen six sheep. The Defendant justifies, and Issue taken thereupon, and found for the Plaintiff; and it was alledged in arrest of Judgment, that the Declaration was not certain nor sufficient to shew that he spake those words of the Plaintiff. For it is not averred that he spake them to the Plaintiff's son, nor that the Plaintiff's son was there present; and then it cannot be intended of the Plaintiff; and the Innuendo will not help this incertainty. And although the Defendant hath admitted it by his Plea: yet that shall never help a Declaration which is defective in substance: but if it were defective in form only, as by leaving out the place where a thing was done, or by pleading a collateral Plea, that may be made good, as 18 Ed. 4. 16. and 6 Ed. 4. 2. and of that opinion were all the Justices (besides Gawdy) that the Declaration was not good; for it cannot be intended to be spoken of the Plaintiff more then of any other person, unless it had been averred

red, that his son was there present: and although the Defendant by his Plea confesseth, that he intended them of the Plaintiff, yet that shall not help the Declaration which is insufficient. But Gawdy e contra: because it shall be intended, that the Plaintiffs son was there, for otherwise he could not have said, Thy Father. But notwithstanding it was adjudged for the Defendant.

Sale Lessee of Nevel (who claimed to be Lord Latimer) Plaintiff *versus* Barrington.

Ejectione firmæ. The Defendant pleaded not guilty, and after issue joyned, the Queen sent a special Writ to the Court, reciting how the Defendant was Tenant in Tail with divers Remainders over; the Reversion to the Queen, and that her Reversion might be prejudiced by this tryal: Wherefore it was commanded them not to proceed to the Tryal of this issue Regina in-consulta. And it was thereupon much disputed, whether this Writ were allowable or not; because it is a Personal Action only, wherein it appears not how the Queen can be prejudiced; for it may be the Plaintiff claims his Lease under the Queens title. It was also objected, That in regard the Defendant is Tenant in Tail, with divers Remainders over; the Reversion to the Queen, it is a very remote cause to have aid. By the Statutes also of 2 Edw. 3. cap. 8. & 11 Rich. 2 cap. 10. Justice ought not to be hindered by the Kings Writ, either under the Great or Petit Seal; and therefore this Writ shall not be any cause of delaying this suit. But Coke the Queens Attorney said, That this was not to delay Justice or hinder right, but to do right; for it is neither Law nor Justice, that the Queen should be prejudiced in her Inheritance without being made privy, which ought to be by Aid-Prayer. And when the Defendant will not pray in aid, this Writ is in nature thereof to inform the Court how it concerns the Queen, and to inhibit the proceedings until, &c. For if the Court be informed by Pleading, that it concerns the Queen in her Inheritance, they Ex Officio ought to stay it until the Queen be consulted, &c. And when they do not, she may by Law enforce them by her Writ; and that such a Writ hath been awarded, appears by Fitz. N. Br. 154. 21 Edw. 3. 44. & 31. Edw. 3. Saver Default 27. But these are in Real Actions, yet it may also be in Personal Actions, where the Queens title appears to come in question; and so is 2 Rich. 3. 13. And although he be Tenant in Tail, Remainder over who is impleaded, yet it is all one; for Tenant in Tail shall have aid of the Queen, but not of a common person, as appears 10 H. 7. 20. & 38 Ed. 3. 14. And that this is allowable in a Personal Action after Issue, as well as Aid-Prayer shall be allowed, stands upon one Reason, and is one Law; and so it hath been put in ure. And Mich. 34 & 35 Eliz. in the Common Bench in an Ejectione firmæ, by one Blofield for Lands, parcel of the possessions of the Earl of Arundel, after issue such a Writ was awarded as is here, and by advice of all the Justices was allowed. And it was held by all the Justices here, That this
(12)
Moor 421.
1 Rol. 159.
1 Rol. 167.
Co. Lit. 269.
Moor 843.
Writ

What ought to be obeyed. For as much as it appears unto them (although this tryal is but in a personal Action) That the Queen may be prejudiced in her Title. And by the Writ, there is a Recital of a Title in the Queen; and that this tryal is prejudicial thereto, which is not reason to be tryed *Regina Inconsulta*. And her tryal of Right is to be discussed in Chancery, where the Queens Records are to prove her Title. Wherefore it is not reason we should proceed without a *Procedendo*; and so they all held. Whereupon they said, it were fitting, that the Plaintiff should procure a *Procedendo*, Wherefore, &c.

Paramour *versus* Varrold, Mich. 35 & 36 Eliz. rot. 26.

(13)
Moor 340.
Poph. 101.

Ant. 92.

FAux Imprisonment in London The Defendant pleaded a Recovery against the Plaintiff in Debt, in Sandwich Court in Kent by custom, and by force of a *Capias ad satisfaciendum* awarded there, he took and imprisoned him at Sandwich; Absque hoc, That he is guilty in London. The Plaintiff for Replication saith, That he imprisoned him in London, Prout, &c. Absque hoc quod habetur aliquod tale Recordum, & hoc paratus est verificare per Recordum illud, &c. And thereupon the Defendant demurred in Law: First, Because he takes a *Craverle* upon a *Craverle*, where he ought to have maintained his Declaration; as 1 Hen. 7. 21. Secondly, Because he avers, Quod non habetur aliquod tale Recordum, & hoc paratus est verificare per Recordum illud, which is a meer contrariety; for he therein confesseth, that there is such a Record, which is the express case, in 9 Hen. 7. where it is alledged and held to be Error, And all the Court for the first held clearly, that the Plea is good; for otherwise, every Defendant by a false Plea might draw a *Transitory* Action in what place he would, and might make the place and day alledged material; which the Law will not suffer, but will rather suffer the Plaintiff to *Craverle* such a false Plea without maintaining his Action. And so are the Books of 10 Edw. 4. 2. 12 Edw. 4. 6. 43 Edw. 3. 23. For the second point, Gawdy and Fenner held the Replication to be ill; for it is meerly contrary and repugnant to say, That there is no such Record, and that he would aver it by the same Record, and that this is matter of substance which needs not be expressed upon Demurrer: For no Plea is good without an *Averment*, but it is a meer *Plugation*, and the Court shall not have any regard thereto; if the party will not aver it: And a void *Averment* is as no *Averment*, and so this Plea is ill. Popham and Clench e contra in this point. For although the *Averment* be void and contrariant in this case, yet the Plea is here good without an *Averment*; for it is a Plea in the Negative, and need no other *Averment*, but to say, Et hoc petit quod inquiratur, &c. And then the other shall say, Habetur tale Recordum, & hoc paratus est verificare per Recordum. And then the Defendant shall joyn with him, Et prædictus defendens similiter, &c. But then Pelham for the Defendant shewed, That this Action is by

by Original Writ, wherein the Trespass is supposed, 1 May, 2 Cr. 664. 34 Eliz. And in the Declaration the Trespass is supposed to be 20 May, 34 Eliz. So the Writ supposeth the Trespass to be done before it was in truth done; as appears by the Declaration. And for this cause it was held by the whole Court to be ill, and adjudged accordingly.

Marvin *versus* Maynard.

Action upon the Case. Whereas he was seised of the Mannor of Upton Gray, that the Defendant to slander his Title, spake these words, Mr. Marvin (innuendo the Plaintiff) hath not any Title to Upton, (innuendo Upton Gray) Upon not guilty pleaded, it was found for the Plaintiff, and now moved in Arrest of Judgment. First, Because he doth not shew what Estate he had therein; For it may be that he hath it but *Pur autre vie*, and then *Cestuy qui vie* being dead, he hath not any Title: He ought also to recover his damages according to his Estate, &c. Secondly, The words are not spoken of Upton Gray, but of Upton only; which cannot be intended of Upton Gray, and it cannot be helped by the innuendo. But all the Court resolved, That the Declaration was well enough. For as to the First, he needed not shew what Estate, &c. for his Seisin of any Estate is sufficient; And therefore Fenner said in the case of Huddleston against the Lord Dacres in a Writ of Annuity, the Defendant pleaded, That he granted it unto him to be his Steward; and that he was seised of the Mannor of D. and requested him to keep his Court there, and he refused, &c. And Exception was there taken, because he shews not of what Estate he was seised, and ruled to be well enough: For peradventure it might be perillous to discover his Estate. And to the second they held; That the innuendo did sufficiently serve to shew his intent what he meant in naming Upton: For it is usually known without the Addition, and might be called so; wherefore the Innuendo stands well with his speaking. But if without the Innuendo, it could not by any Intendment be taken so, it might have been otherwise. Wherefore it was adjudged for the Plaintiff.

(14)

Sharplus *versus* Hankinson, Hill. 37 Eliz. rot.(15)
Ant. 388.

DEbt upon an Obligation Condition, That if the Obligor payed to the Oblige twenty pound of lawful English money, which shall be in the year of our Lord, 1599. in and upon the thirteenth day of October, next ensuing the date hereof; That then, &c. The Defendant pleaded, That the day of payment was not yet come, and it was thereupon demurred, and moved for the Plaintiff, That the Condition shall be construed, that the payment shall be upon the Thirteenth of October next ensuing the date of the Bond, which day is past; and the words, Which shall be in the year, &c. shall have relation that it shall be such money as shall be currant, Anno 1599. But Fuller for the Defendant moved, that the words shall be construed, That the payment shall be upon the Thirteenth of October, which shall be in Anno 1599. next ensuing. So by this Exposition and Interplacing of the words, all parts may stand together; and so without doubt, was the intent of the parties. Gawdy, The Condition is senseless; but he conceived when a certain time of payment is expressed, that ought to stand, and all the residue shall be void, being repugnant. And there cannot be such a construction made, That the next ensuing shall refer to Anno 1599. For that is certain enough without those words; but it shall refer to the Thirteenth of October: For otherwise the Thirteenth of October had not any sence; wherefore he conceived, that the day was past. Fenner, Clench, and Popham e contra: For Fenner held, that when the words in Deeds be repugnant, they shall be rejected, and we ought to adjudge upon the other words: Then here, when the payment is appointed to be in Anno 1599. there is certainty enough; and the words, The Thirteenth of October next ensuing the date, are repugnant and void; and therefore the day of payment is not yet come. Popham: The payment shall be upon the Thirteenth of October Anno 1599. For it is reasonable to construe it according to the intent of the parties, and as it may stand; and then it shall be construed, that the Obligor shall pay such money as shall be currant, 1599. And that he shall pay it upon the thirteenth of October next after the year 1599. And the words after the date hereof, are repugnant and void. And by this Exposition all the words stand, but the date hereof: And if it should be construed to be paid upon the thirteenth of October next ensuing the date, it should be impossible: For how may a man pay money in Anno 1593. which should be currant in Anno 1599. before which time peradventure the coyn may be changed; and therefore this construction shall be received, whereby the day is not yet come. Clench held, that it should be construed as Fuller had expounded it; so as all the words might stand by interposing and interplacing of them. Wherefore, because three of them agreed against the Plaintiff, but upon several reasons, Gawdy consented unto them, that Judgment should be given against the Plaintiff. And without further argument it was adjudged for the Defendant.

Penn versus Glover.

R Eplevin upon Demurrer; The Case was that the Bishop of Rochester made a Lease for years of a Mannor wherein were divers Copyholders, with a Proviso, That the Lessee shall not molest, vex, or put out any Copyholder, paying his duties and services; sub poena forisfacturæ And the Bishop entred for the condition broken: The breach was assigned in hoc, that the Defendant Vi & armis, entred upon a Copyholder in a Cow-house, parcel of the premises, and beat him, Et sic molestavit, &c. and it was thereupon demurred. And Tanfield moved, That this was not any breach of the Condition; for the molestation is to be intended of such sort, that he should oust him of his Copyhold, either by often distraining, that he could not enjoy it quietly, or by some other vexations whereby he was inforced to relinquish his possession. And it is not shewn here, that he ousted him from his Copyhold; and if he entred upon his Copyhold, and did not oust him, it is not any breach, and the wrong here is done only to his person, and not to his Copyhold Tenement. And of that opinion was all the Court, that hereby the Condition was not broken; for that molestation ought to be intended, such as should be an expulsion or molestation concerning his Copyhold Tenement; and there is not any breach by a Tort done to his person, or in disturbing him in any other Lands, unless they were his Copyhold-tenements within the Mannor. Wherefore without any further Argument it was adjudged accordingly.

(16)
Moor 402.*Welden versus Bridgewater, Hill. 34 Eliz. rot. 489.*

T Respals. Quare clausum fregit vocat' Bear-meadow apud Paunchbourn, and his Grass there growing, &c. Upon not guilty pleaded, it was found by an especial Verdict, that the Plaintiff was seised of the Mannor of Paunchbourn and that in the said Mannor there was a Meadow called Wide-Meadow, containing eighty acres, whereof the place where, &c. is parcel, and that from time whereof, &c. this Meadow hath been divided by lot between divers persons, Pro captione fœni de herba inde proveniente; and that from time whereof, &c. the Plaintiff, and all those whose estate, &c. have used to have had allotted unto them yearly out of the said Meadow thirteen acres; which being allotted, shall be called Bear-Meadow; and that the place where, &c. was allotted to the Plaintiff, and that the Defendant entred and cut down the Grass, &c. And if, &c. Atkinson for the Plaintiff; the question is, whether the Plaintiff hath a profit a prender in that Land only, or the Land it self; so as he might have Trespals, Quare clausum fregit, &c. For if he hath but a profit, he cannot maintain this Action, as 5 Hen. 7. 10. of him who hath a Warren only in another mans soil, or 15 H. 7. or 14 H. 8. of him who is a Commoner only. But it seemeth here, this Land being allotted unto him, he hath an Interest and Freehold therein for the time, and may well have this Action; as Fitz. N. Br. 62. Partition between Coparceners, that the one shall have the Mannor of

(17)
1 Rol. 829.
Co. L. 4. 48. b
Moor 302.

Co. Litt. 4. a.

of D. for one year, and the other the Mannor of S. and that every second year they shall exchange. Now each of them for their time have a several Freehold, and shall have Trespals alone, Quare clausum fregit. So Temps Ed. 1. Partition 21. Partition, That the one shall have it from such a day to such a day, and the other for the residue of the year. Wherefore, &c. And of that opinion was the whole Court; for it may be good by prescription: And by the Alotment, it is the proper Soil and Freehold of him to whom it is allotted, and that he well might maintain a Quare clausum fregit. Wherefore it was adjudged for the Plaintiff.

Sower *versus* Bradfield, Trin. 37 Eliz.

(18)

Hob. 318.

DEbt for forty shillings upon an Arbitrement. Whereas the Plaintiff claimed from the Defendant and one J. S. five pounds expended for them Pro diversis negotiis; and they had submitted themselves to the Arbitrement of Sir William Paston for it; who arbitrated, that the Defendant and J. S. should pay to the Plaintiff four pound, viz. The one forty shillings, and the other forty shillings; and for the forty shillings to be paid by the Defendant, he brought this Action. And it was thereupon demurred, First, because this is a debt certain, which ought not of it self be put in arbitration. Sed non allocatur. For although a debt upon a Bill or Contract cannot by it self be put in Arbitrement, yet this five pound is claimed as expences, Pro diversis negotiis; and so may be well put in Arbitration. Secondly, it was alledged, That this Action ought to have been joyned against them both for the four pound, and not several. Sed non allocatur. For the (viz.) makes it as several Arbitrements for both: Wherefore it was adjudged for the Plaintiff.

Adams *versus* Albon.(19)
Ant. 388.

IT was moved in Arrest of Judgment after Verdict, that the Venire facias bore teste, 9 July, 37 Eliz. returnable Die Mercurii proxime post tres Trinitat' proxime sequent', which day is not yet come; for the 9 July 37 Eliz. is Dies Mercurii in tres Trinitat' 37 Eliz. and the last day of the Term: And therefore the Wit here is not returnable the same day, but ought to be Die Mercurii proxime post tres Trinitat' which is a year after. Wherefore this trial is before the day that the Venire facias is returnable, and therefore ill; and it is not like where in a tryal, the Venire facias is not returned: For that shall be intended good, a Venire facias being awarded and returned, and that it was imbeſſed, which is aided by the Statute. And of that opinion was the whole Court at this time. Sed adjournatur.

Fuller *versus* Fuller, Hill. 36 Eliz. rot. 586.(20)
1 Vent. 341.

Trespals. For Lands in Chigwel in the County of Essex; upon not guilty pleaded, a special Verdict was found, that one Henry Fuller was seised of this Land in Fee, holden in Soccage, and had issue four sons, viz. John, Richard, Edward, and Henry, and devised the Land

Land to Richard the second son, and his heirs of his body, and after his death without issue, then to Edward the third son in tail, and then to John the eldest son in tail, Remainder to the right heirs of the Devisor: Richard dies, having issue two sons, viz. Thomas and William. Afterwards Henry the Devisor said, That my Will is, that the sons of Richard, my son deceased, shall have the Land devised to their Father, as they should have had if their Father had lived, and had died after me. Henry the Devisor died, Thomas the son of Richard entred, upon whom John the eldest son of Henry entred; Thomas re-enters, John brings *Crespals*, Et si, &c. This case was argued by Towse for the Plaintiff, and by Foster for the Defendant, and two points therein moved: First, whether by reason of this new Speech and Declaration after the death of Richard, Thomas his son shall take as a Devisee: Secondly, admitting it be not a good Devise to Thomas, whether John the eldest son shall have it during the time that any issue of the body of Richard be alive; or whether Edward in Remainder should enter presently; because it is not limited unto him until the death of Richard without issue; so as in the mean time the heir of the Devisor might retain it: For if he in Remainder ought to have it, then the Defendant hath Primer possession; and so the Plaintiff hath not any cause of Action. Gawdy held, that Thomas should not take it, and that there was not any difference betwixt this and *Brets* case; there the Devise was in Fee, here it is in Tail, which is all one: and this Speech of the Devisor, is not of any effect; for there is such a Speech in *Brets* case; but the Devise of the Manor of D. which he had not, was good with a new publication after he had purchased it; so of a Devise to an infant in ventre sa mere with a new publication after its birth: For there is his Will writen, That he should have it; and it is expressed by his words afterwards, But here there is not any written Will; That the son of Richard should have it, and he cannot have it as his heir. Wherefore, &c. To the second point there is no doubt, but that he in Remainder shall have it presently; for the Devise being void to the first, it is as if it never had been made: So it is if the first Devisee refuse, he in the Remainder shall have it presently; as 37 Hen. 6. Plow. 414. Secundo Mar. Dyer. Jasper Warrens case. Wherefore the Plaintiff hath not any cause of Action, &c. And in this point all the other Justices agreed with him; and as to the first point (lench agreed also, but Fenner and Popham e contra. And Fenner held, that Thomas should take it by this Devise; for this differs from *Brets* case, in the manner of the new publication. And as a Devise to one who is not in esse, with a publication afterwards when he comes in esse is good, so it is here: For it appears (as it is found) that the Devisor knew well, that the heirs of the body of Richard should not take by descent, their Father being dead; and therefore he would have them to take as they might, viz. As Purchasers by the name of Heirs of the body of Richard, although Richard was dead at the time of the Devisors death: and to do that, he made this new Declaration of his Will. Popham accord, That Thomas the heir of Richard should have it as Devisee by this new publication; for none will deny that if the Devise had been to Richard and the heirs of his body, and Richard had been dead at the time of the Devise, but that the heir should take it as a Purchaser: And truly there is not any difference; for this new publication is quasi a new Will, as it is in *Trevilians* case

Ante 401.

Co. 1. 101.

Post 493.

Co. Lit. 26. b.

case Dyer 142. And I hold clearly, if a man hath issue three sons, and Devise his Land to the eldest in Tail, Remainder to the second in Tail, Remainder to the third in Fee; and the eldest dieth, having issue in his Fathers life time, that his issue shall have it without a new publication, because the intent of the Devisor was not to dis-inherit any of his sons; And it may be he did not know of the death of his eldest son, who was peradventure beyond Sea, or elsewhere absent. And there is not any reason to make such a construction, as to dis-inherit his issue; for by such means, many may be dis-inherited, and the Wills expounded against the intent of the Devisor. But of such a Devise to a stranger, it may peradventure be otherwise; for the Devisee being dead, the intent of the Devisor doth not appear to carry it from his own heir to the heir of a stranger. But for the second point, in regard they all agreed against the Plaintiff, it was adjudged presently for the Defendant.

Charter *versus* Hunter, Trin. 37 Eliz. rot. 1064.

- (21) **E**rror of a Judgment in an Action upon the case for words, Thou art a Prigging, Pilfering Merchant, and hast pilfered away my goods from my Wife and Children. The Error assigned was, because an Action lay not for these words; and of that opinion was the whole Court; for the words do not impeach him of Felony: Wherefore the Judgment was reversed.

Bartholomew *versus* Dighton, Hill. 37 Eliz. rot. 251.

- (22) **E**rror upon a Judgment in the Common Bench; because the Plaintiff being an Infant, sued by Attorney, and recovered; whereas he ought to have sued by his Guardian: But the Court upon the motion held, that in regard the Plaintiff hath recovered, and it is for his benefit, and no prejudice by his appearance by Attorney, that it should not be assigned for Error; but they would advise; and afterward, Pasch. 39 Eliz. being moved, it was held clearly to be Error, and the Judgment was reversed for that cause.

1 Rol. 287.

Co. 4. 53. b.
Post 541.
2 Cr. 441.

Whetstone *versus* Higford.

- (23) **U**pon evidence to a Jury, the question was, Whether one might be the Queens Chaplain, and have Plurality of Benefices by the Statute of 21 H. 8. by being retained by Parol only. Popham held, that the Queen could not retain by Parol only: But Fenner e contra, who said, there was a case in this Court, wherein he himself argued, where the Serjeant of the Mace, being made by the delivery of the Mace unto him, it was held to be good. And his office being in question as being forfeited, he pleaded the Queens Licence by parol to be absent and not to exercise it; and it was

Co. 9. 98. b. 9. a.

was adjudged to be good, for her Corporate Body doth not take away or destroy the Human Body, but that she might retain servants, and do other Acts as a Common Person does; and it was shewn that this Chaplain died above thirty years since; and that during his life he was reputed her Chaplain, and exercised the place of Chaplain as well in her private Closet as elsewhere; and had all the benefits as her Chaplain, &c. Wherefore the Court said that it should be intended that he was her Chaplain, and well and duly retained; wherefore the question being to avoid a Lease made by him to the Plaintiff, it was held that he was a person able to make such a Lease; and the Jury found for the Plaintiff.

Germin versus Rolls, Mich. 36 & 37 Eliz. Rot. 365.

ERROR upon a Judgment in the Common Bench, where Germyn brought Debt in the Common Bench against Rolls as Executor of Norwood, for certain Fees due unto him as Attorney of the Common Bench, as also for Fees due unto him for Soliciting Causes in the Queens Bench, as also for money expended about a Fine for alienation. The Defendant pleaded Nunques Executor, &c. and found against him; and Judgment for the Plaintiff; and Rolls brought his Writ of Error. And the Error assigned was because this Action of Debt lieth not against an Executor; for although it lies against him for an Attorneys Fees, because the Testator could not have waged his Law for them, in regard he was compellable to expend them; yet for as much as it is brought for Fees in soliciting Suits in the Queens Bench; where he was not Attorney, for which an Action lies not against an Executor; then having conjoyned them, and Damages intirely given, the Judgment is therefore erroneous in all. And it was agreed by the whole Court that the Action lay not for part against the Executor, and that the conjoyning of them hath made all ill, so as he might have demurred upon it, and have abated the Writ; but if by his Plea he having admitted it, he hath now made it good, was the question; for it was said that the reason why this Action lies not against an Executor, is, because the Testator might have waged his Law; and an Executor by intendment cannot have Conusance thereof; But when he takes upon him notice thereof, and admitteth that there was such a Contract, then he may be well charged, as 10 H. 6. 25. and 13 Ed. 3. Tit. Executor. And so 2 Ed. 4. Accompt lies not against an Executor; yet if he upon account brought against him enters into the Accompt, and be found in Arrear, Action of Debt for this account lies against him. Gawdy, the Judgment is erroneous, for this Writ of it self lies not against an Executor; and the admittance of the party shall never make a Writ, which of it self is ill, to be good; but the Court shall adjudge it according to Law, as 10 Ed. 4. trespass against the Lord vi & armis, and he admits it, yet the Court shall abate the Writ, so 28 H. 8. 13. Debt is brought for a rent-service, which hath continuance, although the Defendant admits it, the Court shall abate the Writ. Fenner e contra, for this is not such an action which lies not against an Executor of it self, but it lies not by reason he is not privy to the Contract, and he could not have

(24.)

Post. 459.

1 Cr. 194.

1 Rol. 924.

2 Rol. 107.

Moor 366.

1 Cr. 159.

2 Rol. 107.

1 Cr. 159.

2 Cr. 521.

2 Cr. 521.

1 Cr. 107, 194.

1 Rol. 925.

Post. 471.

Ant. 121.

Post. 459.

notice thereof; but if his ignorance is taken away, and he may have notice thereof, the Law will charge him, as 46 Ed. 3. Debt was brought against an Executor for a servant wages, and because that he himself retained the servant for the Testator, so as he thereby had Conscience, it was held that he should be charged; otherwise not: So here because by his Plea, he takes notice thereof, and admits it by an implicate confession, the Action well lies; wherefore, &c. Popham, I agree that if in Debt upon a simple contract, the Executor confesses the Action, or pleads Nihil debet, Judgment shall be given against him, because in the one Case upon the Tryal the truth of the Debt appears; and in the other Case he by his Plea confesseth it; but yet in respect the Testator might have waged his Law, or pleaded Nihil debet, and the one way is taken from the Executor to discharge that Debt, he shall not be charged and enforced to plead if he will not; but I doubt here whether by this Plea the Contract be confessed. And therefore a Case hath been cited to be adjudged in the Common Bench, 30 Eliz. betwixt Huson and Webb, that in Debt against an Executor upon a single Contract who pleaded plene administravit and found against him, yet no Judgment could be against him, but the Judgment was against the Plaintiff, which is all one in the reason with this Case; therefore it is good to see the Record thereof. Et adjournatur, Hill. 38. B. R. plac. 4.

Shaw *versus* Tompson.

(25)
1 Rol. 601.
Moor 419.
Co. 4. 30. b.

DEbt for fifty pound recovered in a Court Baron. The Case was, that a Feme recovered Dowry of a Copyhold according to the Custom of the Mannor by plaint in a Court Baron; and for that her Baron died seised, she recovered by Judgment there, fifty pound Damages; and for that fifty brought this Action, and declares upon all this matter; and it was thereupon demurred; and the sole question (as Tanfield moved it) was whether she might recover Damages to fifty pound there, where they cannot hold Plea above forty shillings; but the whole Court held that the Damages were well awarded; and that she might well recover so much there; for as they may hold Plea of the Land, so for the Damages as far as the demandant is dammified, and shall be well allowed. Sed adjournatur, V. Hill. 38 Placito 3. V. 4. Co. 30. B.

Atwood *versus* Ballard.

(26)
2 Cr. 599.
Post. 427, 898.

TRESPASS for his Close breaking. The Defendant Justifies by reason of a way by prescription from his Franktenement in D. unto the Vil. of S. in the same County, Issue was taken de injuria sua propria, &c. and a Venire facias awarded from the visne of D. only, and thereby it was tried and found for the Plaintiff. And it was now moved in arrest of Judgment, that it was a mis-tryal; for the visne ought to have been awarded from D. and S. Gawdy. True it is if the prescription to have a way had been traversed, and so it hath been adjudged here; but by this replication the way is confessed; and it may be that he breaks his Close without using the way

way, for the way is not in question; and of that opinion was Pop-
ham, but Fenner and Clench e contra; and therefore it was adjourned.
Vid. 13. H. 7. 13. 21 H. 6. 22. 34 H. 6. 15. 10 Ed. 4. 10.

Bragg *versus* Banning, Hill. 37 Eliz. Rot. 1004.

Action upon the Case, and declares, whereas he and all those, &c. (27)
have had a way from his House in D. over Green-acre in S. and
over Black-acre into such a place in P. that the Defendant had stop-
ped his way in S. And upon Not-guilty pleaded it was found for
the Plaintiff; and it was alledged in Arrest of Judgment, that
the Declaration was not good, because he alledgeth not in what
Ail. Black-acre was; for if the prescription be traversed, the Venire
facias shall be from every Ail. where the Land is over which the
way lies, and so it was adjudged in 33 Eliz. Haukhurts Case in the
Common Bench, wherefore, &c. Gawdy. It is clear, that this is a
fault for which the Defendant might have demurred; for true it is
he ought to have alledged all the Lands through which he is to
have his way, and Aills where they lie; and if the prescription be
traversed, the Venire shall be from every Ail. But now when he
pleads Not guilty, the Venire shall be from the Ail, where the stop-
ping is alledged; for the way is not principally in question, but it
ought to be proved upon the evidence, and thereto all the Justices
agreed; wherefore it was adjudged for the Plaintiff. Ant. 429.
Post. 619, 751.

Pennyman *versus* Rabanks.

Action upon the Case for standing his Title, for that he said (28)
to J. S. who was in speech to buy the Plaintiffs Land, I Moor 410.
know one that hath two Leases of his Land, who will not part with them at any
reasonable rate. Ubi revera nulla talis dimissio facta fuit. The Defendant
justifies by reason of two several Leases by parol made unto him-
self. The Plaintiff replies de injuria sua propria absque tali causa, and
Issue joyned and found for the Plaintiff; and it was now moved
in Arrest of Judgment, that an Action lay not for these words;
for he doth not say, that any had Leases for years, but it might
be well intended of Leases at will, which are not any prejudice.
Sed non allocatur; for it cannot be intended that he spake of Leases
at will, because he mentions Leases grantable over, and also
such as shall prejudice the Purchaser; wherefore, &c. Secondly,
the Declaration is not good, because he concludes, Ubi revera nulla
talis dimissio, &c. whereas there be two Leases mentioned, and
this conclusion goes but to one which is uncertain. Sed non allocatur;
for Dimissio est nomen collectivum, and comprehends both Leases, as
15 Eliz. 325 Assize, The Plaintiff made two Titles to two Barrs,
the Tenant saith, Veign le Assize sur le title that goes to both, where-
fore, &c. Thirdly, because it appears by the Defendants Justifi-
cation, that he intended of Leases made of himself; and if a man
claim estates, although they be false he shall not be punished, which
was agreed by all the Court, that no Action lay against one for
saying, that he himself had Title or Estate in Lands, &c. although
it Ant. 338.
Ant. 197.

it were false. But here the words in the Declaration as they are spoken being in the third person, be not intendable of himself but of some other, and import a slander to the Plaintiffs Title; and then his justification afterwards shall not take away that Action which before was given to the Plaintiff for the slandering of his Title; wherefore Rule was given that Judgment should be entered for the Plaintiff, unless other matter was shewn upon the third day of the next Term, and afterwards Pasch. 38 Eliz. it was adjudged for the Plaintiff. Fenner contradicente.

Anonymus.

(29) **O**NE was indicted upon the Statute of 5 Eliz. of perjury, for that there was a Suit in Chancery betwixt one Marshall and Harvie for the Mannor of Staverton in the County of Devon, and a Commission was thereupon awarded to examin Witnesses, that the Defendant swore, the deed of the Feoffment of the Mannor (manerium prædictum innuendo) was delivered as an escrow to be delivered, &c. ubi revera, it was delivered absolutely, &c. The first exception was, that this Oath, that the deed of the Mannor was delivered as an escrow, &c. is not material, unless it be shewn that it concerned the Mannor in question; for otherwise although it were false, it is not punishable neither by Action nor by Indictment upon the Statute. For the Statute is, If a Witness depose falsely concerning any Cause, &c. For which false Oath he is not punishable by this Statute, unless it be shewn or averred, how this concerns the Cause. And of that opinion was the whole Court; and although it is alledged, Manerium prædict. innuendo, yet it shall not help it; for a man shall not be punished as a perjurer by an Innuendo, wherefore for this cause only the Indictment was discharged.

Castleman *versus* Hobbs, Hill. 37 Eliz. Rot. 334.

(30)
Moor 396.
Owen 57.
2 Cr. 205.

Action upon the Case for these words, Thou art a Thief, for thou hast stolen half an acre of my Corn, Innuendo, the Corn growing upon half an acre of ground reaped, and put into shocks by the Defendant. And upon this Declaration the Defendant demurred, and upon the first motion without much arguing, it was adjudged for the Defendant; for the stealing half an acre of Corn cannot be said to be Felony, for it shall be taken in Common parlance and intendment, Corn growing upon the Land which the Plaintiff cut down and carried away, and the Innuendo helps nothing, unless the words precedent have a vehement presumption of the Innuendo; and herein no man will intend that it was Corn severed, when he saith half an acre of my Corn: Wherefore it was adjudged for the Defendant.

Reynolds *versus* Pinhowe, Trin. 37 Eliz. Rot. 337.

A Stumpfit. Whereas the Defendant had recovered five pound against the Plaintiff in consideration of four pound given him by the Plaintiff, that the Defendant assumed to acknowledge satisfaction of that Judgment before such a day; and that he had not done it, and it was thereupon demurred, for it was moved that there was not any consideration; for it is no more than to give him part of the money which he owed him, which is not any consideration. But all the Court held it to be well enough; for it is a benefit unto him to have it without suit or charge; and it may be there was Error in the Record, so as the party might have avoided it, wherefore it was adjudged for the Plaintiff.

(31)
1 Rol. 28.
Moor 412.

Post. 538.

1 Cr. 8.
1 Rol. 28.
Post. 538.

Woodroff *versus* Vaughan, Mich. 36 & 37 Eliz. Rot.

A ction for that he spake in the presence of one Lumley these words of the Plaintiff, I did not know that Woodroff (Innuendo the Plaintiff) was thy Brother; he hath forsworn himself, and I will prove him perjured, or else I will pay him his charges; after Verdict upon Not-guilty pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment, because it is not averred that Lumley was Brother to the Plaintiff; and therefore it shall not be intended as spoken of the Plaintiff, as it was agreed this Term in Badcocks Case; Sed non allocatur; for when it is alledged to be spoken in the presence of one only, it cannot be intended but that it was the Plaintiff, if the other revera be his Brother; and therefore it may be well helped by the Innuendo; but otherwise it is where it is spoken in the presence of divers others, as in the Case alledged. Secondly, it was moved that for these words an Action lay not; for, for the words he hath forsworn himself, an Action is not maintainable, which was agreed per curiam. Then for the words, I will prove him perjur'd, or else I will bear his charges, no Action will lie; but the whole Court resolved to the contrary; for it is as great a slander as if he had said directly that he was perjured; and it is not reason that by such colourable addition to slanderous words, the party should be without remedy; wherefore it was adjudged for the Plaintiff.

(32)
1 Rol. 39.
Moor 365.

Ant. 416.

1 Rol. 39.

Whitbie *versus* Marshall.

Ejectione firmæ, as Lessee of Mr. Gray for Lands in Langley in the County of Leicester, at the Nisi prius in the Country, six of the Jurors were challenged and treited, and the Jury remained pro defectu juratorum, and afterwards at the next Assises a new Distringas was awarded against all the first Jurors, as well those who were treited before, as the others, and at the Nisi prius in the Country, the Issue was tried by some of the Jurors of the ancient pannel; and by others returned upon a Tales de circumstantibus awarded, but none of them who were treited before tried it: And the Verdict found for the Plaintiff; and it was now alledged in Arrest of Judgment, that this Distringas was ill awarded; for it ought not to have been awarded

(33)

Post. 430.

awarded against them who were treited but against the others only; and then the Trial thereupon was ill, but the Court held that in regard it was but a judicial process, which being awarded against them, where it ought not to be, is but the default of the Court, and shall not turn the Plaintiff to prejudice. It was a good Tryal by the Common Law, in respect the Tryal was by the Lawful Jurors, as also clearly by the Statute of Jeofails, which helps mis-awarding Process; wherefore it was adjudged for the Plaintiff.

Moor versus Vaughan.

(34)

Ant. 429.

T Respass at the Nisi prius. The Jurors were challenged; and the Jury remained pro defectu jurator, and afterwards a new Distingas with a Nisi prius was awarded against the same Jurors who were treited before; and some of them who were treited appeared and tried it; and this matter was alledged in Arrest of Judgment, and held clearly by all the Justices that it was a mis-tryal, and not aided by any of the Statutes of Jeofails; whereupon a Venire facias de novo was awarded to have a new Tryal.

Sir Edward Denny *versus* Eakenstall, Hill. 37 Eliz.
Rot. 882.

(35)

Co. Lit. 300.b.

Ant. 18.

13 El. c. 10.

E Jectiōe firmæ. Upon a special Verdict it was found, that the Arch-Deacon of Ely having the Parsonage of Haddon appropriated to his Arch-Deaconry, Anno 12 Eliz. let the Land in question, being parcel of his gleab for fifty years. The Bishop of Ely being Patron of that Arch-Deaconry; and the Dean and Chapter of Ely Anno 15 Eliz. confirmed that Lease. The Arch-Deacon dies, the Bishop Collates to that Arch-Deaconry J. S. who enters and let the Land to the Plaintiff, Et si, &c. The first question moved was, whether this confirmation by the Bishop be not void by the Statute of Prim. Eliz. which makes all grants and assurances, &c. by a Bishop more than Estates for twenty one years, or three lives to be void, Et si sic. The Lease made by the Arch-Deacon is void against his successor. But all the Court held that the Statute doth not extend thereto, for that Statute is intended of grants of Lands, Tenements, and Hereditaments, parcel of the Possessions of the Bishoprick, &c. But here the confirmation passeth not any Estate, but it is an assent only to the Lease of the possession of the Arch-Deaconry, and not of the Bishoprick; for it is not the alienation of the Patron, and therefore not within the Statute; but otherwise it is where a Bishop is disseised, and confirms it to the disseisor: Wherefore, &c. Secondly, it was moved that this Lease is void by the Statute of 13 Eliz. for the confirmation after the Statute shall not bind the successor although the Lease made before the Statute shall bind him who made it; but the Court thereto delibered not any opinion. Sed adjournatur.

Anonymus.

COke the Queens Attorney demanded of the Court their opinion in this Case: A man having two daughters being his heirs, deviseeth his Land to them and their heirs, and dies. Whether they shall take as Joyntenants by the devise, or as Coparceners by descent? And all the Justices held clearly, that they shall have it as Joyntenants; for the devise giveth it them in another degree than the Common Law would have given it them, and for the benefit of the survivorship between them. (36)

Ant. 9.
1 Cr. 161.
Post. 695.

Doyle *versus* Wood, Trin. 36 Eliz. Rot. 128.

TRespals. The Defendant Justifies as in his Freehold; the Plaintiff makes Title, that this Land is parcel of the Manor of D. and demisable, time whereof, &c. by Copy in Fee, in Tail, or for life, or for lives, &c. and that this Land was let unto him by Copy in Fee. And the prescription was traversed, and found that it had been demised and demisable, from time whereof, &c. in Fee, but never in Tail; and that it was granted to the Plaintiff in Fee; and it was thereupon held by the whole Court, that it was found for the Plaintiff. For the allegation that the Land had been demisable in Fee or in Tail, &c. is but a conveyance to his Title; and forasmuch as it was found, that it was demisable in Fee, and that it was demised unto him in Fee, that is the effect and substance of his Title, which is found for him, and sufficient; wherefore the Plaintiff had Judgment to recover. (37)

Moor 359.

Ant. 41.
Ant. 415.

Stafford *versus* Bateman, Hill. 37 Eliz. Rot. 118.

TRespals upon demurrer. The Case was, that by vertue of a fieri facias out of the Exchequer for the Queens debt, the Defendant took the Plaintiffs beasts, being Levant and Couchant upon the Land of the Debtor, and sold them for the Queens debt, and adjudged that it was not lawful; for they were not to be sold as the goods of the Debtor, but they might have been distrained for the Queens debt; wherefore, &c. (38)

2 Rol. 159.

Morgan *versus* Williams, Mich. 36 & 37 Eliz.
Rot. 319.

DEbt as Administrator to one Philips, and declares that Administration of the Goods of Philips were committed per Andream Vane sacre Theologiæ Doctorem, such a day apud Monmouth; and the Plaintiff recovered in the Common Bench by default, and Writ of Error was thereof brought; and the Error assigned, because it is not shewn that Vane was Ordinary of Monmouth, nor that the committing of Administration appertained unto him; and in regard it was in a Declaration which ought to be certain, and he is not a Bishop, nor any person who may be intended to be the Ordinary, the Judgment was therefore reversed. (39)

Moor 367.

Ant. 102.
Post. 791.

Samon

Samon *versus* Pitt, Trin. 36 Eliz. Rot. 877.

(40)

Co. 5. 77. b
1 Rol. 243.
Moor 359.

A Sumpfit, and declares. Whereas there were divers Controversies between the Plaintiff and Defendant, concerning divers Lands in D. whereupon they submitted themselves to the Arbitration of J. S. That the Defendant assumed in consideration of six pence to perform such award as J. S. should make; and alledgeth that J. S. awarded that the Defendant should enter Bond to the Plaintiff, that the Plaintiff and Eliz. his Wife habereint & gauderent all the Lands in controverſie excepting seven Acres; and for non-performance of this Arbitrament, the Action was brought, and upon this Declaration it was demurred in Law; and it was argued for the Defendant that this award was void. First, because it is awarded, that he shall enter into Bond, and it is not set down in what sum he should be bound, so he knows not how to perform it; and if he should enter into Bond without a sum, it were void; and the Arbitrament being void, the Defendant is not bound to perform it. Secondly, the award is void in this, that they awarded, he should be bound that the Plaintiff and his Wife should enjoy, &c. and the Wife is not party to the submission, nor is to have any benefit by the award; for the Arbitrators have not any power to award a thing to be done to a stranger. But Tanfield for the Plaintiff moved that the award was good, notwithstanding these exceptions. For as to the first, although it be not shewn in what sum the Defendant shall be bound, yet he is to tender an Obligation in some sum, and it is at his election in what sum he will be bound, be it never so small; and as to the second, the Arbitrament is good; for although it be void as to the Feme, because she is not a party to the submission; yet to be bound that the Baron shall enjoy it, is good, as to him, as 18 Ed. 4. 22. and 19 Ed. 4. That the party and a stranger as his surety shall be bound, it is void as to the Stranger, but is good as to the Party; and he himself ought to enter into the Bond. But as to the first, all the Court held it to be a void Arbitrament; for the Arbitrators are absolute Judges, and therefore ought to decide absolutely and certainly what shall be done; and they cannot give their Authority unto us, or to the party to make certain their uncertainty, no more than they may make an award, that J. D. shall make an award between the parties, for their Authority is not transferrable; and therefore this award being uncertain is void, and the parties are not bound to perform it. But Popham and Fenner said, that if he ought to enter into any Bond, it ought to be in a sum according to the value of the profits of the Land; and therefore if A. covenant to enter into Bond for the enjoyment of such Land, without naming any sum, it ought to be the sum according to the value of the Land, as 8 Aff. an annuity is granted to a man until he be promoted to a Benefice, he need not accept a Benefice of a lesser value than the Annuity. And Popham held the Arbitrament to be void for the second Cause; for it being an intire thing that was appointed to be done, being void in part, it is void for the whole; but otherwise it is where he appoints two things to be performed, and the one is within the submission, and the other not, and they are awarded to be performed severally, it is good for that which is within the submission, and void for the other. But to this

Ant. 4.

Co. 5. 78. a.
Post. 726.

Co. 5. 78. a. ✓

Co. 5. 78. a.

Co. 5. 78. a.

Co. 5. 78. a.
1 Rol. 243.

this point, none of the other Justices spake: But for the first cause principally without other Argument it was adjudged for the Defendant. 5 Co. 77. b.

Sir Christopher Hilliard *versus* Constable.

Action for words. Quod vid. antea Mich. 35 & 36 Eliz. B. R. (41)
 placito 5. was now moved again; and Gawdy and Fenner held, Mo. 418.
 That for the words, He is a Blood-sucker, and seeketh others Blood, 1 Rol. 57.
 (for all the other words all the Justices agreed, that they were not actionable) the Action lies not; for they be not words, which of themselves import any Defamation; for it is usual when a Justice of Peace pursues offenders, and does his Office, to call him Blood-sucker; and it is not any slander unto him, and may be taken in some good sense in executing his Office, and not in malam partem, that he is a Blood-sucker in seeking murther or otherwise. But Popham and Clench e contra; for it shall be construed according to the common intendment of the word which is always in malam partem; and to suck blood is to take blood unjustly from a person. Wherefore, &c. Afterwards the same Term at Serjeants Inn, before all the Justices of England there assembled, this Case was moved, and the greater part of them resolved, That the Action lay not (but I heard not their particular Reasons.) Wherefore the next day by the assent of Popham and Clench, it was commanded, that Judgment should be entred for the Defendant. 1 Rol. 56. 7.

Sir Walter Hungerford *versus* Veisey, Pasc. 37 Eliz.

Rot. 249.

Error upon a Judgment in the Common Bench. The Error (42)
 assigned was, because the Venire facias was awarded upon the Roll returnable Die Mercurii Proxim. post Crastin. Trinitatis; but the Moor 402.
 Writ it self was returnable Die Veneris Proxim. post Crastin. Trinitatis, 1 Rol. 204.
 which was the first day, and therefore Erroneous, because the Moor 465.
 Writ by the Roll was returnable out of Term: And it was held clearly to be erroneous; for the Roll is that whereto the Court gives credit, and not to the Writ: For if the Writ were ill, it should be reformed by the Roll, and that was clearly Erroneous Ant. 340.
 at the Common Law, as appears 7 Edw. 4. 15. 2 Rich. 3. 11. 4 Eliz. Post. 572.
 211. And it is not aided by the Statute. But if it doth not appear, that any Writ was awarded, it is aided by the Statute, 618. 22.
 but not an ill Writ. Sed adjournatur.

Ascue *versus* Sanderson, Pasch. 37 Eliz. Rot. 218.

Action upon the Case. Sur Trover of Three hundred Sheep, the (43)
 first of December, 36 Eliz. the Defendant pleaded that he was Sheriff of the County of Lincoln, and that J. S. recovered against the Plaintiff One hundred pound; and thereupon had a Fieri facias to levy that debt, which Writ was returnable Crastino Animarum, 35 Eliz. That this was delivered to him being then Sheriff of the said County, upon the first of October, 35 Eliz. to be executed. That
 k k k he

Post. 435.
Post. 555.
Ant. 146.

Post. 439.

he by force thereof, upon the twentieth of October 35 Eliz. took the said three hundred Sheep, and sold upon the two and twentieth day of October, Anno 35 Eliz. one hundred and four Sheep for forty pound, parcel of the said one hundred pound, and that the other one hundred ninety two Sheep remained in his hands pro Defectu Emptorum. And at the said day of Craftin' Anim' he returned the said Writ accordingly, and all this matter. The which is the same conversion, Absque hoc, that he converted them, Aliter vel alio modo. And it was thereupon demurred: And after Argument, the whole Court held the Plea to be insufficient. First, and principally, because he doth not by his Plea confess any Conversion, and then the Traveller is ill: But he ought upon this matter to have pleaded Not guilty, and have given it in evidence. Secondly, because the Declaration supposeth the Trover and Conversion to be the first of December 36 Eliz. and he justifies the Conversion in October, 35 Eliz. So he meets not with the Plaintiff in time; and therefore he ought to have traversed it, and the Traveller Aliter vel alio modo shall never answer to the time, but to the manner of the Conversion. Thirdly, he makes not any Justification for four of the Sheep, but that he seized them; but he shews not what he did with them: wherefore the Plea doth not answer all that which is comprised in the Declaration, and for that cause is ill in all. And of that opinion was all the Court, and appointed Judgment to be entered for the Plaintiff; but after caused it to be stayed for the equity of the matter.

Staughton *versus* Newcomb, Mich. 35 & 36 Eliz.

Rot. 381.

- [(44)] Error upon a Judgment in debt in the Common Bench. The Error assigned was, because the Record is Quod obtulit se in placito debiti de 10l. And when he declared, he declared for a debt of twenty pound; and it was held to be a manifest Error.

Johnson *versus* Pays.

- (45) Bill of debt upon the Statute of 5 Eliz. of Perjury. After Verdict it was moved in Arrest of Judgment, that by the Statute of 18 Eliz. cap. 5. no Suite shall be upon a penal Statute, but by Information or Original Action; so this Bill is not maintainable. But it was thereto answered, that in the same Statute is a Proviso, where the Action is given to the party grieved, and not to him who will sue generally that he may sue as before. Wherefore upon view of the Statute, it was held to be maintainable, and adjudged for the Plaintiff.

Stile *versus* Butts, Trin. 37 Eliz. Rot. 159.

(46)
1 Rol. 567. 8.
Moore 411.

TRESPASS, for carrying away Thirty loads of Clay in Brookbanck-Green, digged there by the Plaintiff: The Defendant pleads, that he is a Tenant and Inhabitant in Brookbanck, whereof the said place called Brookbanck-Green is parcel; and that there is a Custom there, that every Tenant and Inhabitant there may dig, have, and carry away Clay in Brookbanck-Green for his necessary use; and that the Plaintiff not being a Tenant there De son tort Demesne,

demefn digged that Clay and laid it upon the Land; wherefore he took it for his neceffary ufe, as lawful it was for him to do: And it was thereupon demurred, and upon the firft motion, without any Argument, the Court held the Juftification to be ill: For by the prefcription it appears, That the Tenant might digg and have Clay; then he cannot have but what himfelf digs, and he fhall not have that which is digged by a ftranger; for it is reasonable he fhould have what himfelf digged, but it doth not warrant him to take what another hath digged, who peradventure did it lawfully by the Lords Licence. This is alfo like to Common, which appertains not to the Tenant, nor is his until it be taken by the mouth of his Cattel; and if a ftranger there, cuts the Grafs, the Commoner cannot carry it away, nor have his Action of Trefpafs, &c. No more here. Wherefore it was adjudged for the Plaintiff.

John Vita *verfus* James Vita, Mich. 36 & 37 Eliz.
Rot. 265.

ERror upon a Judgment in Ipswich, in Debt for twenty pound by John Vita againft James Vita. The Defendant pleaded Nihil deber, & de hoc ponit fe fuper Patriam, and the Ifsue was entred Et prædictus Jacobus fimiliter, where it ought to have been Johannes, and tryed and adjudged for the Plaintiff. And this was the Error assigned: And all the Court held it to be amendable by the Statute of 8 H. 6. which gives authority to amend Records removed out of the Common Bench by Error for faults, which hapned per vitium Scriptoris, or by the Clerks negligence. And this Statute extends as well in Equity to the Records of other Courts, which are not removed for Error. Whereupon it was awarded to be amended, and the Judgment was affirmed. (47)

2 Cr. 67:
Ant. 79.
Co. 8. 199. a
Post. 752, 904.

Dee *verfus* Bacon, Paſch. 37 Eliz. Rot. 472.

ACrion upon the Cafe, upon Trover and Conversion of Goods. The Defendant juftifies the taking of them Damage-Feafant, Abſque hoc, he converted them aliter vel alio modo; and it was thereupon demurred in Law; for the Traverſe is not good, becauſe he confeſſeth not any Conversion; the Plea alſo amounts to a Non Culp. Wherefore without Argument it was adjudged for the Plaintiff. (48)

Ant. 434.
Ant. 146.

Perkins *verfus* Clark & Cleydon.

Aſumpſit. The Cafe was; A man deviſed his Lands to be ſold by J. S. his Executor, J. S. ſells it for forty pound, and dies Inteflate before his Receipt of the forty pound. Adminiſtration of the Goods of the firſt Teſtator was committed to the Plaintiff, Whether he ſhould have an Aſumpſit for this forty pound, or had any other Remedy, was moved by Spurling Serjeant. Gawdy, It is a good Cafe; for the money if it be recovered, is Affets in their hands: But he conceived the Adminiſtrator ſhould not have an Action to recover it. And Clench thereto agreed; but the other Juſtices would not deliver any opinion, but ſaid it was fitting to conſider thereof. (49)

Co. 5. 9. b.

Rofs *versus* Morris.

(50)

Post. 465.

Ant. 311.

Assumpsit brought in Suffolk, and declares, Quod cum prosecutus fuit un brief de Subpoena out of the Chancery, apud Westm' in Comitatu Midd', and intended to serve it : The Defendant apud Hepworth in Comitatu prædict' assumed, That if he would not serve the Writ that he would give him so much, &c. Upon Noli assumpsit pleaded, and found for the Plaintiff by a Jury of Suffolk, it was now moved in Arrest of Judgment, that it was a mis-trial : For although Suffolk was in the Wargent, yet the Chancery apud Westm' in Comitatu Midd' is last named in the Record ; then when the Assumpsit is alledged apud Hepworth in Comitatu prædict' This Comitatu prædict' refers to the County last named, viz. Midd' and then the Trial in Suffolk is ill : Wherefore, &c. And of that opinion was Gawdy upon the first motion ; but afterwards being moved again, because the County of Middlesex is not mentioned but in the recital, and not in the substance of the Record ; and the Assumpsit is alledged to be made apud Hepworth in Comitatu prædict', and Suffolk is put in the Wargent of the Record, and there the Action is brought. Hepworth in Comitatu prædict' shall be intended to be referred to the County named in the Wargent of the Record, and not to the County mentioned by way of recital, and so the Trial may be intended there. Whereupon all the Court resolved, that it was well enough ; and it was adjudged for the Plaintiff.

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But note, in the same Term an Exception was taken to the Indictment of one Grymes, who was indicted of Burglary apud Hereford ; for that Hereford was in the Wargin of the Indictment, and the Indictment was, Quod Richardus Grymes de D. in Comitatu Radnor, generosus fecit Burglariam apud S. in Comitatu prædict'. And for this Cause Exception was taken ; for that two Counties were named, the one in the Wargent, the other in the Indictment ; so it is uncertain to which of them Comitatu prædict' shall be referred ; and if it should refer to the last mentioned, it is clearly ill. And for this cause divers Indictments have been discharged ; and the Court held it to be an apparant and gross fault here. Quære, Whether there be not a difference between these Cases, because the County is mentioned in the body of the Indictment.

Noke *versus* Awder, Antea Hill. 37 Eliz. Plac. 21.

(52)

Ant. 373.
Moor 419.

Co. 5. 18. a.

It was now moved again, and all the Justices agreed, That the Assignee shall have an Action of Covenant without shewing any Deed of the Assignment ; for it is a Covenant which runs with the Estate, and the Estate being passed without Deed, the Assignee shall have the benefit of the Covenant also : And the Executor of the Baron, who is Assignee in Law, who comes in without Deed, shall have the benefit of such a Covenant, as appears 30 Ed. 3. in Symkins Simonds Case. And Popham and Fenner held, That a Feoffee shall vouch by a Warranty made to his Feoffor, without shewing any Deed of Assignment : For the Deed of Assignment is not requisite, nor is it to any purpose to shew

shew it; for it appears by the Books, that being shewn, it is not traversable by the Vouchee. And as a Warranty or Covenant is not grantable, nor to be assigned over without the Estate; So when the Estate passeth, although it be by Parol, the Warranty and Covenant ensue it, and the Assignee of the Estate shall have the Benefit thereof. Coke Attorney-General (who was of Counsel with the Defendant) said, That the Law was clear as you have taken it, yet the Declaration is ill; for he declares, Quod cum Johannes King 10 Eliz. let that to the Defendant for years, Virtute cuius, he was possessed and granted it to Abel by Indenture with the Covenant, who in 15 Eliz. assigned it to the Plaintiff. And further alledgeth, That long time before that the said J. K. had any thing, one Rober King was seised in Fee, viz. 7 Eliz. and so seised, died seised in 15 Eliz. and it descended to Thomas King, who entred upon the Plaintiff and ousted him: So he doth not shew that John King, who made the Lease, had any thing; for Robert King was thereof then seised: And then when John King let to the Defendant, and he granted his Term by Indenture, nothing passed but by Estoppel; then the Lessee by Estoppel cannot assign any thing over, and then the Plaintiff is not an Assignee to maintain this Action. But admitting that J. K. had at the time of the Lease made by him a Lease for a greater number of years, and that R. K. had the Freehold, and thereof died seised, and so all might be true which is pleaded; then the Entry of Thomas King upon the Defendant is not lawful. So Quacunque via data, this Action cannot be maintained; and this point for the Case of Estoppel, was adjudged in this Court in the Case of Armiger versus Purcas, in a Writ of Error. And all the Court held here, that it was clear upon the matter shewn, that the Action lay not; for the Plaintiff ought to have shewn an Estate by descent in J. K. at the time of the Lease and Assignment made, or an Estate whereby he might make a Lease: And that this was afterwards determined; and so confels and avoid the Estate in the Lessor; otherwise this Action of Covenant lieth not; and it never lies upon the Assignment of an Estate by Estoppel. Moor 419 Wherefore they were of opinion to have then given Judgment against the Plaintiff; but afterward they would advise until the next Term. Note, This was continued until Trin. 41 Eliz. and then being moved again, all the Justices resolved, that the Assignee of a Lease by Estoppel, shall not take advantage of any Covenant; but that it shall not be intended a Lease by Estoppel, but a lawful Lease: But no sufficient Title being shewn to avoid it, it is then as an Entry by a stranger without Title, which is not any breach. Wherefore it was adjudged for the Defendant.

Bateman *versus* Allen, Trin. 36 Eliz. Rot. 339.

Eccione firmæ of a Lease of William Hill and Ann his Wife, 14 Martii, 36 Eliz. for one and twenty years of Land in Uttaxton in the County of Stafford. Upon Not-guilty pleaded, the Jury found a special Verdict, That one Henry Clark was seised in Fee, and by his Will devised that Land (Prout in Newys & Scholasticas Case, Plowd.) And further shews, That the Testator had Issue Francis and John his Sons, and Scholastica and Ann one of the Lessors; and that Francis

(53)

Francis and John died without issue male; that Scholastica took to husband Newys, which Newys and Scholastica levied a Fine of that Land, Whereupon William Hill and Ann his Wife, as in right of Ann, entred for the forfeiture upon Rhodes the Conusee, and let it to the Plaintiff, Prou in the Declaration; whereupon the Defendant entred and ousted him. Sed utrum the Entry of the Defendant upon the matter, be lawful or not, they prayed the Advice, &c. And if his Entry were lawful, they found for the Defendant, and if not, &c. So all the matter found in Scholastica's Case, was now in question again. But Williams Serjeant moved, That for as much as in all the Verdict it is not found that the Defendant had the primer possession, nor that he entred in the right, or by the command of any who had Title; but it is found that he entred upon the possession of the Plaintiff without any Title, his entry is not lawful, and the Plaintiff had good cause of Action against him. Wherefore the Plaintiff should recover, and so held all the Court, That for this Cause Judgment ought to be given for the Plaintiff, and they would not hear any Argument of the matter in Law. But if the conclusion of the Verdict had been Si, &c. whether the entry of Hill and his Wife, were lawful or no? then the Judgment should have been upon the matter in Law: For then it should be intended, that the Defendant had Title, if the Lessor of the Plaintiff had not Title, and that the Plaintiff had not Cause of Action, but now not: But then it was moved, that the Plaintiff notwithstanding should not have Judgment; for he hath declared of a Lease by Baron and Feme, and he doth not shew it to be by Deed, and without a Deed it cannot be said the Lease of the Feme. And in proof thereof, Vide Plowd. 436. Dyer 91 15 Ed. 4. 8. But all the Justices held it to be well enough; for it may be intended by Deed, and yet no Declaration thereupon: Also, although it be without Deed, it is well enough, at least-wise during the life of the Baron; and it is a Lease from them both, during that time. Secondly, It was moved, that it was found that Hill and his Wife entred upon Rhodes, the Conusee of the Fine, and made the Lease to the Plaintiff, and it is not found that they expelled Rhodes; and then it rests upon the matter in Law, whether the Plaintiff hath any Lease? For if they entred, and their Entry be not lawful, and they did not expel Rhodes (which is not averred) but Rhodes may be intended to continue in possession; then they gained no possession, and the Lease to the Plaintiff is void, and he hath not any cause of Action; so it rests upon the matter in Law to be decided. But all the Justices held it to be good enough; for it shall not be intended, that Rhodes was upon the Land, but that they by their Entry gained the possession: And although they be in as Disseisors, their Lease is good to the Plaintiff, and the Defendant without Title is not to eject him. Wherefore without any regard to the matter in Law, the Plaintiff had Judgment to recover.

Co. 2. 51. b.
Post. 481.
656, 708.

Co. 2. 61. a.

Woodliff *versus* Drury.

Trespals, after Verdict, Coke Attorney-General moved in Arrest of Judgment. The Case upon the pleading was, That one made a Feoffment, and it was declared by the Indenture, that it should be to the use of himself, and A. his Feme that should be, after their Marriage, and of the Heirs of their bodies; and he took A. to Feme: Whether she should take by the limitation of this Use, was the question; and he moved, that she should not: For presently by this Feoffment, the Fee is in the Baron by the possession, executed to the use which he had before the Marriage, which cannot after the Marriage be divided, and made an Estate-tail in him: For he had the Fee in him until the Marriage; for it might have been that the Marriage had never taken effect, and that would have confounded the other use. And uses in futuro shall not rise upon such future Acts; for then an use should rise out of an use. But all the Justices held, that although he be seised in Fee in the mean time, as in truth he is, yet by the Marriage the new use shall arise and vest, if there be no Act in the mean time to destroy that future use (as it was in Chudleys Case) according to the limitation of the use. And Judgment was given accordingly for the Plaintiff.

(54)
2 Rol. 791.Co. I. 101. a;
Post. 827.
Co. Lit. 187. b.Grills *versus* Ridgway, Hill. 37. Eliz. Rot. 345.

Debt upon an escape, supposing that the Defendant Sheriff of Devonshire, suffered one Chawner who was in Execution, to escape in London the 18. Decemb. 34 Eliz. Co. 3. Fol. 52. The Defendant pleads, that the said Prisoner escaped the 16. December in D. in the County of Devon, and that he freshly pursued him, and by Fresh-Suit took him again the 17. of December, and retained him in Execution again; Absque hoc, That he is guilty, Aliter vel alio modo. And it was thereupon demurred and argued for the Plaintiff, That in as much as he was once escaped, and thereby cause of Action to the Plaintiff, no Fresh Suite may take away that Action from him. But the Prisoner being re-taken, shall not peradventure take advantage of his own wrong to help himself, by Audita Querela thereupon; and in proof thereof, Vide 13 Hen. 7. 1. 14 Hen. 7. 1. 5 Edw. 6. Escape Bro. But all the Justices said, That as to that, an Action of Debt did not lie against the Sheriff, where the Sheriff used his endeavor, and took him again upon Fresh-Sute; although, that in the night, or otherwise he might lose the sight of him: But if before he be re-taken, the party brings his Action of Debt, then the re-taking of him afterwards shall not avoid the Plaintiffs Action, although the re-taking be upon Fresh Sute. A second matter was moved, that the Escape is supposed 18 December 34 Eliz. And he pleads, that the Prisoner escaped 16 December, and the re-taking was 17 December: So he answers not to the escape mentioned in the Declaration. For the Craverle Aliter vel alio modo doth not answer to the time, but to the manner of any thing alleged; and for that Vide 33 Hen. 6. 28. 37 Hen. 6. 27. And of that opinion were all the Justices at this time, besides Popham, that the Plea was ill for that Cause. Sed adjournatur.

(55)
Co. 3. 52.
Ant. 318.Ant. 44.
Co. 3. 52. b.
Ant. 102.
Co. 3. 52. a.

Co. 3. 52. b.

Ant. 434.

Michaelis

Michaelis 37 & 38 Eliz. in Communi Banco.

Boucher *versus* Wiseman.

(1)

Action upon the Case against the Defendant, late Sheriff of Essex. Whereas the Plaintiff had recovered against Pynder One hundred pound, and had a Fieri facias; that the Defendant by vertue thereof leyed twenty eight pound, and had not returned the Writ, nor payed the money to the Plaintiff: The Defendant pleaded Not guilty. And now upon evidence to the Jury, it was proved, That the Writ was delivered to Cowell, the Defendants Under-Sheriff, 9 Novemb. 34 Eliz. and the same day he made Execution. And he proved, that the same day a Writ of Discharge was delivered him dated 6 November 35 Eliz. But because he did not prove, that he had notice of this Writ of Discharge before the Execution served, the Court held clearly, That he was yet Sheriff, and chargeable to the Plaintiffs Action. The Defendant also shewed the Indenture whereby he made Cowell his Under-Sheriff, wherein was an Exception, That he should not meddle with the Execution of any Writ above the Sum of forty Pound, so as to that he was not his Under-Sheriff; but he did it De son tort Demesne, and the Defendant is not chargeable therewith. But all the Court held it to be a void Exception: For when he made him his Under-Sheriff, therein was included, that he should execute all Writs; and therefore the Exception is repugnant and void. Thirdly, it was alledged, That this was not a due Execution: For Pynder had made a Deed of his Goods before, &c. and shewed the Deed dated the same day of the Writ of Execution. Et per totam curiam, although the gift were bona fide; yet Execution might be taken of those Goods. For by the suing forth the Execution, all the Defendants Goods are lyable; so as no gift of the said Goods, the day of the date of the Writ, or afterwards can stop the Execution. Wherefore they resolved the Jury accordingly, without inquiring of the fraud, and they found for the Plaintiff. Vide 4 H. 6. 7. 17 Ass. Plac. 2. 5 Eliz. Dyer 219.

Ant. 12.
Ant. 294.

Hob. 13.

Co. 8. 171. a
Ant. 174, 181.The Dean and Chapter of Hereford against the
Bishop of Hereford and Ballard.

(2)

Quare Impedit. The Case was, that the Dean and Chapter of Hereford granted the next Avoidance of a Church to Ballard. Whether that were a good grant to bind the Successor by the Statute of 13 Eliz. was the question. Walmsley and Owen held, that it was not; for although it is not a thing whereof any profit can be made; nor any Rent reserved, yet it is an Hereditament, whereof the Statute intends that no grant shall be made; and so it hath been adjudged in the Case of the Bishop of Litchfield: But Anderson e contra. For the Statute doth not intend to restrain them but for such things which are for profit, and by reason whereof, prejudice might accrue to the Successor, which cannot be in this Case. Wherefore, &c. Beaumont was absent, Et adjournatur.

Ant. 407.

Goodday

Goodday *versus* Michell.

TRespass. Quare clausum fregit and two Gates and three Perches Sepium fregit. The Defendant justifies: for that the said Close was within the Parish of Rudham, and that all the Parishioners there from time whereof, &c. had used to go over the said Close upon their Perambulation in Rogation week, Et quia the Plaintiff obstruxit duas Januas & tres Particatas sepium in via prædicta. The Defendant being one of the Parishioners, Januas & tres Particatas illas sepium fregit, &c. And it was thereupon demurred, and after Argument by the Serjeants, the Court resolved for the Plaintiff. Anderson, It is not to be doubted, but that Parishioners may well justify the going over any mans Land in their Perambulation, according to their usage, and to abate all Nuisances in their way: as F. N. B. 185. B. and the Book of Entries 158. But whether the Justification here, be good or not, was the question. And he held it to be ill, for Parishioners cannot prescribe, neither in matter of Easment, nor Interest, nor otherwise; but in matter of Easment as a way to the Church, or common Fountain, or otherwise they ought to alledge Custom or Usage within the Parish, as 7 Ed. 4. 26. & 15 Ed. 4. 29. are. Secondly, the Plaintiff declares of the breaking of two Gates, Et tres Perticat' Sepium. The Defendant makes Title to a way; and because the Plaintiff made duas Januas & tres Perticat' Sepium (and doth not say prædictas) the Defendant Januas & Sepes illas fregit. So he justifies the breaking of the Gates and Hedges in his Bar mentioned; but he answers not to them, whereof the Plaintiff declares: And thereto agreed all the Justices that this fault in the Bar was incurable. For Walmley said, that he thereby doth not answer to that wherewith the Plaintiff chargeth him: For it may be, that the Plaintiff had erected four Januas & sex particatas sepium, and the Defendant hath broken all of them, whereof for two Gates and three Perches of the Hedge he might justify for the cause alledged; and for the other two Gates and three Perches, &c. cast down, he brought the Action. So the Defendant answers not to them, whereof the Plaintiff complains; and he cannot refer it to those mentioned in the Declaration, but to the Januas & Sepes mentioned in the Bar. The Bar is also ill for another cause, for that it is Et quia the Plaintiff obstruxit Januas, &c. whereas he ought to have averred precisely Quod obstruxit; for otherwise no Issue can betaken. Wherefore it was adjudged for the Plaintiff. (3)

Ant. 1801

Fitch *versus* Hockley.

TRespass upon demurrer upon Evidence. The Case was, A Coppholder in Fee surrendered to the use of himself for life, Remainder to J. his Son for life, Remainder to the use of his last Will; and the admittance was Secundum formam sursum redditionis prædictæ J. dies, the Father afterwards surrenders it to the use of the Defendant in Fee, and dies without making any Will. Whether this be a good Surrender, was the question between the (4) Co. 4. 23. a

the Heir of the Copyholder, and the Defendant. Harris moved, That it was void to vest the Fee in the Defendant; for when the Father surrendered to the use of himself for life, and after to the use of J. his son for life, and after to the use of his last Will, the Fee of the Copyhold was in the Lord; so as the Father had but an Authority to dispose it by his Will, and not otherwise. And then when he makes not any Will to dispose thereof, the Law shall transfer it to the Heir, and the Surrender in the interim to the Defendant is void. Walmsley; The Surrender to the Defendant is good; for a Copyholder may surrender parcel of his Estate, and in such manner as pleaseth himself; and he who comes in by such a Surrender, is in by the Copyholder, and not by the Lord. And when a Copyholder surrenders to the use of one for life, or in Tail, the residue shall be said to be in himself, and he shall be said to be the Donor: But here he hath expressed an Use to himself for life, Remainder to J. his son for his life, and after to the use of his Will; the which is as strong as if it had been to himself. And although he might have disposed it by his Will, if he had not made that second Surrender, yet by that Surrender it passed to the Defendant. Anderson accord, and it is a Feoffment at this day to the use of his Will; for it is to the use of himself, because he might dispose of it by his Act in his life time; so he might here. Sed adjournatur.

Ant. 361.

Ant. 148, 407.

Co. Lit. 112. a

Post. 878.

Co. 4. 23.

Jeremy *versus* Goochman.

(5)

A Sumpsit, and declares, That in consideration Quod deliberasset & dedisset to the Defendant twenty sheep, he assumed to pay unto him five pound at the time of his Marriage, and alledgeth in fact, that he was Married, &c. The Issue was Non assumpsit, and found for the Plaintiff, and now moved in Arrest of Judgment, because it is for a consideration past; for it is in the *Præter tēse* Deliberasset, and therefore no cause of Action: And of that opinion was the whole Court, wherefore Judgment was said.

Post. 741, 885.

Bright *versus* Forth.

(6)

R Eplevin. The Defendant made Conuſance as Bailiff to Margaret, Countess of Derby, for Damage-feasant. Upon Demurrer the Case was, That Henry Earl of Derby was seized of the Mannor of Currey-Revel (which extended into Currey-Revel and Bradway, and into other Villages; and in Bradway were divers Copyholders for life) and suffered a Recovery of the Mannor, excepting the Land in Bradway. And afterwards that part which extended into Bradway, was conveyed to the Countess of Derby, and afterwards the Earl and Countess of Derby kept a Court at Bradway, and the Steward granted that Copyhold, being a Copyhold for life to the Plaintiff. And whether this were a good Grant by Copy, or not, was the question. Glanville, The Grant is void, because a Mannor cannot be severed. And although there be Demels, Copyholds, and Services in Bradway, yet that cannot make it to be a Mannor, and then the Grant of the Copyhold is void,

void, especially being a Cophhold for life : For there when the Estates of the Tenants for life be determined, they cannot be granted again when the Mannor is dismembred : But of Cophholds of Inheritance, it may peradventure be otherwise; for it remains a Mannor, and a Court shall be kept as to them. And this diversity was agreed in Sir Christopher Hatton, the Lord Chancellors Case. And so was the Case of Meredith for a Cophhold in Stokingham, where there were Cophholds of Inheritance; and this very Case was here, 29 Eliz. where a Feme was endowed of divers Cophholds for life, so as they became severed from the Mannor; and she granted Cophholds, and adjudged void. Williams e contra; for being averred, that there be Demesne, Cophholds, and Services in Bradway, it shall remain a Mannor at least-wise to grant those Cophholds. Vide 26 Hen. 8. 4. 33 H. 8. Br. 1 H. 5. 11. And afterwards being moved, all the Justices resolved, That the Grant was void in regard there was not any such Mannor of Bradway before, nor now. And Anderson said, If this Severance had been of Cophholds of Inheritance, that the Cophholders and their Heirs should have had it; but it can never be surrendered, for Surrenders are by Custom, and therefore they ought to be in the Court of the Mannor; and a Surrender to the Lord himself in his House, or out of Court, is not good, Quod Beaumont concessit; wherefore it was adjudged accordingly for the Abbot. And here a Case was remembered, which was adjudged in the Queens Bench, in this very point, That this was a good Copy, Co. 4. fol. 26. a. But it was thereto answered, That it was a strange Judgment, and never was entred by the direction of the Court, and a Writ of Error was brought thereupon in the Erchequer-Chamber, and the opinion of the Justices there was, that it was erroneous: And thereupon the Cophholder compounded, and took only his Corn, and relinquished the Title. Vide Trin. 30 Eliz. B. R. plac. 10. Ant. pag. 102. 3.

Ant. 103.

Ant. 103.

Ant. 103.

Co. 4. 26. b.

Ant. 103.

Lewen *versus* Dodd.

DEbt. The Case was, That one seised of a house in London, let it for years rendring Rent, and afterwards devised it to his two sons equally, and to their Heirs: The one dies; whether it shall survive to the other and his Heirs, was the question. Drew argued, that it should not; for they are by those words Tenants in Common, and not Joyntenants; for to that intent the Deviser put in that word Equally, and 30 H. 8. Devise 29. Devise to two Et hæredibus eorum; the one dies, his part shall not survive, but his Heir shall have it; for so was the intent of the Deviser. A multo fortiori in this case, where it is limited to them Equally betwixt them, and their Heirs after them. And in Pasch. 18. Eliz. is a president in the Court of Wards, in one Shepherds Case, where he made a Devise in this manner; Item, I will that my Lands called Earthpits, shall equally remain to Joan and Mary my two Daughters, and the Heirs of their two bodies. And by the opinion of Manwood and Dyer, it was resolved, That they were Tenants in Common, and that the surviving Daughter should not have her Sisters part for her life. Anderson; There is an equality in Estate, in Condition, in taking of the Profits, and all this is here: And if it had been Aquis portionibus, I would doubt, whether they should be Tenants in Com-

(7)

Br. dev. 29.

mon; but as it is, they are Joyntenants: But if the words had been to them equally, and to their Heirs equally, that should make a Tenancy in Common; but here equally is annexed to the Estate, and they being Joyntenants, have one equal Estate; and the Book Vouched in 30 Hen. 8. hath been oftentimes over-ruled to be no Law. Owen, a Devise ought to be taken according to the intent of the Devisor; and the intent here was, not to give all to the one by the Survivorship, but an equal advancement, and that their Heirs should have an equal advantage: If we should construe it, that they should be Joyntenants, they should not have it so, and the word equally is vain and idle; and a Devise to them equally, and to be equally divided between them, is all one. Walmfley, the intent in the Devise shall be collected upon the words. And when the intent is ambiguous upon them, it is a sure way to follow the Course of the Common Law: And it may be he put this word equally in his Will, to shew his intent, that the one son should have it as well as the other; and that may be satisfied, if they take as Joyntenants, for they shall have equal portions and equal possibilities of Survivorship; and the case of 30 H. 8. before vouched was never taken for Law: And I have demanded the opinion of divers other Justices of our house, and they held, that they were Joyntenants; and the word equally is not of any effect, but to shew his intent, that they should have an equality in their Estates, and in the perception of the profits; which intent is satisfied, if they be Joyntenants. And in 17 Eliz. was a case in this Court, where a Devise was to two, part and part-like; and the Court was divided in opinion, whether they were Joyntenants or Tenants in Common. But the Lord Dyer held them to be Joyntenants: And it is not a safe course to search the Intent, unless we be certain of the Intent. And as to the Case vouched in the Court of Wards, it may be that they were Tenants in Common of the Freehold there, because the inheritance is several. Beaumont: If the Devise had been to them, and their Heirs equally, it is clear, that they should be Tenants in Common: So he conceived it to be all one here, otherwise the word equally should be void. For the construction that equally shall refer to the Estate and perception of the profits, would have been good without this word equally: And the word being equally to them, and to their Heirs; this Copulative conjoyns equally to the Heirs, as well as to them, and they be of such sense, As a Devise to them equally, and to their Heirs equally, in which case they cannot be Joyntenants. And in the Queens Bench it hath been agreed, where the words were equally to be divided, that they should be Tenants in Common. And I have spoken with the Justices of our house, and they incline to this opinion. Whereupon it was adjourned. V. postea, Mich. 41 & 42 Eliz. B. R. Plac. 6.

Ant. 330.

Post. 695.

Upton *versus* Bassett.(8)
27 El. c. 4.

TRespals upon Demurrer. The Case was, That the Plaintiff and Defendant claimed by several Leases, from one and the same person; and the Plaintiff in his Replication avers, That the Defendants Lease was made upon Fraud; but shews not any Fine by himself paid for his Lease, nor any Rent reserved thereupon, nor any other valuable consideration wherefore it was made; whereupon the Defendant demurred thereto. Yelverton at the

the Common Law, There was not any Fraud remedied, which should defeat an after-purchase; but that only which was committed to defraud a former Interest, Quod fuit concessum per curiam. And the Statute of 27 Eliz. did not remedy it; for there is not any money or consideration paid for this second Lease, no more than for the first; and therefore not aided by that Statute. *Lewknor e contra*: For every one who obtains any thing or Estate by his own act, is a Purchaser, and so within the words of the Statute. The Plaintiff hath also averred, That it was made by Fraud to deceive him, which is confessed by the Demurrer: Wherefore, &c. *Anderson*. The confessing the Fraud is not material, for as much as the Plaintiff is not such a person as ought to have benefit thereof, and within the Remedy and Provision of the Statute: For it is clear, a fraudulent conveyance is not made void against all, by that Statute, but only against those who afterwards come to the Land upon good consideration; for so are the words, and so was the intent of the Statute: And therefore if a man who hath not good government of himself, makes a Conveyance by advice of his Friends of his Lands upon trust, and without any consideration, and afterwards one procures him for five hundred pound or other petty consideration, to sell unto him Land worth five hundred pound per annum. Although this last Purchaser pays money, yet he shall not avoid the first Conveyance; for the Statute was made to help those, who came to Land upon good Consideration lawfully, and not without Consideration, or by any indirect means; and this Case hath been resolved. *Walmsley accord*: For it is not void against all, no more than if a Fraudulent gift be of Goods, it is not Fraud by the Statute of 13 Eliz. against all, but only against his Creditor, but remains good against the Donor himself. *Beamond*; this is not void against all, as a Feoffment upon Maintenance or Champerty, is not void against the Feoffor, but against him who hath right. And I was privy to a Case which was resolved by the two Chief Justices, and three other Justices, viz. One made a Lease for eighty years without consideration, and afterwards conveyed the Land to his Wife for a Joynture after Marriage: And they resolved, because this last Conveyance was voluntary without valuable consideration, That the Wife could not avoid the former Lease, by averring that it was Fraudulent. *Owen accorded* with them in omnibus, and said, That he was at the making of this Statute, wherein special care was taken, That there should not be any words which should extend to Purchasers; but such as paid money, or other good consideration for their purchase. Wherefore it was adjudged for the Defendant. V. 3. Co. 83.

Co. 3. 83. a.

Co. 3. 83. b.

Austye versus Fawkenor.

R Eplevin. The Defendant avows for Damage-Feasant; the Plaintiff justifies, for that he had a Close adjoyning to the Defendants Close; and that the Defendant and all the Occupiers of the said Close from time thereof, &c. had used to repair the Fences between the Closes; and for not sufficient inclosing, his Beasts entred, &c. and issue was taken upon the Prescription, and found for the Avowant; and now moved in Arrest of Judgment, That the Prescription, That every Occupier, &c. is too general; for Tenant

(9)

Yelv. 74.

at Will, or at sufferance, or a Disseisor, are Occupiers. Walmsley, True it is, the prescription is not good: For this Inclosure is a charge upon the Land; and they who are only Occupiers, as a Disseisor, Tenant at Will, or sufferance, cannot charge the Land therewith: But it ought to have been, that he and all they whose Estate, &c. But such a prescription to pay so much in discharge of Tythes by the Occupiers of Lands, hath been allowed to be good; for that goes in discharge, and for the benefit of the Land, and Tythes arise upon the occupying the Land: But yet in regard that Issue is taken upon this prescription, and a Verdict hath found it, this is not any cause for staying Judgment, but it is aided by the Statute of Jeofails. And thereto the other Justices agreed, viz. That the prescription was not good, and that it was helped by 4 Vent. 265. And the said Statute. Wherefore, &c.

Gryfman *versus* Lewes, Parson of Kingsland.

(10) **P**rohibition. For suing for Tythes of Cows, Steers, Dren, Horses, &c. wherein he surmised a Custom, That every Parishioner should pay for every Milch-Cow, one penny by the year, and for every other Cow, an Half-penny per annum, in recompence and discharge of all Tythes of Cows, Dren, Steers, and Calves, and also a Penny for every Mare, in discharge of all Tythes of of all Horses, Hares, and Colts there; and it was thereupon demurred, and Consultation prayed. For Tythes paid for one thing, cannot be intended a recompence for Tythes of another thing, where Tythes are responsible for both in kind: And therefore it was adjudged in Sir Charles Morisons Case, where one prescribed to pay the tenth part of Corn in the Sheaf, for the Tythes of all which is in the Sheaf, and of all which is Baked; and adjudged to be a void prescription, because he is to pay Tythes of both of them. It is also unreasonable; for then he may put the lesser part in Sheafs, and leave the greater part to be Baked. And the opinion of Fitz N.B. 53.G. That Tythes shall not be paid for the Agistment of Cattel, is no Law. And oft that opinion was the whole Court, that this prescription is not good to be discharged of one Tythe by the payment of another: For he ought to pay somewhat for the Tythe of every thing which is due. And if Tythes should not be paid for the Agistment of Cattel, he might employ all his Land in feeding of barren Cattel, and so defraud the Parson of his Tythes. And a special consultation was afterwards awarded Dummodo non agatur de decimis, for Milch-kine, Draught Dren or Beasts agisted for provision for his house.

Post. 475, 786.
Ant. 363.
Post. 660.
Post. 475. 6.
Ant. 363.
2 Inst. 652.

Jennings *versus* Bragg.

(11) **E**jectione firmæ, upon a special Verdict, the Case was, That a Disseisee made a Lease for years, and delivered it as an Escrow to a stranger, commanding him to enter into the Land, and then to deliver it as his Deed, who did it accordingly: And whether this was a good Lease, or not, was the question. And it was moved, that it was not; for when it is delivered as an Escrow, and afterwards is delivered upon the Land as the Deed of the Disseisee, That hath relation to the time of the delivering it as an

an Escrow to be his Deed; at which time he had but a right to the Land, and his Lease was not good. As if an Infant or Feme-Covert should deliver a Deed as an Escrow, and it is delivered after full age, or when she is sole, yet it is void; for it hath relation to the first Delivery, so e converso, where a Feme Sole delivers a Deed as an Escrow, &c. And this Case was agreed by the Court, because it was delivered by authority before, when she was Sole; so it is of a Deed of Feoffment, and Letter of Attorney, therein to make Livery by a man of sane memory, which is delivered by the Attorney, when he is Non compos mentis; yet it is good, because it hath relation to the authority before. But Anderson said it was a good Lease in this Case; for it was not his Deed until the second delivery, at which time he had good right and power to let it. Wherefore, &c. Sed adjournatur. 3 Co. 35. b.

Belford *versus* Foord.

T Respals. The Case was such; A Prebend of Sarum made a Lease for seventy years, and the Dean and Chapter confirms Concessionem prædictam, for fifty one years & non ultra; the fifty one years are now expired. And whether this were now a good Lease against the Successor, was the question. Glanvil moved that it was good; for the Term is a thing intire, and therefore cannot be apportioned by their confirmation. And here they confirm Dimissionem prædictam, which is the whole Term, which shall not be controlled by the subsequent words. This Confirmation also is but a consent, and therefore cannot be given conditionally, or in any other manner than the thing it self whereto it is annexed, is given. And the difference is betwix a Consent and an Interest; for he that hath an Interest, may thereto annex a Condition or Limitation. And if the Prebends Successor be to bring his Action of Waste, he ought to count upon a Lease for seventy years, and that they had assented thereto; And 7 Hen. 4. is, that assent before the Grant is sufficient. Anderson, If the Lessor is to bring Waste, he shall count of a Lease for seventy years; But after his death, if the Successor brings Waste, he shall shew the Confirmation and especial Matter. Walmesley, The Lease is made good for all the years; for all the right and interest remained in the Prebend, and the Dean and Chapter have only a consent, which cannot be apportioned; but they ought to assent to all, or to no part; for their consent goes only to the Action, which is to the making of the Lease; and not to the thing acted, which is the Interest of the Lease; then when they consented to the making of the Lease, they had done all which they could do, and had nothing to do with the Lease it self. But Anderson and the other Justices held strongly, That the Lease was not good but for fifty one years only; for they at their election might confirm for all, or for part, and the Confirmation shall not be taken larger than they have made it: But if they confirmed the Demise, and not shewn for what time, it should be the entire Term. But when they say for fifty one years, & non ultra, that very well qualifies what is precedent, and it shall not be construed larger, &c. Wherefore, &c. Et adjournatur. Vide Residuum postea Pasch. 38 Eliz. B. R. Plac. 34. V. 5. Co. 18. (12) Co. 5. 81. a. Post. 472.

Parker *versus* Parker.

(13)

DEbt upon an Obligation, conditioned to stand to the Arbitration of J.S. so as it be delivered to either of the parties before Michaelmas. The Defendant pleads, That no part of the Arbitrement was delivered unto him before Michaelmas: And it was thereupon demurred; because if it were delivered to any of them, it sufficed. But all the Justices (Anderson absente) held, That one part of the Arbitrement ought to be delivered to each party, so as he might take notice thereof; and this word either shall be expounded as every. But when Anderson came in Court, being moved unto him, he doubted thereof; and the matter was referred again to Arbitration.

Wormleighton *versus* Burton, Trin. 37 Eliz.
Rot. 2838.

(14)

REplevin. The Defendant made Conusance as Bailiff to Sir Foulk Grivell, for that he had a Leet within his Manor of D. and that at such a Court the Plaintiff was amerced for putting his Geese upon the Common there; and for that Amercement distrained: And because it was not shewn, That the Common was within the Leet; as also, because the Court held, that it was not any Article inquirable in a Leet, not punishable there, it was adjudged without Argument for the Plaintiff.

Worsley and his Son *versus* Charnock.

(15)
Post. 472.

Co. 6. 25. b.
2 Cr. 425.
Post. 892.
Co. 10. 135. a.
Post. 635, 549.

Audita querela, to avoid an Execution upon a Statute, where Out-lawry in one of the Plaintiffs was pleaded: And thereupon a Demurrer in Law, whether it might be pleaded in that Suit which is only to be discharged, and not to recover any matter: But it was ruled to be a good Plea; whereupon the other Plaintiff prayed Summons and Severance; so that he only might sue. And all the Justices besides Walsley, held, that he might well have it; for that in this case they only sue to be discharged: Wherefore the Nonsuit of the one, shall not prejudice the other. It is also to discharge their Land, in which case it is not reasonable that an act of the one should make the other mans Land to be charged. But Walsley doubted thereof; and therefore it was adjourned. Vide 34 Hen. 6. 31.

Hart *versus* Brewer & Harison, Trin. 36 vel 37 Eliz.
Rot. 2042.

E Jeſtione firmæ: It was found by a ſpecial Verdict, that one Herſt
26 H. 6. deviſed two houſes in Walbrook in London (being the
houſes now in queſtion) to the Churchwardens of St. Stephens to
theſe uſes; Firſt, to find an obit, and to beſtow three ſhillings four
pence annually upon an obit in the Church of St. Stephens. Se-
condly, to repair the ſame houſes. Thirſdly, to beſtow the reſi-
due of the profits about Reparations of the ſame Church of St.
Stephens, and to provide Ornaments in the ſame Church; but the
deviſe was Conditional, that if they failed in finding the obit, that
then the Eſtate ſhould ceaſe, and the Land ſhould be to the Mayor
and Commonalty of London; and that they ſhould find that obit,
and repair the Tenements, and beſtow the reſidue of the profits
upon London-Bridge. And they found the Statute of prim. Ed. 6. and
that the obit was well maintained within five years before the Sta-
tute, and derived Title to the Defendant under the Queen, and
the Succeſſors of the Churchwardens made a Leaſe to the
Plaintiff; and whether theſe houſes were given to the Queen,
was the queſtion. Daniel moved, that they were; for the obit is the
principal thing why the houſes were deviſed; and the Reparation
of the Houſes and Church are but accessories, without which the
obit could not be maintained; but if it had been to make the Repa-
tion, or for the Ornaments of another Church, it had been other-
wiſe; wherefore, &c. But all the Juſtices held e contra, and for the
Plaintiff; That the Queen ſhould have no more but that which
was appointed for the maintenance of the obit; and that ſhe ſhould
not have that which was given for the other uſe of Reparation
and finding Ornaments; for although the obit is appointed to be in
the Church, yet the Church is for divers other good purpoſes; and
for thoſe good uſes the Church ought to be repaired, and to have
Ornaments. And the letter of the Statute is plain, that the
King ſhall have that only which is given to ſuperſtitious uſes.
And Walmsley ſaid, that the Caſe of the Town of Wakefield, where
houſe and Lands were given to give part of the profits to a Prieſt
to ſay Maſs, and other part of the profits for the Reparation of
the ſaid houſe, and other part of the profits to repair certain
Bridges; it was adjudged that the Queen ſhould have all but
what was given for the Reparation of the Bridges. And Beaumont
ſaid, that he was of Counſel in a Caſe in the Queens Bench, where
Land was given to find a Prieſt to ſay Maſs, and alſo to give part
to the Poor; and becauſe the part to be given to the Poor was in-
certain, the Queen had all. But there is an expreſs difference by
the Letter of the Statute between Land given for the maintenance
of an obit, and Land given for the maintenance of a Prieſt; wherefore
it was adjudged for the Plaintiff.

(16)
1 E. 6. c. 14.

Co. 4. 112. d.

Co. 4. 111. a & b

Scot *versus* Sir Anth. Mayn.

(17)
2 And. 18.
Co. 5. 20. b
Post. 479.

DEbt upon an Obligation, conditioned for the performance of Covenant in an Indenture; wherein Mayn the Defendant had let to the Plaintiff certain Land for twenty one years, and covenanted with him, that upon the surrender of that Lease at any time during his Lease, that he would make him a new Lease for so many years, &c. The Defendant pleaded that the Plaintiff had not surrendered unto him, &c. The Plaintiff shews that the Defendant had levied a Fine of those Lands, sur consuance de droit come ceo, &c. to Sir John Savage; and it was thereupon demurred, because he doth not aver that he offered to make him a surrender, although he were not able to accept thereof, nor to make a new Lease; but all the Court held that there needed not any tender to be made of the surrender, when he hath disabled himself to accept thereof by his own Act, or to make a new Lease; wherefore it was adjudged for the Plaintiff; And Error was afterwards brought thereupon, and the Judgment affirmed, 5 Co. 20. b.

Buckler *versus* Harvy.

(18)
Co. 2. 55. a.
Moor 423.
2 And. 29.

Ejection firmæ, upon a special Verdict. The Case was such; Tenant for life, Remainder to A. Buckler in Tail, Tenant for life 4 Martii, 20 Eliz. makes a Lease for four years; and afterwards 11 April 20 Eliz. grants the Reversion Habendum tenementa prædicta, from Midsummer next ensuing, for the life of the Grantor; after Midsummer the Lessee for years Atturms, the Term afterwards expires. The Grantee enters, the Grantor levies a Fine unto him, sur consuance de droit come ceo, &c. the Tenant in Tail in Remainder enters for the forfeiture, and lets it to the Plaintiff, upon whom the Defendant being the Grantee in Reversion re-enters, the first Tenant for life being yet alive, Et si, &c. The first question was, whether by this grant of the Reversion Habendum after Midsummer, and the Attornment made after Midsummer, the Grant be good or void. Secondly, admitting it to be void, if when the Grantee enters, and he being in by Disseisin, the Tenant for life levies a Fine to him sur consuance de droit come ceo, &c. Whether this be a forfeiture of his Estate or not. And it was argued by Heal for the Plaintiff, and by Harris for the Defendant; Walmsley, a grant of a Reversion, Habendum after the death of the Tenant for life, is good; for so is the course in Fines; for this limitation is as to the having the Possession, and not as to the having the Reversion; for that is in the Grantee presently; but when a Reversion is granted Habendum, after a day future, he is thereby excluded to have the Reversion until that time; and therefore it is utterly void, and the Habendum shall not be void, but where it is not requisite; as in Release of a Right, or grant of a Term; but here the Habendum is necessary to shew the Estate; but as to the Forfeiture I make some doubt: For I know not how there can be a Forfeiture to him who hath not any Reversion; for by the Entry of the Grantee, it is

Post. 585.

is disseisin; and all Remainders and Reversions are taken from the parties in whom they were. And how can one forfeit an Estate which he hath not? as here he hath not who levied the Fine. And it hath been held in this Court by the Lord Dyer and others, that if he in Remainder for life, levies a Fine sur consauance de droit come ceo, &c. that it is not any forfeiture; for it is but as a Release; and therefore 10 Ed. 4. Rent cannot be reserved upon such a Fine; and there is not any book that it should be a Forfeiture. Anderson; It is clear that it is a Forfeiture; and it is not by reason of any Estoppel, but by reason of the prejudice to him in Reversion; and although the Tenant for life hath but a right, yet when he hath levied a Fine, he in the Remainder might enter presently for the Forfeiture upon the disseisor; but if he had released by Fine, there should not be any Forfeiture, but by that Fine levied every one should be concluded, but that he gave a Fee by the Fine, and it is not material although that he in Remainder be a stranger thereto; as if a stranger brings Waste against Tenant for life, and he pleads Nul Waste fait; or if Tenant for life prays in aid of a stranger, he in Remainder is a stranger to these Records; yet he shall take advantage in regard of the prejudice to the Reversion. For the first point I doubt, but I conceive the Grant to be void, and that he by his Entry is a Disseisor. Beaumont, the Grant is void; for if the Estate had passed by the Livery, it had been clearly void; and the same Law is here; for the Habendum is not void otherwise, but in regard that no Estate is limited in the Premises, and because the Habendum limits the Estate, and all the Estates depend upon that which is void; and the grant being void, the Grantee by his entry is a Disseisor, and yet there shall be a Forfeiture of the Tenant for life, in regard he presumed to give a greater Estate than he had; wherefore, &c. Owen was absent, and in the Dutchy Chamber, and it was there adjourned; but afterwards Pasch. 38 Eliz. upon these reasons it was adjudged to be a Forfeiture, and the entry of him in Reversion to be lawful, 2 Co. 55. 8 Mich. 39, & 40. B. R. Pl. 15.

Co. Lt. 252.3

Wentworth *versus* Wentworth.

Dower, The Tenant pleads, That he by Deed indented, granted a Rent out of that Land to the Demandant in recompence of her Dower, which she accepted, &c. The Demandant by Replication confesses the grant of the Rent and her acceptance; but that in the same Indenture there was a Condition, that if the Rent should not be paid within a month, &c. that the Rent should cease, and the Deed should be void; and saith that the Rent was not paid; and thereupon the Tenant demurred. Glanvil for the Tenant argued, that the Demandant should be barred; for Dower is of common right, and may be assigned in Lands, or in Rent out of the Lands; and the Condition annexed to that Assignment is void; for she is in Paramount, as 2 Ed. 4. Executor delivers a Legacy upon condition, the condition is void; it is not shewn also that she demanded the Rent, and then the Condition is not broken; *Drew e contra*: The Condition is well annexed to the Grant, and therefore it is not any bar to her Dower; for it is not absolutely, but conditionally assigned, and recompence of Dower ought to be as absolute and beneficial as Dower it self; and it is not like to a Joyn-
ture

(19)

Post. 462.

Co. 4. 2. b

Co. Lit. 34. b

ture assured upon a Condition (as Vernons case is) which may well be because the Statute makes it a bar if she accept thereof ; here also needeth not any demand, because she is not to defeat an Estate thereby, nor is the Non-payment thereof penal. Walmsley, As this Case is pleaded, there is not any Assignment of the Rent for the Dower, and therefore it is not any bar of Dower, for it is pleaded, Quod dedit & concessit unum annualem redditum, &c. and although dedit & concessit are good words in the Deed, yet when the Tenant is to plead it, he is to plead it in apt words, viz. Quod assignavit ; for a gift of Rent or Land is no bar to Dower, and to that purpose I have seen a Case in the years of Ed. 2. in the book at large, where it was pleaded, that the son granted Land in Dower to his Feme, ex assensu patris, and ruled that it was not good, for it ought to have been assignavit ; for in pleading every one ought to plead according to Law ; and as it is here pleaded, the Feme may have a Writ of annuity upon this Grant, which she cannot have if it were an Assignment ; and the words of the Deed being dedit, &c. the intent of the parties to have it a Grant, doth thereby appear, as also by annexing a Condition thereto ; for it is clear that a Condition cannot be annexed to an Assignment of Dower ; and the Tenant against whom it is, hath pleaded it as a Grant ; and if he hath election to use it as he will (as in many cases a man shall have) yet he hath here made his election to have it as a Grant, and we may not take it otherwise ; and as to the demand, it needed not, when she is not to destroy the Estate ; for the Condition being, that if the Rent be not paid, it shall be void, it is penal to the Heir ; for then she shall be restored to her Dower, and therefore the Heir shall do the first Act by his Tender ; and therefore it was adjudged in a Case wherein I was of Counsel in this Court. A devise made of a Rent out of Land to one, and a devise of the Land it self to another upon Condition to pay the Rent, the Devisee of the Land ought to pay the Rent without demand in salvation of his Land. Beaumont accord, I agree that an Assignment of Land for Dower or of Rent for Dower ought to be absolute ; for the Rent comes in place thereof, and shall be of the same nature ; and the annexing of a Condition to the Assignment of Dower is void ; but here is not any Assignment, but it is a meer Grant, and there needs not any demand, because the Feme is not to defeat any Estate by the Non-payment ; wherefore, &c. Owen, The pleading Quod dedit & concessit is good in substance, but not in form, for it ought to have been pleaded Assignavit ; but although he hath not done so, it is good in Law ; for a gift in recompence of her Dower is an Assignment ; and although it be good in form, yet it is not material, for that the other hath not demurred for this cause ; but for the Condition, it is void for the reasons before alledged ; but if it had been good, it ought to have been demanded, for upon the Non-payment, the Feme is to take the Land from the Heir, for she shall be restored to her Writ of Dower ; wherefore, &c. But Walmsley and Beaumont continued their former opinion, for it is not form but substance ; for the Deed shall not be taken in any other manner than as he pleads it, which is not any Assignment ; the condition also is not annexed to the Land, but to the Grant : and for the Condition broken, she is not to have the Land, but only to be restored to her Action to demand her Dower ; wherefore there needed not any demand. Anderson was

was absent, and it was therefore adjourned; afterwards Pasch. 38 Eliz. it was moved again, and then it was adjudged accordingly for the Demandant.

Baldwin *versus* Smith, Trin. 36 Eliz. Rot. 1676.

Replevin: The Issue was whether the Land was the Freehold of one Kent? upon special Verdict it was found that Francis Archer was seised of this Land in Fee holden in Socage, and devised it to Robert Archer his son for life, and after to the right and next Heir male of the said Robert and to the Heirs males of the body of such a right and next Heir male of Robert; and found further, that at the time of this devise, Robert had Issue John his eldest Son; the devisor died, Robert entered and infeoffed Kent with Warranty; John enters, Kent re-enters after Roberts death, and John re-enters upon him, &c. Et upon all this matter, the Estate of Kent he lawful or not; and that John is to be barred, was the question. First, whether this be an Estate tail or for life only in Robert. Secondly, whether this Warranty descending upon John being an Infant (as it was found he was) shall bind him, because he could not enter during the life of his Father. Thirdly, the Warranty descending, and the right of Remainder vesting all at one time, which of them shall be preferred? Drew for the Avowant moved, that it is an Estate tail in Robert, because the Remainder is limited to his next Heir male immediate, as in the Case 39 Affise. Devise to one & uni hæredi de corpore, &c. was taken to be an Estate tail; the Remainder also should otherwise be in Abeyance which the Law avoids; if it also were not an Estate tail, it is void, for the Remainder shall never be in esse during the particular Estate, but all the Justices (Owen absent) held, that Robert the Father had but an Estate for life; for so are the words plainly; and the right Heir shall take it as a Purchasor; and Beaumont held that John shall take it, and the Remainder shall vest in him presently, living the Father; for the Remainder is limited to the right and next Heir of the Father, which words being in a Will shall be taken according to the intent of the Devisor, viz. to him who was then Heir apparent; for he is in the intention of a plain man the right and next Heir; but Anderson and Walmsley against him in this point, and that this Remainder should be expectant; but it was admitted by them, that this Remainder being depending upon an infant, is good enough. Anderson held that the Warranty should not bind; for a Warranty shall not bind a right, but where he who should be bound thereby had time to avoid it by his Entry; and therefore it was adjudged in the Queens Bench, where Land was given to Baron and Feme for their lives; the Remainder to the next Heir-male of the body of the Baron; the Remainder to the Baron and Feme in Tail; the Baron levied a Fine with Warranty, that the Fine should not bar the Heir-male; for he had not time to avoid it during the life of the Baron. Walmsley held that this Feoffment of it self destroys the Remainder, so as it never shall come in esse; the Warranty also destroys the Remainder, and it is not like to a former right; and if the making of a collateral Warranty be a Tort, it is before the right accrued unto him, and therefore the Remainder here is not to be regarded as an ancient right; and I have the report of a Case in this Court, where a Feme Tenant for life, the Remainder to the right Heir of the Baron, the

(20)
Co. 1. 66. b.

Ant. 314.
Co. Lit. 22. a.

Ant. 314.

Am m

Baron

Co. 1. 66. b.

Baron made a Feoffment with Warranty, the opinion of Dyer and others was, that the right Heir of the Baron should be bound thereby. Beamond, the Warranty cannot bar if there be a Remainder in Expectancy, because a Warranty ought always to bind him who hath right of Entry or of Action; and here he hath not any of them in his Fathers life time, but the Feoffment of it self destroyed it, because it never came in esse. Et adjournatur, and afterwards in Trin. 38 Eliz. It was adjudged for the Avowant, that this Remainder by this Feoffment and Warranty was destroyed and barred. V. 1. Co. 66.

Palmer versus Wolley.

(21)

Action sur Trover: A Prescription was alledged in London, That every Shop in London should be said to be a Market Overt for all wares there sold, which the Court upon the first motion conceived to be too general and unreasonable a custom. And Anderson said, It had been agreed, that if one buys in a Shop any thing which appertains not to his Trade, as to buy Plate in a Mercer or Drapers Shop, it is not a Market Overt as to that purpose. So if the sale be in a back Shop, or in another place not open, no property shall be changed by such sale. 5 Co. 83. b.

Fox versus Carlyne.

(22)

Ant. 205.

Brownlow the Prothonotary shewed me a Record Trin. 37 Eliz. Rot. 927. in the Common Bench between Fox and Carlyne, where upon a special Verdict, the Case was, that one devised Land for years to J. S. Reddend & solvend 20 s. annuatim at Mich. to J. D. and for non-payment of that sum, the Heir entred, supposing that those words made a Condition, and that the Condition was broken, and that he therefore might enter; and his Entry was adjudged congeable.

Mich. 37 & 38 Eliz. in the Exchequer-Chamber.

Stubbings versus Rotheram.

(1)

Post. 459.
Co. 4. 93.
Co. 9. 87. a.
Ant. 121.
Post. 459.
Ant. 121.

Error upon a Judgment given in an Assumpsit against an Executor upon a promise of the Testators, where the Plaintiff declared that the Testator in consideration of Marriage promised to pay to the Plaintiff an hundred pound, and for not performing this promise brought the Action, and Judgment there given for the Plaintiff, and this matter was assigned for Error, that the Action lay not against an Executor; and all the Justices and Barons (besides Clerk Baron) held it to be erroneous for this cause; for Anderson said, the reason why Debt lies not against an Executor upon the contract of the Testators, is because the Law doth not intend that he is privy thereto, or can have notice thereof; and he cannot gage his Law for such a Debt as the Testator might; and when Debt will not lie, it is not fit that this Action upon a bare promise should tie him; for it stands all upon one reason; and if these Actions should be allowable, it would be very mischievous; wherefore the Judgment was reversed. Quære, Whether a Recovery in this Action against an Executor, is allowable against a Debt

Debt upon an Obligation, if it should be an Administration; for it would be then mischievous to Creditors; and if it should not be an Administration, it would be then mischievous to Executors, that they should be charged therein, and have not allowance thereof against other Creditors; for it may be that at the time of the recovery they did not know of other Debts. Note, this Term the like Judgment was given betwixt Gryggs and Helhouse in an Action brought against an Administrator upon a promise of the Intestates to pay monies, &c.

Chamberlayn *versus* Nichols.

Error upon a Judgment in Debt upon an Obligation: The Error assigned, was, because the Obligation being single, the Defendant pleaded payment without an Acquittance, and Issue taken thereupon and found for the Plaintiff, and Judgment accordingly, whereas it is not any Plea, and so the Issue taken upon a void and no Plea, and therefore an ill and void Trial, and therefore the Judgment thereupon is erroneous; but all the Justices and Barons held, although it were an ill Plea, upon which the Plaintiff might have demurred, yet an Issue being taken and found by Verdict, it is holpen by the Statute; and the truth is there was not any payment; wherefore the Judgment is well given accordingly; and the Judgment was affirmed.

(2)
Co. 5. 43. a
Ant. 157.
Post. 697, 716,
456, 884.
2 Cr. 86.

2 Cr. 86.
Co. 5. 43. a
Ant. 367.
Ant. 228, 259,
260, 446.
Post. 458, 777.

Philips *versus* Sackford, Pasch. 36 Rot. 488.

Error of a Judgment in an Assumpsit, where the Plaintiff declares, That in consideration the Plaintiff would forbear to sue one Brediman for twenty pound debt which he owed unto him, that he assumed to pay the aforesaid twenty pound before Mich. and alledged in fact, that from the time of the Assumpsit, Abstinuit from suing him, & adhuc abstinet, and after Non Assumpsit pleaded and found for him, it was adjudged for the Plaintiff: The first Error assigned, because he alledged not any request, but generally licet sapius requisitus, &c. Sed non allocatur; for where a time certain is limited for the payment of any thing, he never shall alledge a request before the day; but otherwise it is where it is incertain. A second Error assigned was, that the consideration that he would forbear, &c. and he weth not for what time, is not a sufficient consideration; for it may be, that he forbore but for a quarter of an hour, or other small time; and although it were alledged, Quod abstinuit, & adhuc abstinet, that will not help it; and of that point the Justices doubted; but the greater part held, that it was not a sufficient consideration. Sed adjournatur, and afterwards for this cause it was reversed.

(3)
1 Rol. 27.

Post. 561.
Ant. 387.
2 Cr. 683.
Ant. 19.
2 Cr. 683.
1 Rol. 27.

Bingham *versus* Smeatkwick, Hill. 37 Eliz. Rot. 362.

Error of a Judgment in an Ejectione firmæ, where S. declares of a Lease of Will. Yerbury, 13 April 36 Eliz. of the Lands in question for three years; the Defendant saith, that long time before Will.

Y m m 2

Yerbury

(4)

Yerbury, the Lessor had any thing, one Thomas Chaffyn was thereof seised in fee; and 25 Martii 24 Eliz. Let them to John Yerbury for twenty one years, which John Verb. 3 Apr. 32 Eliz. Let them to Will. Verb. for eight years, if one Arthur Verb. should so long live; that the said W. Y. being so possessed, the Reversion over to John Verb. that J. Y. the 11 July 33 Eliz. died intestate; that Administration of all the goods of J. Y. were committed by the Archbishop of Canter. (because he died possessed of divers goods in divers Diocesses within the province of Canter.) to Hen. Blake, that Will. Y. so being possessed, Let as it is alledged in the Declaration; that afterwards, viz. 15. April 36 Eliz. Arth. Verb. died, whereupon the Defendant as servant to Hen. Blake, and by his command ejected him. Et hoc, &c. the Plaintiff replies confessing the Lease to John Yerbury; but further saith, that the said J. Y. 30 Jan. 30 Eliz. granted all his interest to Arth. Verb. that the said Arth. Y. 31 July 35 Eliz. died intestate; that the Archbishop of Canterb. 27 Aug. 35 Eliz. committed the Administration of all the goods of Arth. Y. to the said W. Y. who by force thereof entred and made a Lease, prout in the Declaration, &c. And Travers that that the said John Y. let it to W. Y. for eight years, prout in bar; and upon this Issue joyned and found for the Plaintiff, and Judgment given for him; the Error assigned was, that he had traversed that Estate which was an Estate determined, and by him in his Replication avoided before; for he in his Replication affirms, that the said J. Y. 30 Eliz. &c. (which is before the Lease alledged to be made to W. Y.) had granted all his Estate to Arth. Y. under whom he made Title; then although afterwards he makes this Lease to W. Y. it is not material, so he hath well avoided it; then the Travers is idle, and issue joyned upon a vain matter, and then the Verdict thereupon ill, and the Judgment erroneous; and therefore it is like an Issue taken upon a Colour given in an Action of Trespass, that if it be tried, yet it is a Jeofail, and not remedied by the Statute; but all the Justices and Barons besides Walmsley held, that although it be an ill travers, and an ill issue joyned (as it is agreed by them all that it was) yet being tried, and Verdict given, it is aided by the Statute of Jeofails, and the Judgment thereupon is well given. A second Error assigned was (but that was ore tenus) that in the Replication, the Plaintiff hath not made any good Title; for he conveys to himself Title as Administrator of the goods of A. Y. committed unto him by the Archbishop of Canterb. and he doth not shew, that the Archbishop was Ordinary, nor that the Intestate had goods in divers Diocesses; and if he had not, the Archbishop had no Authority to commit Administration, and then he hath not any Title, and Judgment ought to be given against him, But all the Justices besides Walmsley held, that in regard it was in the Replication, and but the Inducement of a Travers, wherein if he had not made any Title at all, but had said, that W. Y. made the Lease unto him prout in the Declaration, and Traversed absque hoc, that J. Y. Let unto him during the life of A. Y. it had been good enough; wherefore the making of an insufficient Title in his inducement to the Travers is not material, especially being after Verdict found; but they held that such manner of pleading had not been good, unless he had averred, that he had Assets in divers Diocesses, or that it was within the Diocess of Canterbury, or that he was loci illius Ordinarius; but for the reasons aforesaid, the Judgment was good

Post. 651.

Ant. 6.

good enough, and not to be reversed; but it was moved by Coke Ant. 456. the Queens Attorney, that the committing of Administration being by the Archbishop, although he had not goods in divers Diocesses, because it is in his Province wherein he hath jurisdiction, Ant. 283. is not void, but only voidable by sentence; and it is not like to an Administration committed by another Bishop of the goods of a man who died in another Diocess, or who had goods in divers Diocesses; and this difference hath been taken and agreed in the Queens Bench, and therefore the Plea is well enough; but Co. 5. 30. a the Justices said, that it was all one, and that the Administration is void in both cases and not avoidable only. But yet for the reason aforesaid, they held that it was not Error; but the Judgment was affirmed. Vide 30. H. 6. 13. Plow. 277. 10 H. 7. 8. 5 Co. 30.

Mmm 3

Termino

Termino Hillarii,
Tricesimo octavo ELIZABETHÆ,
in Banco Reginae.

Corbyson *versus* Pearson.

(1)

Trespas for the taking of his Beasts (viz. four Cows) in a place called Breachleys, and chasing and impounding them without cause. The Defendant justifies as in his Freehold, for Damage-Feasant; the Plaintiff by Replication shews, that he is, and time whereof, &c. was seised of a Messuage and twenty Acres of Land in D. and that he and all whole, &c. have had from time, &c. Common for all his Beasts, Levant and Couchant upon the said Tenements, &c. in the place where every year after the sown Corn was severed and carried away until it were re-sown; and that he there after the Corn was severed and carried away, put in his said Beasts into the place where, &c. *utendo communia sua prædicta, &c.* The Issue was taken upon the prescription, and found for the Plaintiff, and now moved in Arrest of Judgment, that the Replication was not good; and so the Plaintiff ought not to have Judgment, because he saith that he put in his Cattel after the Corn severed and carried away, and saith not that it was before the Land was re-sown; for otherwise he had no Title to Common. Secondly, because he avers not that those Cattel were Levant and Couchant upon the Land aforesaid, for otherwise he cannot use Common with them, nor hath not sufficiently entituled himself to put them in, and in proof thereof vouched 10 Ed. 3. 56. and the presidents in the book of entries, trespass in common 9 & 11. But all the Justices held, that in regard Issue is taken upon the Prescription, although peradventure the Plea is ill, and ought to be adjudged against the Plaintiff, if he had demurred thereupon for this Cause; yet it now shall be taken to be good enough and to be holpen by intendment, when it is said that he put them in *utendo communia sua prædicta*, That it was at such a time as the Common is to be used, and with such Beasts as are there to use the Common; wherefore without any great argument because it was after Verdict and might be well intended, and so aided by the Statutes of Jeofails, it was adjudged for the Plaintiff.

Ant. 455.

2 *Lawd.* 320.

Serle versus Rosse.

Error of a Judgment given in the Queens Bench upon an Assumpsit against an Executor, and declares that the Testator in consideration of such a Marriage, assumed to pay to the Plaintiff twenty pound; the Error assigned was, because this Action lies not against an Executor for the Non-performance of the Testators promise; and for this cause the Judgment was reversed. (2)
Ant. 454.

Fenner versus Plasket & Green, Mich. 37 & 38 Rot. 290.

Rescous: The Plaintiff declares, that a Rent-charge in Fee was granted to the Feme of the Plaintiff, and to Ed. Cofins her first husband, and that Ed. Cofins died, and she took the Plaintiff to husband, and for Rent arrear durante viduitate of his Feme he distrained, and upon Rescous brought this Action; the Defendant hereupon demurred in Law, but shewed not any cause of his demurrer; but the principal cause (as I heard) was, for that his Feme was not joyned in the action: the distress being taken for Rent due dum sola fuit; But notwithstanding it was adjudged for the Plaintiff; for it is a Tort done to the Baron for which he might have an Action sole, or may joyn his Feme therein, because it ariseth upon a duty due unto her before the coverture, but it is at his election. (3)
Moor 422.
1 Cr. 419.

Rolls versus Germine, Ante Mich. 37 & 38 placito 24.

Being now moved again, Gawdy continued his opinion, that Debt lies not against an Executor upon a simple contract with the Testator, although he acknowledgeth the contract or admits thereof; but the Court ex officio ought to abate the Writ: But Popham and Fenner e contra; but then there was another matter moved, that this Action of Debt would not have lien, if it had been brought against the Testator himself for part thereof, viz. for so much as he expended as Solicitor in Suits in the Queens Bench; for those are not allowable by the Law, for such Fees which he expends in such business; and therefore no Action lies for them, but an Attorney in such Cases where he is Attorney, may lay out Fees, and have Debt for them. And of this opinion were Popham, Clench and Gawdy, but Fenner doubted thereof; afterwards in Pasch. 38 Eliz. being moved again, they held their opinion, that for those Fees the Action lay not; so the Writ was abateable in all; and therefore they gave rule, that if other matter were not shewn the fourth day in Trin. Term following, that Judgment should be reversed. (4)
Ant. 425. 6.
Ant. 454.
Post. 804.
Moor 366.
Post. 760.
2 Cr. 524.

Wilson versus Packman, Hill. 37 Eliz. Rot. 416.

Action for Trover and Conversion of Goods. Upon demurrer the Case was, the Ordinary committed Administration of the goods of an Intestate to the Defendant; afterwards the next of kin sues a Citation in Court Christian against the Defendant to repeal that Administration, and he pendente lite sells those goods, and afterwards his Administration is repealed, and Administration on (5)
Co. 6. 18, 19.
Moor 396.

on committed to the Plaintiff, who for this conversion pendente lite brings this Action; and it was moved for the Defendant, that this Action lies not; and the Administration at the Common Law is well committed; and the Statute doth not alter the Law in this point, but gives a penalty against the Ordinary, if he commits them not to the next of kin; and the Administrator until Administration repealed, hath an absolute Authority to dispose of the goods as he pleases. Tanfield e contra, the Conversion pendente lite in Court Christian is not lawful, but is a Tort to the Plaintiff; and that the sentence there proves, which is, that all things attempted or done pendente lite shall be void, and the Justices ought to have regard to the Civil Law in this point, as in 27 H. 6. Gard. 118. 2 R. 2. Quare Impedit 143. & 4 H. 7. 13. And by the sentence it appears, that the Administration is revoked as if it never had been; and upon this reason it is in Dy. 339. where an Administrator recovered a Debt; and afterwards another procured himself to be joyned in the Administration, and released the Debt and afterwards it being revoked, this Release was not any bar to the Execution; and Mich. 35 & 36. Eliz. in the Common Bench betwixt White and Cary, this very point was in question, and adjudged that the Action lay. Gawdy, The Action well lies, for the sentence doth not repeal mean Acts done by an Administrator which are for the Intestates benefit; but for as much as these Goods were not converted or imployed for the Intestates use, it is reasonable that he should be charged for them. Popham and Fennet e contra, for the Administrator hath an absolute and lawful Interest and power to dispose of the Goods, until the repeal be made, and it is not like to an Appeal upon a sentence, for that makes it as no sentence; but the Appeal of the Letters of Administration doth not avoid it ab initio, and make a lawful Act tortious, but rather in this Case, the new Administrator shall have an accompt for the monies received; and the words in the sentence be not to be regarded, for they are ordinary in all sentences. So he having the Goods lawfully, and converting them lawfully, shall not answer for them as for a Tort done; and Popham here said, if Administration being committed, the Ordinary commits new Administration, it is a repeal of the former without any sentence of Appeal; and if the first Administrator waste the Goods, the Debtee shall have the action against him; and if he pleads that Administration is committed over, he may well by his replication maintain it, because he wasted the Goods when he was Administrator; wherefore, &c. Et adjournatur, but afterwards the action was discontinued by the Plaintiff, 6 Co. 18.

Co. 6. 18. b.

Co. 6. 19. a.
Post. 565.Curteis *versus* Savel and three others.(6)
2 Rol. 133.

Post. 465.

Appeal for the death of her Husband; upon several Issues pleaded, the Plaintiff was non-suited upon a tryal against the one; and whether that should be a Non-suit against the rest was the question: And the whole Court held it to be a Non-suit against them all; wherefore as to the suite of the party, it was ruled that he should be discharged, but held that the others who were not tryed, should be arraigned upon the Declaration at the Queens suite.

Ascue

Ascue *versus* Hollingworth, Ante Mich. 37. Plac. 14.
C. B. Trin. 37 Eliz. Rot. 393.

Error of a Judgment in the Common Bench in Debt; the Case was, that Ascue was bound to Hollingworth in a Statute-Staple acknowledged before the Mayor of Lincoln in two hundred pound; and Ascue thereto put his Seal, and the Seal used at Lincoln for one hundred years for that purpose, was also put thereto; but because it was not ensealed with a Seal of two parts according to the Statute of Acton Burnel, it was ruled in an Audita Querela between the said parties, that it was void as a Statute; whereupon Hollingworth brought his Action of Debt thereupon as upon an Obligation; and all this matter being disclosed, and a Demurrer joyned thereupon, it was adjudged for the Plaintiff. Ascue the Defendant thereupon brought Error, and assigned for Error the very point in Law, that this was not an Obligation, and that Debt lies not thereupon, and no other cause was moved for Error. And it was now argued by Pudry for the Plaintiff, and by Yelverton Serjeant for the Defendant. Gawdy held, that Debt lies not hereupon as upon an Obligation; for when a thing is void in the principal and superior operation thereof (as it hath been adjudged here, that it is void as a Statute) it cannot be good in an inferior, as 33 H. 8. fol. 50. a pardon of Petit-Treason was no discharge of Murder; and Blunt and Andrews Case, Bargain and Sale of Land and all the Woods and Under-woods, the Deed not being enrolled, it cannot enure as a Grant of the Wood; and although the books be, that Debt lies upon a Statute, &c. yet he ought to declare thereof as upon a Record, and not as upon an Obligation (and so all the Prothonotaries affirmed to have been always their course) Fenner accord; for it is not an Obligation; for a non est factum cannot be pleaded in this Action; and although it were sealed by the Conusor, it never was delivered by him as his Deed, but he only acknowledged it before the Mayor, which is not of any effect to make it to be his Deed. Clench, There be words Obligatory in a Statute as well as in an Obligation; also in the end he binds his Lands and Goods, and the acknowledgment makes it afterwards to be a Statute: So it is an Obligation and more. And posito, that he had sealed and delivered it as his Deed, and had not acknowledged it, it is no question but it had been a good Obligation; and although peradventure it had been a good Statute, Debt had not lain thereupon as upon an Obligation, but as upon a Record; yet now when it never was any Statute, he conceived it might well be sued as an Obligation; wherefore (Popham absent) Adjournatur.

(7)
Gould. 190.
2 Rol. 149.
Moor 405.
Post. M. 38. &c.
9 Pl. 12.
H. 39. pl. 16.
Ant. 355. 6.
Post. 494, 532.

2 Rol. 56.

Haddon *versus* Arrowsmith.

Ejectione firmæ, upon a special Verdict, the Case was such; the Queen being Lady of the Manor of Winterboure, grants licence by her Steward to a Copyholder for life within the Manor, to make a Lease for three years, if he live so long, he lets the Land to the Plaintiff for three years absolutely, who upon Ejectment by a stranger brought this Action. Stephens for the Defendant argued, that this Lease was not according to his Licence, and therefore it is not warranted thereby; for an authority ought precisely to be pursued, and then an Ejectione firmæ in this Case lies not; for although it

(8)
1 Rol. 331.

Post. 469.

2 Cr. 437.

Ant. 457.

it hath been here adjudged; that Lessee for years of a Copyhold which is made without Licence of the Lord being a common person might maintain an Ejectione firmæ, because he is Lessee against all but the Lord, yet when the Queen is Signioress, it is otherwise; for the Copyholder cannot disleise the Queen; wherefore it cannot be a good Lease; for nothing passed from the Copyholder to the Lessee. Atkinson e contra, for these words, If he live so long, are but to shew how long the Lease is to continue, which is no more than what the Law appoints, and therefore good enough; wherefore, &c. and of that opinion was all the Court; for the limitation, that he shall make a Lease for three years, if he so long lives, be but words of Surplusage, and no more than the Law saith; and then the words of the party, If he live so long; if they had been in the Lease, had been vain: And the difference in this Case will be betwixt a Copyholder in Fee, and a Copyholder for life; for if such Licence had been granted to a Copyholder in Fee, and he had granted it for three years absolutely, that had not been warranted by the Licence; for the intent was to give him Licence, but not to hurt the heir; and without these words in the Lease, the Lease is good and shall bind the heir; but it is otherwise of a Copyholder for life; for the Law without these words determines the Lease by his death. But Gawdy said, admitting it to be not warranted by the Licence, yet the Lessee may well maintain this Action; for there is not any difference betwixt a Lease made by a Copyholder where the Queen is Signioress of the Manor, and where a common person; for in both Cases the Lease is good betwixt the Lessor and Lessee, and against all strangers; Quod Fenner concessit; but Clench denied, and Popham spake not to that point; and Fenner said, that a Lord cannot limit a condition in his Licence, for he gives nothing, but only dispenseth with the forfeiture, and all the Estate passeth from the Copyholder; wherefore he could not annex thereto a Condition, no more than the heir might assign Dower upon Condition, or an Executor deliver a Legacy conditionally; and Popham thereto agreed. But here this is not a Condition, but a limitation of the Estate which he might well limit, but in the principal point they all agreed: Wherefore it was adjudged for the Plaintiff.

Smith *versus* Freeman.

(9)
Ant. 119.
Co. 5. 45. a.

Error upon a Judgment in Waste: The Writ recites the Statute, Quod nullus faciat vastum, venditionem seu distractionem, where it should be destructionem, And it was prayed that it might be amended, for it is but the default of the Clerk; and it was held by all the Court that it could not be amended, because it is in the original Writ. 5 Co. 45.

Green *versus* Wilcoks, Mich. 37 & 38 Eliz. Rot. 332.

(10.)

Debt against an Executor; the Defendant pleads, that hanging this Action, J. S. brought another Action of Debt for an hundred pound, true Debt of the Testator, which Action he had confessed; and that he had Riens inter maynes beside to satisfie that judgment; the Plaintiff protestando that it was not a true Debt, for Replication saith, that this Recovery was by Covin to defeat him of his Action; and it was thereupon demurred in Law, because he

he ought to answer thereto if it be a true Debt; and if so, it cannot be recovered by Covine, and so the Covine is not issuable; but all the Court held that the Replication was good enough; for if the Recovery be not by Covine, the Plaintiff is barrable, and therefore it is the principal matter to be answered; and the Conusance of the Action is not material, viz. whether it be a true Debt, and an Action truly pursued, and a Recovery may be covenous, although it be upon a true Obligation, as Mich. 36 & 37 Eliz. in Sarah de Banhaults Case in this Court where the Testator was obliged in an Obligation (with an intent to defraud Creditors) to pay a thousand pounds; the Obligee brings Debt thereupon in Windsor Court against the Executrix, and recovered; and it was pleaded in bar here, and the Issue was whether the Recovery were by covin by rule of the Court, and found against the Defendant; yet there it was a true Debt, and Judgment given accordingly. So here; wherefore, &c. And the Court moved the parties, that the Defendant should pay Costs and waive the Demurrer; and afterwards upon a motion it was adjudged for the Plaintiff, and Error thereof brought and reversed for the matter in Law; for it cannot be a Covinous Recovery if the Debt be true, and the Covin alledged is not material.

Sir Henry Knevett *versus* Pool and Hawkins and two others, Trin. 36 Eliz. Rot. 326.

TRESPASS: Quare clausum fregit, and his Corn there growing, cut and carried away; upon Not guilty pleaded a special Verdict was found, and thereupon the Case was such, Tenant for life Remainder for life, the Tenant for life makes a Lease for years to Hawkins, who is ousted by a stranger, who commits a disseisin, the disseisor makes a Lease for years; his Lessee sows the Land; the Tenant for life dies, he in Remainder (the Corn not being severed) and the first Tenant for years of the Tenant for life; the disseisor and his Lessee for years enter and cut, and carry away the Corn; and the Tenant for life in Remainder brings Trespass, Et c. &c. And found damages severally for entering into the Land, and for the Corn carried away; and as to the entering into the Land, it was held clearly, that the Verdict is against the Defendant, for although some of them had Title to have the Corn, and the others in aid of him might come and enter upon the Land to carry the Corn away, yet that is by liberty in Law which ought to have been pleaded and cannot be given in evidence, nor shall be holpen upon the Verdict. And the whole Court was clearly of that opinion; wherefore as to that the Plaintiff should have Judgment; and as to the Corn Tanfield for the Plaintiff argued, that they appertained to him in Remainder, and not to the Lessee for years of the Tenant for life; nor to the disseisor nor his Lessee, i. To Hawkins the first Lessee, they appertained not, because they did not sow them at his own Cost, nor was in possession of the Land at the time of his Estate determined; and the sole reason why a Lessee whose Estate is determinable upon an uncertainty shall have the Emblements, is because they arise out of his labor and costs, the Law gives him that privilege after the determination of his Estate, which is the reason given in Broke Emblements pla. ultimo; but if he were not at the cost and labor to sow it, he shall not have the Corn, but he who should have the Land, shall have the Corn; for Quicquid plantatur solo,

(11)
Co. 5. 85. 2.

folo

Ant. 61.
Hob. 132.
1 Rol. 727.

solo credit ; and therefore if a man sows Land, and lets it for life, and the Lessee for life dies before the Corn be severed, his Executor shall not have them, but he in Reversion ; but if he himself sowed the Land and died, it were otherwise. So if Tenant for life sows the Land, and grants over his Estate, the Grantee dies before the Corn severed, his Executor shall not have the Corn ; which Cases Gawdy and Popham agreed. So Mich. 29 & 30 Eliz. there was a Case in this Court, where a man sowed his Land, and devised his Lands for life, Remainder in Fee; Tenant for life dies, the Corn not severed ; the question was, whether the Executor or he in Remainder should have it? and held that he in Remainder, which Case they all agreed, then here this reason is strong against the first Lessee that he should not have it : But if he had entred living the Tenant for life, and had continued his possession until his death, it had been otherwise ; for then it shall be construed, as if he always had continued in possession, and had sown it himself ; but when he did not enter it was his folly and his laches to prejudice himself ; and the disseisor nor his Lessee for years shall not have them ; for their Estate is uncertainly determinable by their own Tort which the Law will never regard nor give any privilege thereto ; wherefore, &c. But all the Justices (absente Clench) resolved to the contrary, that the Corn appertained to Hawkins the first Lessee of the Tenant for life ; for he having right to it at the time of the death of the Tenant for life, the Law shall preserve his Title and right as if he had entred. For Gawdy said, if he had entred in the life of the Tenant for life, it is clear that he should have had the Corn : Now when he could not enter, the Law supplies his Entry, as 19 H. 6. 28. Tenant pur autre vie is disseised ; he shall not have Trespals for the mean profits, until the Re-entry ; but if cessy q. vie dies, so as he cannot re-enter, the Law shall give him the Action without re-entry. Then Lessee for years having right to have them in the life of the Tenant for life, it is not reason it should be taken from him by the uncertainty of the death of the Tenant for life ; wherefore he in the Remainder hath no right to have them, wherefore he should not have his Action against the Defendant ; and it was therefore held, that the Plaintiff had no cause to recover ; and afterwards Pasch. 38 Eliz. their opinion being again delivered openly in Court, it was commanded that Judgment should be entred for the Defendant, if other causes were not shewn to the contrary by the last day of the Term, and it was adjudged accordingly, 5 Co. 85.

1 Rol. 727.

Penryn versus Corbet, Trin. 37 Eliz. Rot. 504.

(13)
Moor 407.

Appeal of Murder, of the death of his Brother ; it was tried by Nisi prius in London, and all the Justices of the Kings Bench sat upon it in the Guild-hall in London ; the Jury found him Not Guilty of the Murder, but guilty of Homicide ; and this by advice of the Court they might well do ; and they might if they would (if they thought him Not Guilty of the Murder) have found him Not Guilty generally, and not have spoken of the Homicide ; and it is at their Election in this Case how they will give their Verdict ; and afterwards this matter was moved in Court whether this Verdict was well found, and should be a Conviction for the Homicide. And Popham said, that it was so ruled by the advice

advice of all the Justices of England in Stowels Case. Vide the Case of Wrott and Wiggs, where the Jury found him not Guilty generally, and would not find him guilty of the Homicide, although the evidence was pregnant, that he was guilty thereof; yet it was good by the advice of all the Justices of both Benches. The Defendant then pleaded the Queens pardon, and prayed to have it allowed; and a president was shewn, Pasch. 8 Eliz. Rot. 33. Mulgraves Case where the Defendant pleaded the Queens Pardon in this very Case; and it was allowed; although in 9 Eliz. Dyer 261. there was a Quere thereof; but Popham said it was a strong president; for it is hard the Queen should pardon that which is the lute of the party; and there is no question if it had been an appeal of Homicide, as it well might, the Queen could not have pardoned it; whereto Coke the Queens Attoyny of Counsel with the Defendant agreed: for it is meerly the lute of the party. But here the lute of the party is an appeal of Murder; and that wherein he is found guilty, is not for the party, but for the Queen; wherefore the Court would advise thereof until the next Term; and afterwards Pasch. 38 Eliz. the Plaintiff being compounded with, would have been Noniuted; and the Court doubted whether it might be allowed, being after a general verdict, although it were in another Term. It was then prayed that a Retraxit might be entred thereof. And therein also the Court doubted whether it might be, but they would advise.

Ant. 276.

Co. 5. 50.

Post 632.

Ante 460.

Wilkinsons Case.

Wilkinson by Colour of a Writ de vi laica removenda awarded out of the Chancery, retournable in this Court, was put out of possession by the Sheriff, and the possession by that means gotten by his adversary; and this being suggested to the Court by affidavit, restitution was awarded, and to that purpose a president shewn, 35 Eliz. rot. 66. between Erkenfall and Palmer for the Parsonage of Wiberton in the County of Cambridge in such Case, upon such a suggestion, restitution was awarded.

(13)

Moor 462.

Walter *versus* Dawes, Trin. 37 Eliz. rot. 458.

A Sumpsit as Executor to Robert Walter his Father, for that where- as the said Walter the Testator was Justice of Assise in the County of Glamorgan, and two other the adjoyning Counties, and that every Justice of Assise there had used time whereof, &c. to appoint an Officer called the Clerk of his Fines, who hath the ingrossing of all Fines within the said Circuit, and had 5 s. for the ingrossing of them; the Defendant in consideration that the Testator would appoint him to that Office, assumed to pay unto him Twenty marks per annum, quamdiu he should exercise it; and that the Testator appointed him to that office; and that he executed it for three years; and for nonpayment of this Twenty marks per annum, for the three years he brought the Action; the Defendant pleads that he did not exercise that Office; and Issue being joyned thereupon and tried by a Visne of D. in the County of Worcester where the Action was brought, and found for the Plaintiff, this matter was alledged in arrest of Judgment; because this office by intendment is to be exercised in the Counties in Wales; and

(14)

2 Rol. 599.

Gould. 180.

Moor. 412.

N n

then

then the tryal ought to have been in the County of Hereford, begin the County next adjoyning, and not in the County of Worcester, and of that opinion was the whole Court; for although the office, might be exercised in any place by ingrossing the fines in any place; yet it shall not be so intended to be out of the Circuit, unless it be expressly shown; they also held that this was not any office and therefore the appointing him to be his Clerk of the Fines is not any consideration to maintain this Action; wherefore without further argument it was adjudged for the Defendant, absente Gawdy.

Wytham *versus* Waterhouse.

(15)
1 Rol. 346.
Co. Lit. 351. a

A Lease for years was granted to the Defendant to the use of the Grantors sister, whom he afterwards should marry; who married her accordingly and then died; the Feme takes the Plaintiff to husband, and afterwards she died; and the Defendant takes Administration of the Plaintiffs wives goods; and the Plaintiff sued the Defendant in Chancery to have this Term; and it was there decreed by the advice of all the Justices of England, that neither the Term nor the use thereof appertained to the Plaintiff.

Corbet *versus* Cook, Mich. 37 & 38 Eliz. rot. 602.

(16)
Moor 450.

DEbt upon an Obligation conditioned, that if he appeared at Westm. such a day to answer, &c. that then, &c. (this was a Sheriffs Bond) the Defendant pleaded that before the day of the return of the Writ, the Term was adjourned to Hertford; and that there he appeared, and thereupon the Plaintiff demurred: it was first moved whether this Plea were good, the Obligation being taken (as by intendment it might be) after the Adjournment of the Term, whether he ought not to appear at Westm. or at Hertford; but it was held that the Obligation shall always relate to the day and place comprised in the Writ, for that shall not have regard to the Adjournment; and yet if the Term be adjourned he ought to appear in the Queens Bench, or otherwise he shall forfeit his Bond; as 9 Ed. 4. is, and so be divers presidents. Secondly, It was moved that the Plea was not good, because he doth not conclude prout patet de recordo. For although he appeareth, yet if his appearance be not entred upon record, he forfeits his Obligation, and he ought to conclude so; otherwise the Plaintiff cannot have an answer thereto, to say Nul tiel Record; and of that opinion was all the Court.

Nector and Sharp, Executors of Thrower *versus* Gennet, &c. Trin. 37 Eliz. rot. 178.

(17)
Owen 72.
Gould. 141.
Moor. 413.

Prohibition against Gennet and others, Wardens of the Company of Tallow-Chandlers in London, surmising that the Defendants sued them in Court Christian for a Legacy of two hundred pound given unto them by the Testator of the Plaintiff; and that they there pleaded that their Testator was Keeper of Ludgate, and was possessed of goods to the value of Three hundred and twenty pound, and no more; and was obliged in an Obligation of One thousand pound to Spencer and Massam Sheriffs of London, that he should safely keep the prisoners committed to his charge; and should

should save the Sheriffs harmless from all escapes, &c. and shews that one Helms was taken upon a *capias utlagat.* after Judgment in Debt, and escaped; and Debt was brought upon this escape against the Sheriffs of London, and Judgment against them; and so the Obligation forfeited; so there was *Riens inter mayns* more then to satisfy this Obligation; and because the Ecclesiastical Court would not allow of this Plea, a Prohibition was sued; and it was thereupon demurred. Ackinson for the Defendant prayed a Consultation; for this Plea is not any Plea; and therefore the Court Christian which is to take notice of our Law, ought not to allow it; for the Judgment in Debt was in Anno 20 Eliz. and the *Capias utlagatum*, whereupon he was taken was in Anno 25 Eliz. so as the Plaintiff could not take benefit thereof; for he was not in Execution for him, as one taken by a *capias pro fine*, after the year and day is not in Execution for the Plaintiff, as 1 H. 7. 19. 36 H. 6. 24. *Quod fuit concessum per curiam*, and then the Obligation is not forfeited, for it is not any escape; and therefore an Action lieth not against the Sheriffs, and if it be not any forfeiture, it is plain that this Legacy shall be first paid. But the Legatory by the Civil Law should enter into Bond to make restitution, if the Obligation should afterwards be recovered, so there is not any inconvenience to any; and to that the Council on the other side, and the whole Court (besides Fenner) agreed: that this is no Plea unless the Obligation be forfeited; but Fenner said he doubted thereof: Coke, the difference is when the Obligation is for the payment of a lesser sum at a day to come, it shall be a good Plea against the Legatee before the day, for it is a duty maintainant which is in the Condition, as 9 Ed. 4. 12. is. But otherwise it is where a Statute or Obligation is for the performance of Covenants or to do a collateral thing; there until it be forfeited, it is not any Plea against a Legatee, for peradventure it never shall be forfeited, and may lie in perpetuum; and by such means no Will should be performed. Tassfield, the Obligation is clearly forfeited; for the Condition is that he shall not suffer any Prisoner committed to his Prison to escape; and to save the Sheriffs indemnified from all escapes, &c. so it is in the conjunctive, and then although the Prisoner was not in execution, so as no Action of Debt lies for the escape; yet being taken by the *capias utlagat.* the suffering him to escape is a breach of the Bond. Coke, It appears by the Record, That the *capias utlagat.* was awarded 25 Eliz. and was returnable 35 Eliz. so meerly void, for every *Capias* ought to be returnable the ensuing Term; for the mischief which otherwise might befall the Prisoner, to be kept always in Prison, as appears 21 H. 7. 16. 8 Ed. 4. 4. Dyer 175. and then he was never lawfully his Prisoner, and might well let him at large. Fenner conceived that being taken by Process, he might not dispute whether the Process was lawfully or well awarded, but he ought by reason thereof to detain him; and the suffering him to go at large is a forfeiture of the Bond, but all the other Justices to the contrary; for although peradventure this arresting by force of this Process is excusable in Faux Imprisonment by the Sheriff, 14 H. 8. 16. and 11 H. 4. 36. yet clearly it is no lawful Imprisonment; and as to the benefit or prejudice of a stranger, he shall never be said to be a Prisoner; and the Goalers suffering him to go at large is lawful; and the Obligation is not forfeited thereby; wherefore consultation was awarded.

Post 706.
1 Rol. 895.
Co. 5. 88. b.

1 Rol. 928.

Co. 5. 28. b.

Co. 5. 89. b.

Bowyers Case, Hill. 27 Eliz. Rot. 750.

(18)
Gould. 188.
Moor 410.

Ante 261.

Error upon a Judgment given in an Action of the Case for words supposed to be spoken at Bridg-North; in the County of Salop. The Defendant pleads that he spake them as a witness upon his Oath, upon an Issue tried at Chard. in the County of Somerset. The Plaintiff replies de son tort demesne, &c. and thereupon it was tried by a venire of Bridg-North; and Error thereof assigned, because it ought to have been by a venire of Chard where the justification arose; and it was held clearly to be a mis-trial; and not aided by the Statute of Jeofayles; wherefore the Judgment was reversed.

Nevell *versus* Sydenham.

(19)
2 Cr. 66.

Ant. 335.
2 Cr. 66.

Ant. 335.
2 Cr. 66.
Ant. 335.

Valore maritagii, against John Sydenham and Mary his Wife, Daughter and Heir of Buckland; and declares that the said Buckland held of the Queen by Knights Service in Capite, and died, Mary his Daughter and Heir being within 14 years of Age; and that an Office was found, and the Queen seised the Ward, and granted it to Edward Nevell his Father, who died possessed, and made him his Executor, whereby he was possessed, and tendered a convenient Marriage to the said Mary, when she was within age, viz. one Badger, and that she refused; wherefore, &c. The Defendant traverseth the Tender, and it was thereupon demurred: and after Argument by the Serjeants, The Justices delivered their opinion severally; and Owen and Beaumont held that the Plaintiff should recover, because the Marriage appertaineth to the Lord de mero jure, without any tender; and that there needed not any tender to be alledged; and when it is alledged, it is not material, for it shall never be traversable; and that there needed not any tender, they relied upon the Statute of Mert. that the Marriage belongs to the Lord de mero jure, whether she will marry her self or not: so as the Lord hath Election to have the Marriage or the value of the Marriage; and it is quasi a service due to the Lord by reason of his Tenure which is due of it self without any other Act to be done by the Lord, as well as his Relief or other duty; and the difference hath alwaies been betwixt the double value demanded, and the single value, in the first there ought to be a tender of necessity, because he is to have the Penalty upon the Heirs refusal; but in the other not: It would also be mischievous to Lords, if they should not have it without tender; for it may be the Heir might be effoynd or beyond Sea at the death of his Ancestor, and alwaies after until full age, or a close Prisoner by the Queens command, so as the Lord by no possibility can make a tender; wherefore being a duty due unto him, it is reason he should have it without a tender; and therefore the Traverse is not good, and the Plaintiff ought to recover. But Walmisley and Anderson very strong to the contrary, that there ought of necessity to be a tender; and that it is well Traversable. For although the Lord is to have the Marriage of the Heir mero jure (as the Statute is) it is true; but there he ought to do an Act to have it (viz. to make tender of Marriage) for without tender the Heir cannot make a refusal; and it is not reason, the Heir should pay for the value of his Marriage, where peradventure he would

would willingly have accepted thereof, if it had been offered him. And here ought two things to be done to have the Marriage. The one the Lords tender, the other the Heirs acceptance or refusal; and without the first Act done by the Lord, nothing accrues unto him; and the payment of the value of the Marriage is, and that the Land shall be retained until he paies the value of the Marriage, is a penalty inflicted upon him, as in Case of the double value; and therefore it is a good reason that there should be a tender in the one, as in the other Case; and the Register and Nat. Brev. and the book of Entries are all in point, that tender ought to be alledged; and therefore there is not any reason to say it should be vainly and idly alledged; and the Statute of Merton cap. 7. which is so hæres pro Domino suo noluerit se inartiare, hath been always expounded, that if upon request he will not marry, &c. So alwaies there ought to be the Lords request, and for the mischiefs they are rather to be suffered then that the Law should be changed; and there would on the other side be as great mischief to the Heir; for if he should pay for her Marriage without tender, she might peradventure be one of such deformity that none will marry with her; and then what reason is there that he should pay for her marriage: And Walmsley said, in Case of a Female it is more clear; for the words of the Statute of Westm. 1. cap. 22. which gives the Lord two years, after she hath accomplished her age of 14 years to tender her Marriage, the Statute there is expressly, that the Lord shall tender her Marriage within the time; then against an express Statute, it is no reason he should have it without tender; wherefore, &c. Et Adjournatur. See the Books cited. Dy. 255. 306. 2 H. 7. 9. 21 Ed. 4. 43. Temps H. 8. forfeiture de marriage 7. 40 Ed. 3. 6. 31 Aff. 26. 35 H. 6. gard. 71. 24 H. 3. gard. 149. 18 Ed. 3. 18. 35 H. 6. 53.

Wells *versus* Partridg.

Ejectione firmæ, of Lands in Uxbridge. The parties were at Issue; upon the evidence it appeared, that the Plaintiff was Lessee for three years of a Copyholder; and the Custom of the Manor was proved to be such, that a Copyholder there might let the land for 3 years. Anderson conceived that the Lessee of a Copyholder cannot maintain an Ejectione firmæ in any other manner; but if he might, it is clear he ought to shew the Estate of his Lessor at the first; and the Licence of his Lessor, and the especial custom to warrant that Lease, for otherwise being a general Count, it shall be intended of a Lease at the Common Law, which a Copyholder cannot make; as if the Heir in Burrough English brings a Mort dauncester, he ought to shew the Custom in his Count, and declare according thereto; and he held the Action to be well maintainable; but he ought to shew the Custom; otherwise it is not good. But because there was other clear matter for the Defendant, it was passed over, and the verdict found for the Defendant.

(20)
Ant. 462.
Post 483. 535;
676, 717, 728.

Knight *versus* Rushworth.

Assumpsit. The Case was that one Mary Rushworth had entred into a Bond of Two hundred pound to the Plaintiff; and Mary Rushworth gave all her goods to the Defendant to pay her Debts. The Defendant pretending that this Bond was read to the said Mary Rushworth as an Obligation of One hundred pound only and so void, assumed to the Plaintiff, that if he and two witnesses would Deponere before the Mayor of Lincoln, that the Ob-

(21)

ligation was read to M. R. as an Obligation of Two hundred pound, that he would pay it. Whereupon the Plaintiff with two others, came before the Mayor of Lincoln; and there deposed upon a Book accordingly; and hereupon brought this Action: where-to it was demurred. Yelverton for the Defendant moved, that this Action lies not, for there is not any consideration besides this Oath which is unlawful, and therefore void. Hearn, it is not material whether the consideration be for the Plaintiffs benefit; for if it be any charge or trouble to the Defendant it sufficeth, as in Albanies Case; and he conceived the Oath to be lawful enough, he being before the Mayor, not only by his Authority, but before him also as a witness. And 2 H. 4. and N. B. R. are, That if a Feme swears that she will not sue a Cui in vita, the Oath is not unlawful, and she might be sued pro latione fidei in this Case in the spiritual Court, but because the matter is meer Temporal, the Temporal Court will grant a Prohibition, which allows that the Oath is lawful. Anderson, the Travail of coming before the Mayor is a very good consideration; and truly the Oath is not illegal, being taken before him; and the smallness of a consideration is not material, if there be any; and the Case cited of 2 H. 4. proves, that the Oath is not illegal; for the spiritual Court ought not to meddle therewith being Temporal. But if a woman swears to marry such a one; and she be sued in Court Christian, pro latione fidei, the suit is lawful, and no Prohibition lies in that Case; and if one takes an Oath before Arbitrators in the Countrey voluntarily, which have no Authority to take an Oath, it hath been punished in the Star-chamber, being false, for its falsity. Walmesley accord. For Oaths are in two manners, viz. by compulsion, as before Judges who have Authority to take an Oath, or voluntarily by consent of the party, which is also lawful, as 10 Ed. 4. 11. The Condition of an Obligation was to prove such a thing before J. S. it is not to be doubted but that there it may well be by Oath before J. S. and the Oath being taken voluntarily and without compulsion is lawful enough; and whereas it was objected that the word being Deponere before the Mayor, is a word incertain. For Deponere is to lay down, it is certain enough; for to depose or lay down for truth, are Synonima's & tant amount. Beaumont and Owen doubted herein at first, but afterwards they agreed with their Companions, that the consideration was sufficient and lawful; wherefore it was adjudge for the Plaintiff.

Ant. 67.

2 Cr. 381.
Ant. 237.Matthewson *versus* Lydiate, Quod V. Ant. Trin. 37. Pl. 20.(22)
Ant. 408.
Post 46.

The Case was now revived again upon a new Action brought; and the matter pleaded in Bar as before; and a Demurrer thereupon. Glanvil, moved that it was a several Deed, for every one Covenanted by himself that the one should pay, &c. and that the other should pay, &c. and therefore it is as several Deeds in one piece of Parchment; and in that regard although the Deed of the one be discharged by the breaking off the Seal, yet it remains the Deed of the other. Warberton, Although the first words have a Covenant separatim, yet in the end is this Clause. Et ad performandum omnes conventiones prædict' every of them separatim bound himself in a double freight, wherein every of them bound himself that the Covenants of his companions and his own

own should be performed, which is joynt in it self. Walmsley and Beamond. The Covenant is, that every one binds himself, ad performance omnium conventionum mercatorum prædictor' the which extends to every of them, Reddendo singula singulis, viz. to perform his own Covenants. Anderson, I doubt much thereof, for in the premises it is a joynt Deed, for as a joynt Demise by joynt Lessors to joynt Lessees, and the Covenants are in words severall; so as if the one had released the Covenants to the one of the Lessees, that had not discharged the others, for their Covenants are severall; But if a discharge of the Deed of the one be a discharge for all, I doubt much; wherefore the Court moved the parties to compound. Vid. Poltea Hill. 39 Plac. 18.

Further *versus* Further, and others.

DEbt upon an Obligation against F. and three others Administrators of J. S. who pleaded that one J. D. had brought Debt in the Queens Bench upon an Obligation of One hundred pound against one of the Administrators, and recovered by a Nihil dicit, and that they had Riens in ses Maynes to satisfie over and above the said Debt; and it was thereupon demurred. Glanvill moved that this was not any Plea, for in regard the Defendant in the first Action might have abated the Bill by saying that he had Coadministrators not named, this recovery shall not bind any stranger; this recovery is also covinous being by default, and in proof thereof vide 9 Ed 4. 12. Anderson and Beamond held that it was a good Plea prima facie, for a stranger cannot falsifie a recovery by reason of Joynt-tenancy or Mortenancy, or by such dilatores, but only for matter of substance; and if the recovery be for a true Debt it is not reason but that the Administrator might suffer it to pass by default; and it is reason it should be allowed to all the others; and if there be any Covine, it is to be averred by the Plaintiff, for prima facie, it shall not be so intended, but that it is true, and if there be any Covine in it, he may falsifie it for that cause; and a Recovery against one Administrator shall bind him and all his Companions; and therefore it is reason it should bind all Estrangers; and of that opinion Owen and Walmsley said they were; but they would be advised, &c.

(23)

Ant. 41. 426.

Stapletons Case.

DRew moved the Court that one Stapleton of Yorkshire being Tenant in Tail, covenanted to stand seised in consideration of the Marriage of his eldest son, to the use of himself for life; and after to the use of his eldest son for his life, and after to the use of the first son of his eldest son, which should be in Tail; and that afterwards the eldest son had Issue one Gilbert Stapleton his eldest son. The Grandfather afterward upon great cause would sell part of the Land, and assure more in recompence to the son, and the Purchasers would not take any assurance unless the Infant (who was but four years of age) would suffer a recovery; and yet it was conceived that the Covenant did not alter any estate; and so it was adjudged in this Court in the Case of Blythman *versus* Blythman. Quod Walmsley, Beamond & Owen concesserunt; but yet to satisfie the purchaser he prayed, that a Gardian might be allowed to that

(24)

Ant. 279, 280.

Anr. 172.
Hob. 197.
1 Cr. 307.

that Infant, that a recovery might be suffered against him as Vouchee, whereto the Court agreed, and therefore admitted two gentlemen there present (the Infant being brought into Court) to be Guardians for him; and then a Recovery was had of that Land at the Bar wherein the Infant was vouched; and he by his Guardian appeared and vouched the common vouchee.

Byron *versus* Byron.

(25)
1 Rol. 909.

DEbt as Administrator of Byron upon an Obligation; the Case was, that the Intestate died in Lancashire, but the Obligation was at London at the time of his death; and the Bishop of Chester in whose Diocese the Intestate died, committed Administration to J.S. who released to the Defendant; and the Archbishop of Canterbury committed the Administration to the Plaintiff; and this release was pleaded in Bar, and it was thereupon demurred. Warberton, every Debt follows the person of the Debtee, and Chester is within the Province of York, where the Arch Bishop of Canterbury hath nothing to do, ^{Anderson,} Where one dies who hath goods in divers Diocesses in both Provinces, there Canterbury shall have the prerogative; otherwise there would be two Administrations committed, which is *res inaudita*. The Debt is where the Bond is, being upon a specialty; but Debt upon a Contract follows the person of the Debtor; and this difference hath been oftentimes agreed, Vid. Dy. 305. And if the Archbishop of Canterbury hath not any prerogative in York, but that several Administrations ought to be committed; yet at leastwise Administration for this Bond ought to be committed by the Archbishop of Canterbury; wherefore this release is not any Bar.

* Donid to Co Law, & in y^e case
Administration must be com-
mitted by J^r several Ordinances
vid. 1. V. Com. Pl. Til. 926. A.

1 Rol. 908.

Frampton *versus* Stiles.

(26)
2 Rol. 22.
Co. Lit. 229.a.

DEbt upon an Obligation conditioned for the performance of certain Covenants, in quādam indentura hic in curia prolata; and in truth the Deed was not indented, but it was written *Hæc Indentura fact. per curiam*. And it is not any Indenture, although there be two parts thereof; wherefore because the Defendant did not shew an Indenture by him pleaded, it was adjudged for the Plaintiff, 5 Co 20 B.

Anonymus.

(27)

DEbt per ^{vers} Executor, &c. and an especial verdict found, that Administration of the goods of the Testator was committed to the Wife of the Defendant who is dead, and that he kept *bonam partem bonorum* in his hands, and sold them. Williams moved that this verdict was void for the Incertainty; for *bonam partem* is altogether incertain but it was held to be well enough; for if he detain any part, it makes him Executor de son tort, &c. Wherefore it was adjudged for the Plaintiff.

Termino Paschæ.

Tricesimo octavo ELIZABETHÆ,
in Banco Regina.

Hyde *versus* the Dean and Chapter of Windfor
Paschæ 37 Eliz. Rot. 162.

ERror upon a Judgment in the Common Bench, in a Writ of Covenant, the Case was such: The Dean and Chapter 30 H. 8. let an House to A. for years by Indenture, and A. Covenanted to Repair the House at all times necessary during the term: A. grants his Estate to Hyde, and dies. And against Hyde for not repairing, Covenant was brought, who pleaded, Quod non permisit domum prædictam esse discoopertam, & ruinofam, at any time necessary, &c. And hereupon Issue was joyned, and found for the Plaintiff, and adjudged for him, and Error thereof brought. The first Error assigned was: That this Action lies not against the Assignee, in regard he did not Covenant for himself and his Assignees, and therefore it determines by his death, which Gawdy and Fenner agreed, That this Covenant shall not bind longer, then during the Life of the Lessee himself, as Dy. 114. A Lessor covenants to pay all Quit Rents during the Term, the Lessor dies: No Action lies for any Quit Rents after his death. But Gawdy said, It did not appear here, but that the Lessee is yet alive: For he doth not aver that he is dead, and otherwise it shall not be intended, that he is dead. But Fenner e contra therein, Because it is to enable the Plaintiff to the Action, he ought therefore to aver it. But they all held, That Covenant lay in this Case against the Assignee by the Statute of 32 H. 8. For it is a Covenant which runs with the Land, but otherwise it were, if it were to build a new house. A second Error assigned was, That here was not any Issue joyned, for it is non permisit domum esse discoopertam ad aliquod tempus necess. Quasi diceret, That it would be sometimes necessary to suffer the house to decay. But the Court held it to be only an Issue misjoyned, and so aided by the Statute: Wherefore it was adjourned. Vide postea Paschæ 39. Pl. 3. 5 Co. 24.

(1)
1 Rol. 521.
Post 552.
Moor. 399.

1 Rol. 521.

Banks *versus* Whetston, Hill. 37 Eliz. rot. 614.

Detinue of money, (not in Bag, or Chest) And it was thereupon demurred, whether the Action lay; And, without Argument, adjudged for the Defendant, That the Action lay not: for Detinue ought

(2)
Moor 394.
Co. Lit. 286.b.

ought always to be of things certain, and which may be known to be delivered : and moneys be incertain, and one piece cannot be known from another. And therefore, in an appeal of Robbery for money, If the Defendant gages battaile, it is no Plea, That he was taken with the Hayner : for the Hayner cannot be of a thing not to be known.

Humphrys Case.

- (3) John Humphrys was endicted upon the Statute of 8 H. 6. of Forceably entering into a Close, called Serjeant Hens Close in D. in the County of Lincoln ; Shurley took exceptions thereto, That it was incertain ; So as there cannot be any Restitution, But he ought to have said, That the Close contained 20 acres of Land more or less, as in truth it was, Sed non allocatur. For Popham said, It had been adjudged, That an Ejectione firmæ lay of a Close well enough, and therefore a fortiori upon an Endicment.

Co. II. 55.
Ant. 116.
Ant. 235.

Norton *versus* Rishden. Trin. 37 Eliz. rot. 483.

- (4) Debt upon an Obligation contained, That if he appeared before the Plaintiff at D. such a day, that then, &c. (which was at the Commissaries Court in Oxford) The Defendant saith, That he appeared before the Plaintiff at S. before the day, which he accepted of, and allowed for his said appearance to be at D, &c. And it was thereupon demurred, and without Argument adjudged for the Plaintiff : Because the Condition was to do a collateral thing, and the Acceptance of another thing cannot dispense therewith, nor is a discharge of the Obligation, Dy. : 1.

Co. 9. 79. a.

Framson *versus* Delamere. Trin. 37 Eliz. rot. 1079.

- (5) Assumpsit, and declares. Whereas one Adderly levied a plaint before the Sheriffs in the Counter, London, against one Malyns, which Malyns was thereupon Arrested and Imprisoned, until the Plaintiff, at the Defendants request, became Bayl for the said Malyns ; That the Defendant assumed to the Plaintiff to save him harmless from that Bayl : And alledgeth further, That the said M. was condemned at the Suit of Adderly, and that upon a Capias awarded against him, it was returned, Non est inventus. Whereupon the Plaintiff was taken in Execution upon this Judgment, Quousque he paid the said condemnation. The Defendant pleaded Non assumpsit, and it was found, That the said Adderly levied a plaint against the said M. who was arrested thereupon, and the Plaintiff, at the Defendants request, became Bayl for him at the Suit of Adderly : And that afterwards the said Adderly declared against the said M. by the name of W. Adderby, and thereupon recovered, and the Plaintiff upon it taken in Execution by reason of that Bayl. And that the said Adderly had not been known by any

any other name then Adderley. And if upon the matter the Plaintiff be onerabilis in lege ut manucaptor M. upon that Judgment, they found for the Plaintiff, and Assess for Damages 80 l. Et si non &c. they found for the Plaintiff, and Assess for Damages 1 d. And hereupon, after Argument, the opinion of the Court was, That he was not onerabilis in lege, &c. So he had but a penny Damage. For the Bayl was at the Suit of Adderley, and from him the Defendant was to save him harmless: But this condemnation was at the Suit of Adderbye, who is another Person, and cannot be intended all one; and he was not Bayl to that Suit, and therefore not onerabilis in lege thereto. But this appears to be but the default of the Clerk, which peradventure might be amended, if the Record were before us: Because, it is but the variance of one Letter of the Bayl from the Plaint, which is in nature of an Original. But yet it cannot be now amended by us, because we have not the Record here; Nor are we Judges of the said Record, and therefore he never was in lawful Execution thereupon. But yet in regard the Serjeant took him in Execution by process of Law, that peradventure shall discharge him of the false Imprisonment: And the Plaintiff for the money, which he hath paid to Adderley thereupon, in discharge of that Execution, shall have an Account against Adderley to have it again. Wherefore, &c. But the Court gave not any Judgment for the Plaintiff, although it is clear: Because the Defendant had pleaded Non assumpsit, and it is found Quod Assumpsit: although that there is not any breach of Promise, nor any Damage to the Plaintiff; the Plaintiff upon this Verdict shall recover the 1 d. Damage found by the Jury. But let him advise him first, how he take any Judgment thereupon.

Denyson *versus* Burgh.

Action upon the Case for these words, I have a matter against D. the Plaintiff, who hath stolen by the high-way side. After Not Guilty pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment, That the Action lay not for these words: For it shall not be intended by them, that he committed any Robbery, or Felony, for he might steal Sticks or Stones, &c. And of that opinion was the Court: Wherefore it was adjudged for the Defendant.

(6)

Conesbie *versus* Rusky.

IT was held by Popham and Fenner upon Evidence, That where the Baron was seised of a Mannor in right of his Feme, and let a Copyhold, parcel thereof, for years by Indenture, and died: That it shall not destroy the Custom as to the Feme, but that, after the death of her Baron, she might Demise it by Copy as before. The same Law is, If Tenant for Life of a Mannor lets a Copyhold, parcell of the Mannor, for Years, and dies, It shall not destroy the Custom as to him in Reversion.

(7)
a Rol. 271

Langton *versus* Gardiner.(8)
Moor 428.

Action upon the Case, against the Sheriff of the County of Surry. Whereas the Plaintiff sued a Latitat against D: intending to Declare against him in Debt upon an Obligation, and thereupon the Defendant Arrested him, and at the day returned Capi corpus, & paratum habuit, &c. and for that he appeared not at the Day, he brought this Action: and it was thereupon Demurred, and the Defendant shewed to the Court, That he had taken Bond of the party for his appearance, and was compellable by the Statute of 23 H. 6. to let him to Bayl, and therefore it was not reason he should be now chargeable. But the Court said, It might peradventure have been a good Plea, if it had been pleaded, but, it not being done, the Court cannot intend it, nor take consilience thereof: Wherefore it is reason, that for this falsity he should be charged at the Suit of the party: Wherefore it was adjudged for the Plaintiff.

Neve *versus* Lyne. Mich. 36 & 37 Eliz. Rot. 263.

(9)

Error upon a Judgment in an Assumpsit in the Common Bench. The Error assigned was, That there was not a sufficient consideration to maintain the Assumpsit: For the Plaintiff declares, Whereas there were divers controversies betwixt the Plaintiff, and J. S. The Defendant, in consideration that the Plaintiff would submit himself to the Arbitration of J. D. for those matters, Assumed, &c. And alledgeth, that he submitted himself, and that the Defendant had not performed his promise &c. Atkinson moved, That this is not any Consideration, for it is not of any value: For although he submit himself, he may revoke it the next day, or presently: But if it had been in consideration that he would submit, and stand to the Award of J. D. it had been otherwise. But all the Court e contra: For it shall be intended a Submission with an abiding to the Award, for so was the intent of the Parties: And, if he had revoked it, the Defendant ought to have pleaded it, otherwise it shall not be intended. Wherefore the Judgment was affirmed.

Oland *versus* Burdwick. Hill. 37 Eliz. rot. 924.(10)
Gould. 189.
Co. 5. 116a.
Mo. 314.
1 Rol. 806.

Trespas. Upon a special Verdict: The Case was: A Feme Copyholder, durante Viduitate, after the Custom, Sows the Land, and before Severance of the Corn, takes Baron: Who should have the Corn was the Question betwixt the Baron and the Lord of the Mannor. And, after Argument, it was adjudged for the Lord (the Defendant) that he should have the Corn, by the Opinion of Popham and Clench, Contradicente Fenner, & absente Gawdy: For Clench said, There was a difference, when the Estate of him who Sows the Land is determined by his own Act by a casualty, and when by the Act of the Law, or by another man: And therefore in this Case, if the Feme had Let the Land, and the

the Lessee had sown it, and afterwards the Feme had taken Baron, Co. 5. 116. a.
 yet the Lessee should have the corn. But, if the determination be
 by the Act of him, who sows the land, it is otherwise. As if a Lease
 be made upon condition, That he shall not commit waste; The
 Lessee sows the land, and afterwards commits waste, The Lessee
 shall lose the corn: which Cases Popham agreed. And he further
 said, If Tenant-at-will sows the land, and afterwards deter-
 mines his estate by his own Act, by disagreeing to the Lease, Co. Lit. 55. b.
 otherwise, the Lessor shall have the corn. But it is not so, when his
 estate is determined by the Act of the Lessor. And if Tenant for
 life sows the Land and surrenders, or makes a Feoffment, and the
 Lessor enters, he shall have the corn: whereto Fenner agreed. So it
 is here, when the estate of her, who sowed the Land, is determined
 by her own Act, for Volenti non fit injuria. Fenner e contra; The diffe-
 rence will be, when the Estate is determined before the severance
 by incertainty, by the forfeiture of the Lessee; or, for a condition
 broken. So as the Lessor enters for a Tort done, or by Title Para-
 mount, the Lessor shall have the corn: And when by limitation of
 the estate, as here: And therefore if a Lease be made to Baron and
 feme during the coverture, and the Baron sows the land, and after-
 wards he sues a divorce, yet he shall have the corn; which Popham
 and Clench agreed: For that it is not meerly by the Act of the party,
 but by the Judgment of Law. Fenner; If a Lease be made for seven
 years upon a condition on the part of the Lessee, at the end of the
 seven years to be performed, to have it for life; the Lessee the last
 years sows the Land, and performs not the condition, yet he shall
 have the Emblements. But Popham and Fenner denied it. And Judge-
 ment was given for the Defendant. Vid. 37 H. 6. 35. 40 Ed. 3. 5. 33 Ed.
 3. Trespas. 254. 5 Co. 116.

Warner and Collins Case.

Who were indicted upon the Statute of 8 H. 6. and, because it (11)
 was not alledged to be manu forti, although it were vi & ar- Ant. 93. 1
 mis, the Endictment was ruled to be insufficient, and the Parties
 were discharged.

Jeremy versus Lowgar.

Action upon the Case, and declares, Whereas he was seised of (12)
 land in right of his wife for the life of the Feme of a lease by
 J. S. and they let it to the Defendant for years, the Defendant
 had burnt the house; and thereupon the Action was brought. The
 Defendant pleads to Issue, and found against him, and it was
 now moved in arrest of Judgment. First, That this Action lies
 not in regard it was the Plaintiffs folly to make a lease, and not
 provide by covenant, otherwise; That the Lessee should not
 commit waste; Which is the reason, That the Lessor had not any Post. 177.
 Action at the Common Law to punish waste. But Fenner and Clench 1 Cr. 187.
 (Popham and Gawdy absentibus) held the contrary, by reason of the
 charge, wherewith he is chargeable over. Secondly, It was mo-
 ved, That, if an Action did lie, Yet this was not maintainable
 by the Baron only, without his Feme: for the Tort, which is done, is
 done to the estate, which he had in right of his Feme. And the is to
 have

Ant. 357.

have the loss, (viz. of the land) as also to answer the Damages, if she survives her husband: and it may be the Baron shall never be at any loss, for it may happen, that the Action will not be brought against him in the life of the Feme, and then he is not chargeable, and it can never be brought against him alone: wherefore it is reason, that the Feme should be joyned in this Action. But the Court doubted thereof, Et adjournatur.

Burrough *versus* Taylor. Trin. 27. rot.

(13)
Co. 4. 72. b.

Co. 4. 73. a.

Ejectione firmæ. Upon a special Verdict, The Case was: That the Queen let lands in Brewern to the Defendant for years, rendering Rent ad Receptum Scaccarii apud Westmon. seu ad manus Receptorum, vel Ballivorum Nostrorum permissorum pro tempore existentium, annuatim solvend. With a Proviso, That the Lease should be void upon Non-payment. The Queen grants the Reversion to Dodington, who demanded the Rent at the day at the Receipt of the Erchequer at Westmin. and the Tenant tendered it upon the land. And for Non-payment of the Rent entered, and let it to the Plaintiff: And it was moved, That Judgment upon the matter should be for the Plaintiff. For a special place of payment being appointed, the Demand, and Tender ought to be there, and not elsewhere, as in 33 H. 8. and Kidwelleis Case. Then here, The Receipt of the Erchequer apud Westmon. is the Local denomination of the place, where the payment should be, & not for the Queens Receipt thereof only: But all the Justices (absente Gawdy) held the contrary, That the Tender need not be at the Receipt of the Erchequer. For Popham said, That when the Queen makes a Lease, reserving Rent at the Receipt of the Erchequer, or by her Receiver, &c. It is no more then the Law appoints; For, without those words, the Law is, That the Farmer ought to pay it there, or to the Receiver for the County, and so it hath been Ruled before these times, and it is clear if these words (at the Receipt of the Erchequer, &c.) had not been in the Lease, the Patentee of the Reversion should not take advantage of the Condition without a demand upon the Land, and therefore not here. And the limitation of the payment at the Receipt of the Erchequer at Westmin. doth not alter the Case. For the Lessee is bound to pay it at the Receipt of the Erchequer, in whatsoever place it is: as where it is adjourned to Sion, or any other place, the Farmers ought to pay their Rents there, and not at Westmin. The nomination then of Westmin. in the Lease is not material; But it is because the Receipt is most usually at that place. And of that Opinion were the other Justices in omnibus, and therefore Rule was given. If other matters were not shewn, That Judgment should be entered for the Defendant, 4 Co. 72. b.

Heigham *versus* Best. Trin. 36 Eliz. rot. 972.

(14)
2 Rol. 54. 335.
Owen 58. 74.

TRespass upon Demurrer. The Case was; a Vicarage was endowed to have the Tythes of the third part of the Pannoz of D:

D. and whether the Vicar thereby should have the Tythes at the third part of the Demeasns, and of the Free-holders also, was the Question. And, after Argument at the Bar, it was resolved by Popham and Fenner (for the other Justices were not in Court) That the Vicar should have Tythes as well of the Freeholders, as of the Demeasns. For Fenner said, That an Endowment is to be construed according to the intent of the parties, which (without doubt) was, That the Vicar should have Tythes throughout the Mannor. And therefore, if the Queen grants unto me Conuifance of all Pleas within the Mannor of D. I shall have Conuifance of Pleas between the Freeholders of the Mannor. Popham; If the Queen grants me Free-Warren within my Mannor of D. I shall have it within my own Demeasns only. For if otherwise, the Queen should impose a charge upon another person, which the Law will not suffer: So it is, if the Lord grants a Rent-charge out of his Mannor. But if the Queen grants unto me Felons goods, or Wayfs and Strays, within my Mannor, I shall have it in the Lands of the Freeholders. For it is a liberty due to the Queen, which she may grant, and is not any charge to the Subject: for she hath it in every mans Land, and therefore may grant it to any other. So this composition doth not create a new charge, but is a disposing of the ancient, which was due by the Tenants; for it runs through all the limits of the Mannor, as well to the Freeholders, as to the Demeasns. But if the Lord had made such a grant before the Council of Lateran, It would not have charged his Freeholders, but his own Demeasns only. And it was adjudged accordingly for the Vicar.

2 Rol. 54.

Butler *versus* Wallis. Trin. 37 Eliz. rot. 206.

TRESPASS the Defendant pleads, That the place where, &c. is the Freehold of J. S. and that he entred by his command. The Plaintiff replies, That, as to one Acre, it is the Freehold of J. S. which he let unto him at will. Absque hoc, That he entred by command of J. S. As to the residue, that it is the Freehold of J. S. who was bound unto the Plaintiff in a Statute, and that the land was extended. And afterwards, viz. 28 Octob. 36 Eliz. a Writ of Liberate was awarded; and that the Sheriff by force of that Writ afterwards, viz. 27 Octob. 36 Eliz. delivered unto him that land in execution, by vertue whereof he entred, and was possessed until; &c. And thereupon the Defendant demurred. And for the first part of the Replication, it was held clearly to be good, and that by this special pleading, the command is traversable. And as to the second part it was moved, that the Replication was not good: For it doth not appear that the possession was delivered by the Sheriff, by vertue of the Liberate. For the Liberate bears date 28 Octob. and he pleads delivery of the possession upon the 27 of Octob. before, which is clearly ill, and without warrant. And of that Opinion was Gawdy, but the other Justices e contra. For when the land is seised into the Queens hands, and afterwards a Writ of Liberate is awarded, the Party may presently thereby enter without the Sheriffs delivering of possession. As where an Ouster le maine is awarded, the Party may enter presently, as 4 Ed. 3. is. And

(15)
1 Rol. 737. 8.

1 Cr. 586.

Co. 4. 67.
Post. 523.
1 Rol. 738.

Ant. 368.

here, the land being certain, which is extended, the Party may well enter therein after the Writ of Liberate awarded. Popham also held, In regard it is pleaded, that the Sheriff Virtute Brevis delivered the Land in execution 27 Octob. those words (the 27 of Octob.) are void. For it appears it could not be then delivered Virtute Brevis. Wherefore it was adjudged for the Plaintiff.

Bird *versus* Wilford. Trin. 37 Eliz. rot. 394.

(16)

Error of a Judgment in Debt in the Common Bench upon confession. The Error assigned was, That Wilford brought Debt upon an Obligation, as successor of Brandon late Chamberlain of London, upon an Obligation made unto him, Solvendum to him, and his Successors, and alledgeth the Custom of London, that the Chamberlain there hath used from time, &c. to take Bonds to him, and his Successors. And that there is a Custom there, That the successors of the Chamberlain shall sue those Bonds in any Court, and further alledges, That all their Customs are confirmed per Parliament. 7 R. 2. And the Plaintiff had thereupon Judgment, whereas by Law this Obligation, being a Chattel, cannot go to a successor. And for this Cause Foster moved, That it was Error, and the Judgment ought to be reversed: For there is a difference, as it appears, 20 Ed. 4. 2. betwixt an Obligation made to a Corporation, which consists of one sole person, as Parson, Prebend, &c. For that shall not go to his successor; For he may make an Executor, who shall have the benefit thereof. But of a Corporation, which consists of divers persons; as Dean, and Chapter, &c. which cannot have an Executor; There the Obligation made to one shall go in succession: And here by the death of the Chamberlain, in the interim, before a successor shall be Elected, none can have the Action: and if it should go to the successor only, the Action is suspended: and a personal Action once suspended is gone for ever. But on the other part it was moved, That in regard it is alledged to be a Corporation for that purpose to take Obligation, it may be well allowed, and shall go to the successor, and not to the Executor, and so be 8 Ed. 4. 18. And so was the Case ruled here, Pasch. 21 Eliz. Mabbs Case. And Godfry said, That it was one Taylors Case, so ruled accordingly: Where Debt was brought by the successor of the Chamberlain, in the Mayors Court, upon such an Obligation, and a Recovery and Error thereof brought, and before Manwood, and other special Commissioners for this purpose the Judgment was affirmed. And of that opinion were Gawdy and Fenner (Popham and Clench absentibus,) For the Chamberlain is a special Corporation to that purpose, and an Obligation may as well go in succession, as land, as Dyer 48. is; And therefore the Custom being averred to be so, it is lawful and reasonable, &c. Wherefore, they gave Rule, That, if other matter were not shewn to the contrary upon the first day of the next Term, that the Judgment should be affirmed. Which accordingly was then affirmed. Note, In Mich. 43. and 44 Eliz. in the Queens Bench betwixt Wilford and Hutten, Debt was brought upon such a Recognisance made to Brandon his predecessor, alledging the

Co. 4. 65.
Post 682.

Post 682.

the Custom of London for the Chamberlain to take Obligations, or Recognisance to them, and their successors, for Orphans portions. And, after Judgment for the Plaintiff, Error was brought thereof in the Exchequer Chamber, where the Judgment was affirmed.

Sherley versus Sackville. Trin. 27 Eliz. Rot. 498.

Error of a Judgment in the Common Bench in Debt upon an obligation. The Error assigned was, Because Surrey was in the Margin of the Declaration, and the Defendant therein was named of D. in the County of Suffex, and that he made that Obligation at Darking in Comitatus prædicti. and upon Non est factum pleaded, it was tried by the County of Surrey, and thereupon Error brought; for Comitatus prædicti. refers to the County last named, which is the County of Suffex; so a Mis-Trial: Sed non allocatur; for it shall have relation to the County where the Action is brought, and that named in the Margin for the other County mentioned was by way of recital, and therefore it shall not relate thereto. Wherefore the Judgment was affirmed. (17)

Ant. 436.

Alsop versus Cleydon.

A Sumplis. A special Verdict was found: and thereupon adjudged for the Defendant, and it was now moved, Whether the Defendant should have costs by the Statute of 23 H. 8. 15. for it was alledged, that that is to be intended where the Plaintiff is nonsuited, or a general Verdict passeth against him; so as it appears that he had not any cause of Action. But the Court ruled, That he should have costs; for a special Verdict is as well a Verdict for him, for whom it is found, as a general Verdict, and there is not any difference, when Judgment is given thereupon, but it is as if a general Verdict had been given for the Defendant. Wherefore, &c. (18)

Moor. 406.
23 H. 8. c. 15.

Portman versus Morgan.

Ejectione firmæ of 30 Acres of Land in D. and S. The Defendant was found guilty of 10 Acres, and Quoad residuum, Not guilty, And it was moved in Arrest of Judgment, That it is uncertain, in which of the Wills this Land lay, and therefore no Judgment can be given, nor any Execution. Sed non allocatur, and it was adjudged for the Plaintiff; for the Sheriff shall take his information from the party, for what 10 acres the Verdict was. 29 H. 8. Dy. 34. (19)

Ant. 263.

Clifton versus Gybbon.

A Sumplis: The Defendant assumed upon good consideration to make such assurance of such Land, as the Plaintiffs Counsel should advise: The Plaintiff himself, without any Counsel, or advice of any Counsel, requires such an assurance to be made; (20)

1 Rol. 466.

Do o 2

Whether

Co. 5. 19. b.
Ant. 298.

Whether the Defendant be bound to make it, was the Question: and it was Ruled by the Court that he ought: for to have advice of Counsel, is but for the strengthening of his assurance: and if the Plaintiff at his own peril will enquire it of himself, the Defendant ought to do it as he requires. Wherefore it was adjudged accordingly for the Plaintiff, 5 Co. 19. b. Vid. Pas. 35. B. 4. Placito 8.

Weare versus Woodliff.

Ant. 310.
Ant. 340.

1 Cr. 563.

(21)

A Stumpfit: The Parties being at Issue, and a Ven. fac. awarded, and returned, and afterward a Distringas, the matter was before the Justices of Nisi prius in Exon, but it did not appear upon the Dorfe of the Distringas, that it was returned by the Sheriff, there being no return at all upon it, and this matter was alledged in Arrest of Judgment: And a President for that purpose cited betwixt Stayner and James, 35 Eliz. where for this cause Judgment was reversed: But all the Justices held, That, for as much as it is in the same Term wherein it came in, it may be well amended upon examination of the Sheriff, that he intended to return it, and the Return shall now be made thereto: But if it were in another Term, it cannot be amended. Wherefore it was ordered, That the Sheriff should be examined, and if it appeared, that he intended to return it, and that it was tried by the same Jury, as it ought to be, that it should be amended: and it was afterwards amended, and the Plaintiff had Judgment.

Alston versus Pamphyn.

Co. 9. 112. b.
Post 845.
Ant. 199.

(22)

Action upon the Case for stopping of a way to his Free-hold in Newton in Norfolk. Upon Not guilty pleaded, it was found for the Plaintiff, and now moved in Arrest of Judgment, That in respect it is a Nuisance to his Freehold, he ought to have had an Assise, and could not have an Action upon the Case, vid. 2 H. 4. 11. 21 H. 7. 30. Dy. 250. But all the Court held, That he might have an Action upon the Case, or an Assise, at his Election: And Popham said, he had seen it so in experience divers times. Wherefore it was adjudged for the Plaintiff.

Bedel versus Sir Edw. VVingfield.

Ant. 340.

(23)

Ejectione firmæ, of six acres of Pasture. The Record of the Nisi prius was 6 acras Parturæ, and it was tried, and found for the Plaintiff, and now moved, That this word Parturæ might be amended, and made Pasturæ, according to the Record, which is the Original: for it was but the mispision of the Clerk: and it was so Ruled by the Court, and it was amended, and Judgment entered for the Plaintiff.

VWilloughby *versus* Gray. Pasch. 37 Eliz. rot. 483.

Error of a Judgment in the Common Bench. The Error assigned was, because the Ven. fac. bare Date 24 Decemb. which was out of Term: And it was ruled to be no Error, but aided by the Statute of Jeofailles. So it hath been ruled where a Ven. fac. bare Tesse upon the Sunday, that it was aided by the Statute. A second Error assigned was, That the Writ was made returnable coram Justiciariis Nostreis, and doth not say apud Westm. Sed non allocatur; for it is necessarily intended. Thirdly, the Writ is Et habeas ibi nomina, and leaves out Juratorum. Sed non allocatur, for it is merely a mispision of the Clerk; wherefore it was awarded, that it should be amended, and the Judgment was affirmed.

(24.)
1 Rol. 204.
Owen 59.
Moor 465.
Noy 57.

Bedingsfield *versus* Feak.

Prohibition. The Case was such. In the Village of D. in Norfolk there hath been a Parsonage, and Vicarage to the Church thereof, time whereof, &c. And the Parsons have always had the great Tythes, and the Vicar the small Tythes; And that the Parsons for forty years have had the Tythes of such a Field, viz. the Corn: And it was now planted with Saffron, and the Vicar sued for the Tythes thereof, and the Parson sued a Prohibition, and it was thereupon demurred. Coke moved, That it well lay; For by the Statute of 2 Ed. 6. Tythes shall be paid, as they had been paid for forty years before: which had always been to the Parson: And although the Land be now otherwise imployed, yet the Parson shall have the Tythes thereof: And therefore it hath been adjudged here in the Case of Shipdam-Park in Norfolk, where 10 s. was alway paid for the Tythes of all things renovant within the said Park, and afterwards the Park was disparked, and converted into arable Land; yet no other Tythes should be paid but the 10 s. Popham; It was otherwise ruled in the Erchequer, in Master Worths Case, for a Park in the County of Sommerfet. Fenner; The Law is certainly, as it is cited in that Judgment in this Court. And the Clerks said, That they had divers Presidents in Court according to the Judgment cited. Popham, The difference is, when the Prescription is to pay Money for all the Tythes of such a Park, and there peradventure, if it be disparked, he shall not pay any Tythes; and where it is to pay the shoulder of every Buck, or a Doe at Christmas, for all Tythes of the Park: There, if it be disparked, Tythes shall be paid as of other Land. And in the principal Case he held, That the Vicar should have the Tythes of Saffron, as minutæ Decimæ. For notwithstanding that Tythes had been always paid for that Land to the Parson, yet being converted to another nature and use, it shall be paid to the Vicar, as if it had been converted into an Orchard. So, if the Vicar is to have all the Hay, if the Meadow be converted into arable, the Parson shall have it: so e converso. Wherefore a Consultation was awarded.

(25.)
1 Rol. 643.
2 Rol. 310.335

Hob. 39.

Hob. 40.
Moor 909.
1 Cr. 28.
1 Rol. 643.
Moor 863.

Gawen *versus* Ludlow.

(26)
Moor. 403.
1 Rol. 485.
2 Rol. 278.

Post. 761.
Ante 180.]

REplevin. The Defendant at the first appeared, and afterwards, upon pleading and Demurrer, Judgment being for the Plaintiff, and a Writ of Inquiry of Damages awarded, returnable Octab. Mich. the Sheriff returned the Inquisition; but upon the day of the Effoyns Octab. Mich. and for this cause exception was taken, That it was not well executed, for no Writ returnable Octab. Mich. can be executed upon the same day of the Return thereof. And Popham at the first was of that Opinion. But Gawdy, Fenner, and Clench, e contra; Because upon all the day of Octab. Mich. the Writ might have been executed; for the Writ is only to have the Writ, at the same day. Afterwards being moved again, the Case of Buckleer and the Queen, in a Quare impedit, was remembered, where the Writ of Inquiry of the value was executed the first day of the Return, but the Jury did not give their Verdict, until two dayes after, and it was adjudged to be good; for the Jury being charged the first day, although they gave not their Verdict until two days after, it shall not prejudice the Party; but the Verdict being given shall relate to the first day of the Return, and shall be said to be executed upon the first day, for it shall have relation to the first day. Wherefore Popham agreed with them, that the Writ was well executed. Vid. 33 H. 6. 45, and 46 Pas. 32 B. Placito 15; antea. fol. 180.

Wright *versus* the Mayor and Commonalty of Wickham. Intratur Trin. 37 Eliz. rot. 242.

(27)
Moor 413.
Owen 21.
2 Rol. 757. 788.
2 Rol. 412. 3.

Post. 469.

Post. 677.

Error, To reverse a Fine levied of 120 Acres of Land, by Baron and Feme, to the Defendants. The Error assigned was, That the Writ of Covenant, upon which the Fine was levied, did bear Tesse 10 Augusti 12 Eliz. returnable Mensē Michaelis eodem Anno (which was 27 Octob.) and that a Dedimus potestatem issued to certain Commissioners to take the Conisans, which did bear Tesse 11 Augusti in the same year, and that the Feme, from whom he claimed, died 17 Octob. eodem Anno, before the return of the Writ of Covenant. (Nota, He entituled himself as heir to the Feme, but neither in the Writ, or assignment of Error, shewed how heir, or that the Lands were the Lands of the Feme) The Defendants pleaded, That, after the Fine levied, the Plaintiff did enfeof J. S. of the said Lands: The Plaintiff replied, That he did not enfeof, &c. and upon that they were at Issue, and it was found, that he enfeofed J. S. of 20 Acres, parcel of the 120 Acres, but not of the residue. Snag. for the Plaintiff prayed, That the Fine might be reversed for the 100 Acres, of which no Feoffment was made. But first an Exception was taken to the Assignment of the Error, viz. That the Feme Conisor died, before the return of the Writ, which is contrary to the Record, and not to be admitted. But Godfrey, for the Plaintiff, answered, That the difference is between a Conisans taken in Court, which is always after the Writ returned, there the Party cannot say the Conisor was dead before the Writ returned; but against a Conisans taken in pais before Commissioners he may assign for Error, the death of the Conisor

nisoꝛ before the return of the Writ; foꝛ that is not contrary to the Record; foꝛ the Conisoꝛ may die after the Conisance, and before the return of the Writ; and death is a countermand of the Conisance, and the recording of it afterward is erroneous, 8 Eliz. Dyer. And although, to some purposes, it is a Fine after the Conisance, and before the Queens silver is entred, foꝛ the Conisee may have a Quid juris clamat, as 22 H. 6. is, yet it is no perfect Fine, foꝛ the death of either of the parties doth abate it. And 1 Mar. Dyer, doth not impugn this difference; foꝛ there the Error was assigned, that the Conisoꝛ died before the Teste of the Dedimus potestatem, which is directly contrary to the Conisance before the Commissioners, which are Justices appointed foꝛ that purpose; but here it is confessed, that the Party was living at the Conisance, but died after; which was agreed per totam Curiam. And Popham said, That one may be received to say against the Conisance of a Fine taken before the Chief Justice of the Common Bench (which may be without a Dedimus) That the Conisoꝛ died before the return of the Writ of Covenant. And as to the matter in Law, Godfrey said, That the Fine is to be reversed foꝛ the 100 Acres, and it is not strange foꝛ a Fine to be reversed in part, and to be in force foꝛ the residue. As a Fine levied of guildable Lands, and of Land in ancient Demesnes, though the Lord by a Writ of Disceit avoid the Fine foꝛ the ancient Demesne Land, yet it is good foꝛ the other Land; as 17 Ed. 3. Tanfield and George Coke Contra; foꝛ in a Writ of Error the Plaintiff is to annihilate the Record, and to have Restitution of that, which the Record giveth away from him; and if by any Act he hath barred himself to subvert the Record, oꝛ to have Restitution, his Writ of Error is gone, and in this Case he cannot have restitution of that of which he made a Feoffment; as, if he had made a Feoffment of the whole, no Error lieth, 12 H. 6. 6. 39 Ass. So a release of his right. And the Right is intire, though a feoffment be onely made of part, and the Right cannot be divided, as 3 H. 4. 17. if one be indebted to me by contract foꝛ 20 l. and I take Bond foꝛ 10 l. of it, the whole contract is determined; so 29 Ed. 3. if one enfeoffe me of 20 Acres with warranty, and I enfeoffe J. S. of one of them, the warranty is gone: 9 H. 6. by Babington, 19 H. 6. the Case of partition; but by Act in Law it is otherwise, as 7 Ed. 4. casu penultimo, if the Sheriff levy part of a Debt by Fieri facias, the Party may have an Action foꝛ the residue. Tota Curia contra in the Point in question, That the Feoffment only destroyeth the title of Error, foꝛ that party. Fenner said, He, which hath title to a Writ of Error, hath right to the Land; and none will deny, but, if he releaseth all his right in the Land, a Writ of Error lieth not. Popham, He hath a right of Action to the Land, but not a right in the Land: foꝛ, if the Land had descended to him, he had not been remitted, but a right of Action may be divided. As if two bring Error against J. S. he pleadeth the release of one of them, he shall be seidered, and the other shall recover: but if one hath a right, and he brings Action against two, and one pleadeth a release, this is good to both. And the Court agreed to reverse the Fine foꝛ the 100 Acres: but postea it was shewed, that he made himself Heir to the Feme, but shewed not how, nor that the Land was the Land of the Feme, and foꝛ those causes the Writ of Error was held to be insufficient.

2 Gr. 12.

1 Rol. 775.

Co. Lit. 264. b

Co. 6. 25. b.
Post 518.

Ant. 468.

Childs *versus* Wescot. Pasch. 37 & 38 Eliz. rot. 712.

(28)
Post 481.

Post 743.

Co. Lit. 182.a.

E Jectiōe firmæ. Upon a Special Verdict, the Case was. Three Joynt-tenants for life; The one of them purchased the Reversion by Fine: Whether the Joynture were hereby dissolved, or not, was the Question betwixt his Heir and the other two who survived. Glanvil moved, That the Heir should have his part; for the difference hath been always, where the Reversion comes to the Free-hold, there the Joynture is destroyed; but where the Free-hold comes to him in Reversion, and to another, it is otherwise. And it was resolved accordingly in the Court of Wards, in Morgan's Case, by the opinion of the two chief Justices. And so held all the Court: and Walmley said, It was stronger here, Because he takes this Reversion by Fine Sur conusans de droit come ceo, &c. which implies a precedent gift, and that implies a surrender of the Conusée: But a gift to two, and the Heirs of the one, the Free-hold remains in Joynture, because it was so given at the beginning: but otherwise it is, where one of them acquires the Reversion afterwards, or it descends upon him; for if it were not so, it would be mischievous, because, if the other two committed waste, he should not have any remedy for it. But there was not any Judgment given at this time; for that it was said, there were divers faults in the Verdict, and therefore it was adjourned. Vid. Resid. postea, Trin. 38. R. B. Pl. 16. 2 Co. 60.

Corbyn *versus* Brown. Mich. 37 & 38 Eliz. rot. 523.

(29)

A Stumpfit, The Defendant pleaded Not guilty, and found for the Plaintiff, and this matter was moved in Arrest of Judgment by Hearn, That this was not any Issue in this Action. But all the Court held, That although it be not a proper Issue in this Action, and therefore the Plaintiff might have demurred thereupon, yet because in this Action there is a Disceipt alledged to charge the Defendant, Not guilty is an answer thereto, and that it is but an Issue mis-joynd, which is aided by the Statute, being after Verdict: for that aids mis-joyning of Issues or other faults: and this is an Issue, but an imperfect Issue. Wherefore, absente Owen, it was adjudged for the Plaintiff. And Walmley said, That he had many Presidents in the Queens Bench of that Issue joynd, and tried in this Action, and Judgment thereupon.

Halland *versus* Mabbs.

(30)
Ant. 62.

A ction for these words, J. Halland (the Plaintiff) will come home again, if he escape the Gallows, for he hath deserved to be hanged. After Verdict it was moved, That an Action lay not for those words. And so it was Ruled accordingly: for they are too general. Because

because the Countrey people might intend, that he deserved hanging, although he never committed any Felony. Wherefore it was adjudged for the Defendant.

Anonymus.

Action upon the Case for these words, Thou hast feloniously taken my Wood: After Verdict for the Plaintiff, Spurling moved, That an Action lay not for these words, for it might be intended Wood standing, and so no Felony: But the Court, resolved to the contrary; for being spoken in the worst sense, it shall be construed most strongly against him, who spake it, viz. That it was Wood cut down: For otherwise he could not have said Feloniously taken, whereto by Anderson and Beaumont, contradicente Walmsley, and Owen absente, it was adjudged for the Plaintiff. (31)

Sheldon *versus* Hodges.

Replevin. The Defendant avows for Damage feasant. The Plaintiff by his replication claims Common by prescription in the place where, &c. being Broadway, in the County of Worcester, appurtenant to his Manor of D. in the County of Gloucester, and Issue thereupon, and two Ven. fac. awarded to the Sheriffs of the several Counties. And now seven of the County of Worcester appeared, and five of the County of Gloucester. And although there ought to have been six sworn of each County to try that Issue, as appears 49 Ed. 3. 1. 31 H. 8. 46. yet by the assent of the parties, those twelve, who appeared, by advice of all the Justices were sworn, and tried the Issue, and the parties released all Errors, the one to the other; and it was commanded, That this Assent should be entered upon the Record; for otherwise it would be a strange President. (32)

Cary *versus* Dancy. Mich. 37 & 38 Eliz. rot. 1946.

Ejectione firmæ; upon a special Verdict, the Case was; Tenant in tail of Lands in Andover Levies a Fine with Proclamation, with the Remainder to himself in Fee, the Fine was afterwards reversed by a Writ of Disceit: and it was thereupon held by the whole Court, That the Issue in tail is remitted, and shall avoid all Estates made by him; For the Fine is void between the parties: But the Tenant in tail, after that Fine levied, and before it was reversed, had made a Lease for years, the memainder over for life: And whether the Issue might enter to avoid those Estates, was the Question. And it was held, That he could not without a Scire fac. sued against him, who had the Free-hold; For he, who is to defeat a Record, is always to commence his Suit against him, who is privy to the Record: But when he hath reversed it against him, he ought to have always a Scire fac. against him, who is Ter-tenant; For it may be, he hath some matter to bar him of (33)

Iost. 458.

of Execution. And otherwise he shall not be bound, unless he be made privy by a Scire fac. or that two Nihilis be returned: As if Error be brought to Reverse an Erroneous Recovery, or a Contra formam collationis is brought against an Abbot, who aliened, or a Cessavit de Cantaria, in all these Cases the Tenant of the Land shall not be ousted, without a Scire fac. sued against him. And, if he be, he shall have an Assise. Fitz-H. N. B. 142. and 211. 23 Ed. 3. contra form. 3. 2. Affis. 13. Wherefore, &c. But Quere in this Case, how a Scire fac. may be awarded for the Defendant in the Suit, and where the Land it self is not in Demand. Afterward, Trin. 38 Eliz. the Court was moved again, and they held, That he could not enter without a Scire fac. But they respited Judgment, and gave a Rule, That if any of the Parties died, Judgment should be entered, Tunc pro nunc.

Betford *versus* Ford, Ante Mich. 37 & 48 Pl. 67.

(34)
Ant. 447.

The Case was now argued again by Drew on the one side, and by Glanville on the other. And after Argument the Court resolved, That this Confirmation goes to the whole Term, and cannot be abridged by the following words. For Owen said, The Confirmation was concessionis predictæ in forma predicta, and it cannot be abridged by the subsequent words. But if he had confirmed the Land for 51 years only, it had been good for so much. But here the first words go to all the Term, and therefore the limitation for 51 years comes too late: and to this reason Anderson agreed. Walmesley; If one will confirm an Estate, he cannot apportion it by his Confirmation; As a Confirmation to a Disseisor for an hour, is good for all the estate: But when the estate is divided it is otherwise: As if an estate be for life, Remainder over, The confirmation may be to any of them: So if Lessee of a Disseisor for 20 years makes a Lease for 10 years, the Disseisee may confirm it to either of them, and not to the other. Wherefore, &c. And afterwards this Term it was adjudged accordingly, That the Confirmation went to all.

Ragisters Case.

(35)

A Writ of Dower was brought of Lands in the County of Northumberland, The Parish Church wherein this land lay was at Newcastle, which is a County by it self. Where the Proclamation of the Summons, by the Statute of 31 Eliz. should be made, was the Question, and Ruled per curiam, That it ought to be at the Parish Church door, although it were in another County then where the land lies.

Worsley and Worsley, the Father and Son *versus* Charnook.

(36)

A Udea Querela. For suing Execution upon the Fathers land in D. and of the Sons land in S. upon a Statute acknowledged before the Mayor of Preston, Sealed with one piece: and it was now moved, That they ought not to joyn in this Action: For they supposed the Execution of their lands severally

severally, which are several causes of Suit, whereof every one shall have his Action apart: as 25 H. 6. 20. of an Execution sued against Joynt-Tenants of their Lands; They shall joyn in an Audita Querela: but, if Execution be Sued of their bodies, they shall sever, for the Tort is several. Harris Serjeant e contra; For although the Execution of their Lands be several, yet it is upon one Statute, which is intire; and therefore one Audita Querela lies, as 20 Ed. 3. Aud. Quer. 28 is. An Audita Querela is also by way of defence, as 34 H. 6. 31. is; and by way of defence two may joyn, although their Plea be several, as 12 Ed. 4. 6. Wherefore, &c. Anderson; The Statute is joynt, and therefore the Comisee might have Execution joyntly against them, if they have goods, or Lands joyntly, and he might have several Executions of their Lands. Wherefore the cause of their grief being several, they might have several Actions, if they would, or have it joyntly; because it is grounded upon a Statute, which is joynt, which is the principal cause of their grief. Walmsley and Beamond e contra; For although the Statute be joynt, yet the Extent is several; and the prayer of the Plaintiffs to be restored to their Lands is several: For peradventure the Land of the one, which is extended, is more than the Land of the other, and it should be unequal to restore to them joyntly. And every Remedy ought to be according to the grief and loss, which being here several by reason of the Execution sued against their several Lands, the Action to redress it should be several. Wherefore, &c. Et adjournatur. Afterwards in Mich. 38. & 39 Eliz. it was moved again, and Anderson held his Opinion as before; That the Audita Querela is well sued joyntly, being grounded upon a Statute, which is entire, and one Action of Debt might have been maintained against them upon that Statute. But Walmsley, Beamond, and Owen e contra: Because it is here pretended, that the Statute was never good, being sealed but with one piece of Wax, and so the Execution against them was always Tortious; wherefore for this wrong they ought to sever in the Action to have it reversed, the Tort being to them several: But if the Statute were once good, and afterwards Released, and Execution sued against the Release, there peradventure it should be otherwise, because it is there grounded upon one entire Cause; wherefore the Suit here being joynt by them, which ought not to be, It was adjudged, that the Writ should abate.

Hunt *versus* Singleton.

Hill. 38. rot. 1814.

Trespas Upon special Verdict; the Case was, The Dean and Chapter of Pauls being seised of a Messuage in St. Fosters Parish in London, 4 Ed. 6. let them to Hargrave for 40 years, who assigned his Lease to R. Eales; afterwards Eales, 20 Eliz. let two Chambers of the Messuage to Robins for 12 years, and afterwards Eales reciting Hargraves Lease, &c. Surrenders it to the Dean and Chapter, and they afterward, reciting the Surrender, let the Messuage to Eales by these words, All their said Messuage, or Tenement, with the Appurtenances to the same belonging, or in any wise appertaining, by the said Eales now occupied, and all other Rooms with the same now

(37)
Post. 564.

P p p

occupied

occupied, and now in the tenure of the said Eales, between the Messuage of I.S. East, and of I.D. West, and so much in length, for Forty years. And the Jury found, That these Rooms were then in the tenure of Robins and not of Eales, and that the neather Story of the said Messuage was between the said bounds, but not these Rooms; and after the Dean and Chapter let the Rooms to the Plaintiff for Forty years, who entred, and was ousted, &c. Et si super totam materiam, &c. And it was adjudged for the Plaintiff. Note, I collected this Case out of the Record delivered to me by Mr. Brownlow. The reason seemeth to be, That Eales had not the Rooms in his possession at the time of the Lease, although he had the Reversion; but they were severed for the time, and passed not by the Lease. Vid. Patch. 39 Pl. 25.

Ante 16.
1 Cr. fol. 130.
Ant. 300.

Termino

Termino Trinitatis,
Tricesimo octavo ELIZABETHÆ,
in Banco Reginæ.

Wright *versus* Wright. Trin. 38. Eliz, rot. 628.

Prohibition. Upon Demurrer the Case was: The Bishop of Winchester had Lands within a Parish, and prescribed in Non Decimando (as it was agreed, that a Spiritual person might) and let it to a Lay person for years. Whether this Lessee shall pay Tythes to the Parson or not, or should hold discharged, as his Lessor held it, was the Question. Vid 10 El. Dy. 277. & 18 Eliz. 341. & Resid. postea. M. 38, & 39 Pl. 36. (1)
Co. 2. 43. b.
Moor 425.
Post. 511.
Post. 579.

Sir Nicholas Bacons Case.

Replevin. The Defendant pleaded, That the property of the Beasts Tempore Captionis was in the Lord North, and Issue was thereupon joyned: and it was moved, That this was not any Plea; but that there should be a Repleader, and Ruled per curiam, That it was a good Plea. Vid. 29 H. 6. 35. (2)

Sherington *versus* Flewood.

Prohibition for Tythes. Popham said, If Land be overflown with water, and afterwards gained by industry, Tythes shall presently be paid thereof, although it had been overflown, Time whereof, &c. So if Land be full of Thorns and Bushes, from time whereof, &c. and it is grubbed up and made Meadow, or Arable Land, Tythes shall be presently paid thereof, notwithstanding the Statute 2 Ed. 6. for those Lands of their own nature were not barren, but by negligence, or ill husbandry became so. And the Statute doth not intend, that Tythes shall not be paid within seven years after the manurance, &c. But of such Land, which was merely barren, and made good by foldage, or other industrious means. And this was agreed by the other Justices. He also said, That it hath been here adjudged, That Tythes shall not be paid for Rakings, unless they be foul Rakings. The Parishioners also prescribed, That he used to pay 1 d. for every milch Cow, in satisfaction for the Tythe of milch Kine and Beasts agisted, which was moved not to be a good prescription: For Tythes for one thing cannot be Tythes for another. But if he had prescribed, That he had paid 1 d. for all Cows and Beasts agisted, that peradventure had been good: And this diversity was so Ruled in the Case of Dr. Lewes, and of that Opinion were the Court here. Then Godfrey moved, that no Tythes by the (3)
1 Rol. 647, 651.
2 Inst. 656.
St. 2 E. 6. c. 13:
Moor 909.
Ante 363.
Post. 702.
1 Rol. 651.
Ant. 446.
Ant. 446.
Law

Ant. 446.
1 Rol. 647.
2 Cr. 576.
2 Cr. 237.
1 Rol. 647.

Law are payable for Beasts agisted, and so is Nat. Br. 53. G. But all the Court held, That for Beasts agisted for hire, or for dyttel, which are depastur'd to be sold, Tythes shall be paid: But for dyttel Cattel reared for the Plow, or to be expended in the House, no Tythes shall be paid for them. Sed adjournatur.

Ewer versus Hayden.

Trin. 36 Eliz. rot. 359.

(4)
Psst. 658.
2 Ro. 57.
Moor. 359.
Owen 74.

2 Rol. 57.

Ante 267.
Post. 665.

2 Rol. 57.

DEbt for Rent reserved upon a Lease. Upon a special Verdict the Case was such: One Hayden being seised in Fee of Lands and Houses in Lawton in the County of Oxford, and also of Houses and Land in Waterford in the County of Hertford, Let the Houses and Lands in W. in the County of H. to the Defendant, and afterwards Devised all his Messuages and Lands in L. in the County of O. and all his other Lands, Meadows, and Pastures in W. in the County of H. to the Plaintiff: And Whether the Houses in W. in the County of H. passed by this Devise to the Plaintiff, by these words, All other my Lands, &c. was the sole Question. Tanfield moved, that those Houses passed; for in Grants, especially in Devises, the exposition of the words shall be according to the common intendment of the Grantor, and of the Ley-gens: As if one builds an House upon Bl. Acre, and maketh Feoffment of Bl. Acre: The house shall pass, and so is the common Course; That in a Grant by Copy de virgata terræ, the House thereupon shall pass: and so is the common Phrase in the Country, that a man hath an 100 l. Land; therein is intended all his Possessions, Lands, Houses, &c. And in Andrews Case it was adjudged, That if one brings an Ejectione Firmæ, or a Præcipe of 100 Acres, according to the Statute-measure: But if he bargains, and sells 100 Acres of Land, that shall not be according to the Statute-measure, but after the usual account in the Country. Winter è contra; I agree, if a man levies a Fine of 100 l. of Land, that the Houses shall pass by such a Fine; as 43 Ed. 3 r8. so by a Devise, or Grant of all his Lands, his Houses shall pass. But here the intent of the Devisor appears, that he restrained the word Land according to the propriety of the word, viz. Arable Land; for he couples it with Meadow, and Pasture, and so shews his intent, that Land shall not extend to all kinds. In the first part of his Will also, he Deviseeth his Houses, and Land in L. in the County of Oxon; but in the last Clause he doth not mention any Houses: And the Verdict found, that he had there, Land, Meadow, and Pasture, so as his Will might be satisfied. Wherefore, &c. Fenner accord; for his particular devising of his Lands, Meadows, and Pastures exclude the general intendment of this word Terra, and restrains it only to Arable Land, and excludes Houses, and Wood. Gawdy è contra; The difference is apparent betwixt Writs, and Deeds, or Wills; for in a Writ nothing shall be demanded, or recovered, but according to its proper signification: But in Wills, or Deeds, they shall be taken according to the common Intendment, and Phrase, And this appears 32 H. 8. Dy. 43, Wherefore in a Will, by the Devise of his Land, all his Houses may pass. And so here Popham accord: For

For if a man bargains and sells all his Lands in D. all his Houses, and Wood there shall pass; as it was resolved before the two Chief Justices, Wray and Dyer. And Warrants of Attorney are always entered in placito Terræ, although Houses onely, or Wood is demanded; for that is intended by the word Terra. But if a man seised of three Houses and three Acres of Land in D. Devise his Land, and one of his Houses in D. there the other two Houses pass not; for his intent is apparent therein, that but one House only should pass. But here the words are in the general, as to the Lands in w. and therefore it shall make the Houses there also to pass. Wherefore, &c. But Gawdy said, That in the last Case put by Popham, all the Houses shall pass. Clench was absent: Ideo adjournatur. And afterwards it was adjudged, that the Houses in W. did not pass, for the reason given by Fenner. Vid. Pasc. 41. Plac. 3.

2 Rol. 57.

2 Rol. 53.

Mp. 360.

Thornton *versus* Kemp.

Hill. 38. Eliz. rot. 987.

Assumpsit, Whereas I.S. was indebted unto him in 100 l. in consideration, that the Plaintiff would abate 10 l. of that Debt, and forbear the 90 l. residue until Michaelmas next ensuing, he assumed to pay the said 90 l. at Michaelmas to the Plaintiff; if the said I.S. did not pay it, and alledges in Facto, that he abated 30 l. of the said Debt, and forbear the said 100 l. until Michaelmas then following; Whereupon he brought his Action. The Defendant pleads, That after this promise, and before Michaelmas, the Plaintiff levied a Plaint in London against I.S. for this Debt, and caused him to be arrested thereupon: And upon this Plea the Plaintiff demurred. First, Because he alledgeth, that he abated 10 l. and doth not shew how; so as the Court might take Conscience, whether it were a sufficient Discharge. And of that Opinion was the whole Court. Vid. 22 Ed. 4. 40. 18 Ed. 3. barr. 243, or 247. Secondly, Because it now appears by the Defendants Plea, which the Plaintiff hath confessed by the Demurrer, that the Plaintiff had not forborn him: for when he sued him, it was not any forbearance, But Gawdy and Popham held it to be well enough: for he hath forborn him the payment; and the promise is not, that he shall forbear from suing him. But Fenner and Clench e contra; For it is in vain to forbear him the payment, when he doth not forbear to sue him for it: And this was the intent of the Assumpsit, That he should not be molested for it before Michaelmas, &c.

(5)

Ant. 253.

Ram *versus* Patenson.

Hill. 38. rot. 522.

Prohibition upon the Statute 45 Ed. 3. For that whereas he libelled in the Spiritual Court for Cythes of Timber-Trees. The Defendant said, That those Trees were long since mortuæ, aridæ, & putridæ, fit only for fire-wood, and not for Timber; and it was thereupon Demurred: And all the Justices (Popham absente) held, That no Cythes should be paid for those Trees: for being over the growth of 20 years, they were once discharged of Cythes, and therefore shall always be discharged. Another point was

(6)

1 Rol. 640.

Co. 11. 49. 2.

2 Cr. 199.

Moor. 908.
Pl. C. 470. b.
Co. 11. 48. b.
2 Cr. 100.

was also then moved, The Suit being for Tithes of the loppings of the Trees : And the truth was, those Trees had not been lopped for 10 years together : so as then the branches of the loppings were discharged from Tythes ; but afterwards they were lopped every seven years. Whether now Tythes shall be paid for these branches ? And they all held, that they shall not pay Tythes ; for as the Body is privileged, so are the Branchen.

Abraham versus Twigg.

Hill. 38. Eliz. rot. 739.

(7)
Mo. 424.
Co. 7. 41. b.

Ant. 40.

Lit. Sect. 31.
Ant. 40.

A Vowry for Rent. The Case upon Demurrer was: Peter Dormer was seised in Fee, and made a Feoffment to the use of himself, and his Heirs of his Body ; and for default of such Issue to Gabriel Dormer, and to his Heirs males lawfully engendred ; and for default of such issue, to the right Heirs of Peter. Peter Dormer dies without Issue, Gabriel Dormer enters, and deviseeth that Rent out of that Land to the Avowant, and dies having Issue : And whether Gabriel Dormer by the limitation of this use should have a Fee-simple, or Fee-tail, was the Question ? Exception was taken to the Avowry, because it is not shewn when the Devisor died ; so as it might appear, that this Rent was afterwards due: Sed non allocatur ; For the matter it was moved, whether it were an Estate-tail in Gabriel ? For although it be not limited to the Heirs of his body, yet being by way of use, which is expounded according to the Intent, and as Wills, it shall be construed as an Estate-tail, as 9 Ed. 3. Tail 21. and 5 H. 6. 6. But all the Justices (Popham absente) held, that it was an Estate in Fee in Gabriel Dormer : and although it were by way of use, it differs not from other gifts by Deed, and shall not have any other construction : and it cannot be an Estate-tail, because there is not any body, from whom this Heir male should come. And so it is in case of a Devise, as appears 9 H. 6. 25. Wherefore it was then adjudged for the Avowant. 7 Co. 41. b.

Kelloock versus Nicholson,

Mich. 37 & 38 Eliz. rot. 387.

(8)
Noy 36.
1 Rol. 46.
Moor 422.
Post. 496.

Detinue of an Obligation. An especial Verdict was found ; That the Plaintiff, and one Stephenson, as Executors to I. S. had an Obligation, wherein A. B. was obliged unto their Testator in 20 l. and Stephenson, one of the Executors, in satisfaction of his proper Debt to the Defendant, by words only, dedit & deliberavit that Obligation to the Defendant, and died : And the Plaintiff, being surviving Executor, brought a Detinue for this Obligation. Quære ; For the Justices did not give any great opinion therein, but seemed to be divided. Vid. 10 Ed. 3. 28, & 29 Dy. 5. Residuum postea, Mich. 38, & 39. Plac. 15.

Blofield's Case.

(9)
Mo. 459.
Co. 5. 86. b.
Post. 850.
1 Cr. 75. 240.

Two were condemned in Debt ; the one is taken by a Capias ad satisfac. and afterwards suffered by the Sheriffs voluntarily to go at large. And then the other was taken in Execution, and would upon this matter have maintained an Audita querela ; Because now the one is discharged, not by his own wrong, but by the Sheriffs Act, of whom the Party is put to have his remedy. But

Gawdy

Gawdy and Fenner held, That this was not any cause to discharge him : Popham and Clench absentibus. 33 H.6.18. 5 Co.87.b.

Post.555.

Blunco *versus* Marston.

Prohibition : and surmisseth, That he was Parson, and the Defendant was Vicar of the same Church, and Sued him in Court Christian for Tythes, upon an Endowment, that the Vicar should have the Tythes of all the Lands within the Parish ; and alledgeth, that he pleaded there, that he is Parson imparsoned there ; and that the Land, whereof Tythes are demanded, is parcel of his Glebe ; and that they of the Spiritual Court would not there allow of this Plea. And it was held clearly, That a Prohibition lay upon this Surmise ; For Ecclesia Decimas solvere Ecclesiæ non debet. And Tanfield said, That here lately this matter was in Question betwixt Young and the Parson of Boxley, in the County of Wilts, and adjudged, That no Tythes shall be paid of Glebe Land. But Popham said, If the Vicar be endowed to have all the small Tythes within the Parish, and the Parson make a Lease of his Glebe Land, the Lessee shall have the small Tythes arising therefrom to the Vicar, and the gross Tythes thereof to the Lessor. Which was agreed per Curiam postea.

(10)

2 Rol.335.

Post.578.

Moor.457,

910.

Post.579.

1 Rol.335.

Post.578.

M. 39, & 40

Pl. 1.

Sir Anthony Maynis *versus* Scot. Pasch. 38 Eliz.rot.42. Vid. ante, fol.450.

Error of a Judgment in Debt upon an Obligation in the Common Bench : (quod vid. ante, fol. 450.) The Condition was, to perform the Covenants within such an Indenture. The Covenant, wherein the breach was assigned, was, Whereas he had let that Land to S. for 21 years, he covenanted, upon surrender of the first Lease, to make unto him a new Lease for 21 years. The Defendant pleads thereto, that Scot never surrendered his Lease unto him. The Plaintiff replies, that the Defendant had accepted a Fine sur consuance de droit come ceo, &c. of Sir John Scavage, and others, and thereby had granted, and rendered unto them the Land for 80 years : & hoc, &c. And thereupon the Defendant Demurred ; Because he doth not shew, That he, notwithstanding this Lease, had offered to make a Surrender, so to perform as much as on his part was to be performed, although the other could not make a Lease according to his Covenant. And it was thereupon adjudged for the Plaintiff ; For the Defendant being disabled to make a Lease, he needed not tender the Surrender unto him. And Error being brought hereof, it was assigned onely in the point, and matter of Law. And Tanfield moved, That the Judgment was Erroneous : For this Covenant to make a new Lease, is not to be performed, unless upon a former Act to be done by the Lessee, viz. the surrendering, which at leastwise ought to be offered : because there ought a promptness to appear in him to do that on his part, that is to be performed, although the other cannot make the Lease on his part ; and in proof hereof relied upon 32 Ed.3. Bar. 26 & 34 Ed.1. Debr. 168. But all the Justices resolved, without any great Argument, That, in regard the Defendant hath disabled himself by this Fine to make the Lease according to his Covenant, And the Plaintiff is not to make the Surrender, but with an intent to have a new Lease, which he cannot have ; It would therefore be in vain for him to offer his Surrender. But the

(11)

Poph.109.

Moor.452.

the Covenant is broken of it self. Wherefore the Judgment was affirmed. 5 C. 20. b.

Partridg versus Naylor. Pasch. 38 Eliz. rot 299.

(12)
Gould. 145.
Moor. 453.
Noy. 52, 62.
Ante 331.
1. & 2 Phil. &
Mar. c. 12.

Error of a Judgment in the Common Bench. In an Action upon the Statute of 1 & 2 Ph. & Mar. c. 12. against three, for impounding a Distress in several Pounds in three several Hundreds, Where the Case was; That three Distrained a flock of Sheep, and severally impounded them in three several Pounds in several Hundreds. Upon Not guilty pleaded; and Verdict found accordingly, and Damages assessed by the Jury at 40 s. And thereupon Judgment entered, That every of them should forfeit 5 l. (being the penalty given by the Statute) and the treble of 40 s. against every of them. And this was assigned for Error, That there ought to be but one 5 l. against them all; and but one trebling of the 40 s. against them all; but it is but one Distress, and one offence in them all against the Statute. And, in Hill. 39 Eliz. being moved again, All the Court resolved, That it was erroneous. And for this cause Judgment was reversed.

Gybson versus Garbyn. Hill. 38 Eliz. rot. 1060.

(13)

Action upon the Case. Sur Trover and conversion of Sixteen Broad-Clothes. The Defendant pleads, That, before the time of the Trover and Conversion, one Morrice was possessed of those Goods, and sold them to the Defendant; and, before he had notice, that they appertained to the Plaintiff, he sold them to I. S. The which matter, &c. And it was thereupon Demurred.

West versus Monson. Hill. 38 Eliz. rot. 228.

(14)
Poph. 110.
2 Rol. 693, 5, 6.
Moor. 431.

Error of a Judgment in an Assise in the County of Lincoln before Gawdy and Owen Justices of Assise there. Where in an Assise against West, he pleaded Nul tenant de Frank-tenement named in the Writ; and it named, there was not any Tort, &c. The Jury found, That the Plaintiff was disseised by the Defendant, prout in brevi supponitur; Nisi verba contenta in voluntate Roberti Monson (which they found in hæc verba) conveyed a good Estate in the Lands to the Defendant; And thereupon they prayed the discretion of the Court. And thereupon Judgment was given for the Plaintiff, and Error thereof brought. Yelverton: The first Error assigned was; Because the Assise did not inquire of the Tenancy, which ought to be in every Case, unless where the Assise is taken in right of Damages; as 12 Ass. 10. 20 Ass. 4. 11 H. 6. 46, 37 Ass. 15. 40 Ass. 29. 21 Ass. 20. 23 Ass. 2. 50 Ed. 3. 11. And although the Verdict finds, Quod ipse fuit Tenens; yet because it is not said, Liberi tenementi, it is not good; for so it may be said of a Tenant for years, or by Elegit. And the Conclusion, prout per breve supponitur, will not help it; for that doth not prove him to be Tenant. The Verdict is also imperfectly found; and then the point ought also to have been better examined by the Justices of Assise ex officio, as 12 H. 4. 20. is; and because they did it not, it is erroneous. Secondly, It is not found, that he was seised of any Estate, so as he might be disseised. Wherefore, &c. But all the Court resolved, That in regard there was but one Tenant named in the Assise, and the Jury hath found, That he disseised the Plaintiff, prout per Breve supponitur: It is thereby to be intended, That

That the Plaintiff was seised of such an Estate, which might be disseised, and that the Defendant is to be intended always Tenant, in regard there is not any other named in the Writ, who could be Tenant: But if there had been more Defendants named in the Writ, then they ought to have enquired of the Tenancy. And all the Justices, besides Gawdy, resolved, That the Verdict was found for the Plaintiff: and that which came after the Nisi, being imperfect, as it was agreed clearly by all, that it was (for they found not, That Robert Monsor was at any time seised of that Land, that he might make a Will, nor that he made any Will) It was idle, & void: & Judgment should be given upon the precedent Verdict: As in the Case of Sir Rowland Hayward, 23 Eliz. Dy. 372. And the Verdict being perfect before, that, which comes after the Nisi, being idle and void, shall never hurt it, but Judgment shall be given upon the Verdict, which is good: But where that, which comes after the Nisi, is material, and is well found, the Court shall then adjudge as well upon that, as upon the residue of the Verdict. And although the Verdict was imperfect, and the Tenant might have prayed a Certificate of Assistance to make it more full, so as Judgment might have been given upon the entire Verdict: yet that needed not be awarded by the Court ex Officio, but they might well have adjudged upon that which was found. Wherefore the Judgment was affirmed against the Opinion of Gawdy, who said, That he always held the Verdict to be imperfect, and that no Judgment ought to be given thereupon. But in respect he was informed by Owen his companion, That the Opinion of many of the Justices, upon conference with them, was, That the first part of the Verdict was perfect: That, which came after the Nisi, was void and idle; and that Judgment ought to be given for the Plaintiff: He assented thereto; Yet in his Opinion held, That the Verdict was imperfect in all: For the Jury intended not to find the one part without the other; And it is not a perfect Verdict, for it is all in one entire Sentence, wherefore they ought to have adjudged upon all together, and so not like to the Case in 23 Eliz. For there was an absolute Verdict given, and that which came after was idle. Wherefore, &c. But notwithstanding the Judgment was affirmed.

1 Cr. 212.
Ante 41.
Post. 482.

Childes versus Wescot.

Ante Terminum Paschæ, Placito 28.

THe Case was now recited to be such: Tenant for Life, Remainder to four others for their Lives; The Lessor in Reversion levies a Fine Sur conusance de droit come de ceo, &c. to the Tenant for Life, and to one of those in Remainder, to the use of the Tenant for life, for his life, and after to the use of the other in Fee. The Tenant for Life dies; He in Remainder, who took the Fine, dies; And whether his Heir should have that part, was the Question. And it was resolved by all the Court, That that Part should descend to his Heir, and should not survive. But it was then moved in Arrest of Judgment, That he declares in an Ejectione firmæ, of a Lease by Baron & Feme, and shews not that it was by Deed: and without a Deed it cannot be a Lease of the Femmes. For her acceptance of the Rent upon such a Lease cannot make

(15)
Ant. 470.

Ante. 470.

Ant. 438.
Ant. 112.

it good : And in proof thereof was cited Dy. 91. 21 H. 8. 2. 15 Ed. 4. 13. 21 H. 6. 24. Walmesley ; Although he Counts not of a Deed, yet a Deed may well be intended. Anderson ; That cannot be, but he ought to Count thereof precisely, if a Deed be necessary. And afterwards a President was shewn unto them, Paschæ 33 Eliz: betwixt Mosely and Guilbert, where he made his Count of a Lease by Baron and Feme, and mentions not any Deed, and yet adjudged to be good. And Drew said, That he was a Counsel therein, and that then this Exception was taken thereto, and that then another President was shewn in the Queens Bench betwixt Diggs and Withers, and there adjudged good : Wherefore upon these Reasons, and Presidents shewn in Court (being the last day of the Term) the Plaintiff had Judgment to recover.

Co. 6. 61.

Sharp versus Sharp.

(16)
Mo. 458.
Co. 6. 26. a.

Ant. 481.

Co. Litt. 48. b.
Co. 6. 26. a.

UPon a special Verdict, the Case was : That J. S. being seised of Land in Fee, being upon the Land, Demised the Land to the Plaintiff for Life, Et quod nulla alia deliberatio Seisinæ facta fuit. And, Whether this were a good Lease for Life, being but by Words only upon the Land, was the Question. Anderson ; It is a good Libery, and so it hath been held to be before this time, and so I can shew you. But the Case is better : for the Jury find Quod demisit for Life, being upon the Land, which is an express finding of the Lease. And although it be afterwards found, Quod nulla alia liberatio Seisinæ facta fuit, it is not material : And in the first Words there is a good Libery and Lease intended, and it shall be good in Pleading, a multo fortiori in a Verdict. Walmesley ; True it is ; by the first Words, if no more had been found, it should be intended to be a good Lease, and a Libery in Facto to have been made : But when the Jury find further, Quod nulla alia, liberatio Seisinæ facta fuit, They have thereby left it to our Judgement, Whether it be a good Libery or not, which it is not : For Libery is a solemn thing, and ought to have an external Act, and not Words only, so as the intent of the Parties ought to be apparent to have a Libery. For Bracton and Britton hold, That a Free-hold cannot pass by Words only. Owen and Beaumont accord, For Libery is an Actual thing, and ought to be made by some Act done, and Words upon the Land, I let you this Land, &c. cannot make the Land to pass, and the Verdict is plain enough, That they did not intend any other Libery, then by Words only. Anderson, If there be words used upon the Land, to shew the intent of the Parties to make the Land to pass, it is a good Libery : As in Dower ad Ostium Ecclesiæ. Libery within the view although nothing be done, but Words used only, yet the Land shall pass thereby. But, notwithstanding his Opinion, it was adjudged for the Defendant, That it was not any Lease. Note, That Serjeant Glanvil said, such a Case was between Swan and Sparks. 6 Co. 26.

Huit versus Cogan.

(17)

THe Case was : Two Persons recovered severally against one in Debt ; He, who had the first Judgment, sued first an Elegit and had the Voyety of his Land delivered in Execution. Afterwards, the other sued an Elegit, and the Sheriff prayed the Advice of the Court, Whether he should deliver the Voyety of the entire

entire

entire, which was all that, that remained to the Debtor, or but the Hoyety of the Hoyety, viz. the Hoyety of that, which remained to the Debtor. And Anderson, Beaumont and Owen held, That he should deliver but the Hoyety of that Hoyety, which he had at the time of the Writ awarded. But they advised the Sheriff to return that special matter. Vid. 10 Ed. 2. Execution. That the entire Hoyety shall be delivered.

Cross versus Powel.

DEbt. The Case was: A Deed-Poll was made between C. and P. whereby C. Covenants with Powel to assure unto him such Land, and Powel by the same Deed Covenanted with C. to pay unto him for it 40 l. Powel delivered the Deed first to C. and C. afterwards delivered it to P. and C. brings Debt for this 40 l. And all this matter being disclosed by pleading, It was thereupon demurred by the Defendant, pretending, That by this re-delivery of the Deed unto him it had lost its force. But all the Court held, That it is a good Deed to both. For here is a Writing, Sealing, and Delivery, and the delivery thereof to the Defendant is not material: For if a Deed be delivered to be cancelled, to the Party himself, yet if it be not cancelled, and the other gets it again, it remains a good Deed. Wherefore it was adjudged for the Plaintiff. (18)

Litcl. 550.

Post. 487, 498.

Stephens versus Eliot.

Ejectione firmæ, of Lands in Stepney in the County of Middlesex, by Edw. Ascue, And upon the Evidence it appeared, That Edw. Ascue, the Lessor, being in the County of Lincoln, delivered a Letter of Attorney to deliver this Lease upon the Land. But it appeared further upon Examination of the Witnesses, That the Lessor in the County of Lincoln, being out of Possession of the Land, delivered that Lease to the Attorney as his Deed, to the Plaintiffs use, and afterwards the Attorney entered into the Land, and according to his Warrant delivered it to the Plaintiff upon the Land. Yet per Curiam it was held to be a void Lease. For it was delivered in the County of Lincoln, when he had nothing in the Land. And although it was moved, That the first delivery was void, therefore the second Delivery was good; yet they held it to be void. For, although the first be void, to pass a thing, yet it is his Deed by the first delivery, so as it takes thence its Essence: Wherefore the second delivery thereof was void. Secondly, It was moved, admitting this to be well delivered, yet the Land being Copy-hold Land, and Let by a Copy-holder, Whether the Plaintiff might thereby maintain an Eject. firmæ at the Common Law? And all the Court, besides Beaumont, held, That he could not. For the nature of Copy-hold Land is to be recovered only in the Copy-hold Court, by Plaint according to his Case, and the Law takes not any Comfiance of them, but as Tenants at Will; & although their Customs are pleadable, & allowable at our Law, yet no Action can be maintained for them at the Common Law, nor by any Writ of the Queens. But Beaumont doubted thereof. Thirdly, If Tenant in Tail of a Copy-hold surrender, Whether it be a Discontinuance, and shall take away the Entry of the

Ant. 446.

Ant. 469.

Post. 524.

Ant. 148.

Issue? And, per totam Curiam, It should. For, being admitted that he is Tenant in Tail, It is to be admitted also, That he may make a Discontinuance, which cannot be by any means, but by Surrender; for he hath not any other course of Conveyance. Wherefore, &c.

Wright *versus* Penry.

(21)

Post. 774.

Ant. 393.

ENtry Sur Disseisin of a Disseisin made to himself: The Plaintiff prayed a Writ of Estrepement, and it was doubted, Whether he should have it: because he is in this Action to recover all his Damages. But afterwards upon good Advice the Writ was granted: For otherwise the Plaintiff might have his Houses, and Woods defaced, and destroyed, and turned to his remedy to recover in Damages against one, who peradventure hath not so much in value.

Anonymus.

(22)

NOte, That Serjeant Daniel said, He had seen this President: That the Bishop of Durham Imprisoned one for a Lay Cause, whereupon the Arch-bishop of York, as his Sovereign, cited him to appear before him to answer for that Imprisonment, Whereupon complaint being made to the King in Parliament: The matter was heard there, and the Arch-Bishop submitted himself to the Kings Grace, and was fined 4000 Marks. And the Justices said, They had seen it also.

Termino Michaelis,
Tricesimo octavo & Tricesimo nono ELIZ.
in Banco Reginæ.

Comyns *versus* Boyer.

Trin. 38 Eliz. rot. 953. Middl.

Action sur le Case, Sur Trover of 9 Dren apud Stepney in Com. prædict. 29 Aug. 37 Eliz. and converting them to his proper use the same day, at the same place, &c. The Defendant pleads, That the Vill. of Crawley in Comit. Sussex is, and time whereof, &c. was an Ancient Vill. within which habetur, & tenetur, and time whereof, &c. hath been held one Fair every Year, upon the twenty ninth day of August, for all the Queens Subjects thither resorting: Et quod ante tempus, quo, &c. viz. The said twenty ninth of August, 37 Eliz. One William White was possessed of those nine Dren, and them to the Defendant for 28 l. the said twenty ninth of August in open Fair sold, and delivered, whereby he was of them possessed, as of his proper goods, and them converted at Stepney in Middlesex, the same day in the Declaration, prout, &c. And it was thereupon demurred. First, Because the Declaration suppoeth the property of those goods to the Plaintiff, and the Defendant doth not confess, nor deny it, nor answer thereto: But the Court held, That his Plea was good enough as to that. For when he Justifies by buying in a Market Overt; it is thereby allowed, That the property was in the Plaintiff, but he is bound by that Sale, and he needed not otherwise confess it. Secondly, The Prescription is alledged: That there had been a Fair in that vill. and he doth not alledge it to be in any certain person, &c. But it was held to be good; For he need not take Consuance in whom it is: And so is the usual course of pleading in such Cases. Thirdly, He alledgeth the Prescription to be to hold a Fair there every Year upon the twenty ninth of August, and he doth not except Sunday, as it ought to be. Sed non allocatur. For a Fair holden upon the Sunday is well enough: Although by the Statute there is a Penalty inflicted upon the Party, that sells upon that day, but it makes it not to be void. Fourthly, It is not alledged here, That any Toll was paid, for otherwise the property is not changed. 12 Ed. 4. 8. 35 H. 6. 29. Dy. 99. Sed non allocatur. For it is not of necessity, and in many Vills no Toll is used to be paid: And if it ought, it should be shewn on the other part, to avoid the Sale, (1)

Ant. 146, 174.

2 Cr. 165.
Co. 10, 91. a. b.

2 Cr. 496.

2 Cr. 496, 595.

Ant. 86.
Post. 559.

That

That there was not any Toll paid. Fifthly, It is not alledged, That William White was possessed of those Goods, as his proper goods, nor that he had any property in them, but generally, that he was possessed of them, and sold them. Sed non allocatur. And, notwithstanding these Exceptions, and others, it was adjudged for the Defendant.

Harrington *versus* Wife.

Mich. 37, & 38 Eliz. 226.

(2)

Noy. 57.
1 Rol. 847, 8.
2 Rol. 449, 50.
Moor 459.

DEbt, for 60 l. Rent upon a Lease, 23 Septemb. of Lands in Newadham in the County of Warwick, Habend. a Festo Sancti Mich. proxim. futur. for five years, rendyng 120 l. per annum at the two Feasts. The Defendant pleads, Nihil debet, &c. An especial Verdict was found, That there were certain Articles ended in writing of the same date, whereof the Plaintiff sealed the one part to the Defendant, and the Defendant sealed another part to the Plaintiff: which were in this manner. Imprimis, It is covenanted, and agreed between the Parties, That James Harrington doth Let the said Lands for, and during 5 years, to begin at the Feast of S. Michael next following. Provided always, That the said Wife (the Defendant) shall pay to the Plaintiff annually, during the Term, at the Feasts of S. Michael, and the Annuntiation, 120 l. by equal portions. Also the said Parties do covenant, That a Lease shall be made, and sealed according to the effect of these Articles, before the Feast of All Saints, next ensuing. And they further find, That he entred by force of that Demise, and that the Rent was Arrear, prout, &c. And if, &c. Two Points were moved. First, Whether it were an Immediate Lease, or but an Agreement to have a Lease made, by reason of the last Words, which refer to a Lease to be made, and sealed: But all the Justices held it to be a good Lease. For the Words, It is agreed, that he doth Let, being in the Present Tense, is a good Lease by the Words of the Agreement, and that which follows is in reference to further Assurance, &c. And the rather as it is here, for that it is to be made after the beginning of the Term. So he ought to have the Term presently at Mich. 21 H. 7. 36. 1 Ed. 6. Bro. Leases 66. Secondly, Whether this Proviso were a good Reservation of the Rent, or a Condition only: For that there be not any Words of Agreement to pay it, nor any Reservation. But all the Justices held, That it was a good Reservation, being by Articles, whereto either of them were Parties, it is an Agreement, that the Rent shall be paid annually, during the Term: Which Tant amount, as if it had been a Reservation upon the Lease by Words of Reservation. And Popham said, That it was a Reservation, and Condition also, as in the Case of Sir Henry Berkley, ante; where a Proviso joyned with the words of Covenant make it a Condition, and a Covenant also. And it was adjudged for the Plaintiff.

2 Cr. 92.
Ant. 33. 156,
173.
Hob. 35.
1 Rol. 847, 8.

Ant. 385.

Hall *versus* Hennesley.

Hill. 38. rot.

(3)

Action for Words. Whereas he was Robbed by persons unknown of divers Parcels of Linnen Cloth; That the Defendant

Defendant præmissa sciens, in slander of the Plaintiff; spake these Words in the presence of divers others, viz. Hugh Hall (innuendo the Plaintiff) hath received 3 pieces of his Cloth again of the Thief, and beareth with the Thief, and if I have any hurt hereafter, I will charge him with it. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That an Action lies not for these Words. For when he saith, That he was Robbed by persons unknown, then the saying, That he received his goods of the Thief, is not any offence. For it is not alledged, that he knew who was the Thief, from whom he received his Goods, and to say, that he bare with the Thief, is no offence: For one may bare with a Thief, as to bare with him, that he shall not prosecute him, which is not any offence in Law; and one may receive his goods again, which were stolen without offence, unless it be done on purpose to conceal the Defender, and to help him to escape. It was moved also, that this Declaration was not good. For it is, That he spake those words in præsentia diversorum, and doth not say, in auditu, and, if none heard, it is not a slander: And as to it, non allocatur. For it shall be necessarily intended, that it was in auditu, when it was in præsentia, &c. But for the words themselves, they all held, for both reasons alledged, that they were not Actionable. Wherefore it was adjudged for the Defendant.

Ante. 52.

Sleigh. *versus* Bateman.

Hill. 37 Eliz. rot. 514.

Assumpsit: And Declares, Whereas Henry Cavendish, 1 April, 27 Eliz. 2. Let a Close, called Biggen-booth, to one Hugh Bateman for 21 Years, who assigned it to the Plaintiff: That the Defendant, 9 Martii 34 Eliz. in Consideration, that the Plaintiff at the instance, and request of the Defendant, reconcederet, or yield up all his Interest, and Term for years in the said Close, to the said Henry Cavendish, ac contentus esset, that the said Henry Cavendish should have the said Close, ad utendum ad voluntatem suam; Assumed to the Plaintiff to pay unto him 70 l. when he should be thereto requested, and alledgeth in Facto, That afterward, viz. 10 Martii 37 Eliz. ad prædict. Instanciam & Requisitionem of the Defendant, he did regrant, and yield up his said Lease to H. C. and was content that the said H. C. should have the Close to use at his will. And for the non-payment of the 70 l. by the Defendant, the Plaintiff brought this Action. The Defendant pleads a special Plea, and traverseth the Assumpsit modo & forma, and hereupon a special Verdict was found: viz. That H. C. Let ut supra, and the Assignment to the Plaintiff, and the Assumpsit as it is alledged; And that the Plaintiff, 10 Martii 34 Eliz. at the Defendants Request delivered an Indenture containing the said Demise to one William Jackson, to deliver Simul cum toto Statu, & Interesse termini prædicti, to the said H. C. upon the Defendants agreement to pay to the Plaintiff the said Sum of 70 l. And that Superinde the said Will. Jackson, for the Plaintiff, and by his appointment, delivered and surrendered to the said H. C. the said Indenture and Demise, and the Estate, Interest, and Term of the Plaintiff therein: And that the said H. C. accepted thereof, and plucked away the

(4)

Ant. 483.

Ant. 483.

the Seal thereof. And it was further found, That the Plaintiff was content, that the said H.C. should have *tenementa prædicta, uti ad voluntatem suam*: and that afterwards, the same day, H. C. made a new Lease thereof to the Plaintiff, Et s. &c. And hereupon it was moved, That this Verdict is found for the Plaintiff: The whole matter here only is, Whether this be a good Surrender made according to the Assumpsit, and so a good performance according to the Consideration alledged. First, That by the delivery of the Indenture of the Lease to Will. Jackson, *ad deliberandum simul cum toto Statu & Interesse suo*, to Hen. Cavendish, and he delivered it accordingly, It is as good a Surrender, as if he himself had Surrendered it by express words: For, *Qui per alium facit, per seipsum facit*; And if he himself had delivered the Indenture, and all his Interest in the Land, to the Lessor, who had accepted thereof, and Cancelled the Deed, it had been a good Surrender. The Law is the same, where he delivers the Lease to a Stranger, and Commands him to do it, who doth it accordingly. Secondly, Admitting there was not any Surrender made by this Act: Whether, when the Lessee himself accepts of a new Lease from the Lessor, it be not then a good Surrender? As 37 H. 6. 15. is, and so the Consideration is well performed. But the Court, as to that, held clearly; That it is not any Surrender according to the Assumpsit: for it ought to be an absolute Surrender in Deed, and not a Surrender in such manner; and such a Surrender also, that he might have the Land in him to dispose of afterwards, to whom he would, which is not here done by this taking of his second Lease. Thirdly, It was moved, That this is a Surrender by Agreement, That the Lessor should have the Land to use at his pleasure; which is as good a Surrender, as if it had been by express words, That he did Surrender the Land. For, when it is agreed, That the Lessor shall have, and dispose of it: It is as much, as if he said; He yielded up all his Interest. For otherwise, the Lessor hath not any authority to dispose thereof. And to that purpose was Cited, 21 H. 7. 7. 40 Ed. 3. 24. Dy. 251. But it was thereto objected, That this is not any Surrender; Because it is not found, That he used any words to the Lessor, That he was content, &c. But the Jury had only found, That he was content, &c. which might be by assent of his mind. But all the Court Resolved as to the first Point, That it was not any Surrender. For one cannot Authorise another by words only, to make any Surrender of his Lease, although it were by a Lease for years. But as to the Third, they all held clearly, That it was a Surrender. For when the Lessee agrees with the Lessor, and is content, that he shall have again the Land, It is a good Surrender of a Lease for years: And so it was agreed in the Case of Brown and Kingswell, That a Lease for years may be terminated by such words: But it was there doubted, Whether a Lease for Life might be so determined? And the Jury finding, That he was content; It is thereby as good a Surrender, as if it had been found, That he used such words. Wherefore it was adjudged for the Plaintiff.

Ant. 264.

Co. Littl. 337. b.

Halman *versus* Collins.

Mich. 37 & 38 Eliz. rot. 211.

ERror of a Judgment given in Plimouth in an Assumpsit, where the Defendant pleaded Non Assumpsit, and found against him, and Judgment given for the Plaintiff. The first Error assigned ore tenus (for it was not assigned upon the Record) was, Because the Stile of the Court is, Burgus Dominae Reginae Burgi de Plimouth, ibid. tent. in Guild-hall, coram Johanne Philips, Majore ejusdem Burgi, 18. April, 36 Eliz. and shews not in the Stile of the Court, by what authority it was holden, viz. by Prescription, or by Charter: And of such inferior Courts, their authority to hold Pleas ought always to be shewn, Otherwise the Court of the Queens Bench cannot take Consuance of them, 13 Ed. 4. 8. Dy. 262. 2 R. 3. 9. and Hillar. 31 Eliz. rot. 826. betwixt Stanton and Rogers: And of that Opinion was the whole Court, Popham absente. A second Error was assigned, Because it appeared not upon the Record, that Halman the Defendant came in by Attachment, or that he declared against him Sub custodia, &c. But the Record is certified only in this manner, after the Stile of the Court, as before, &c. W. Coll. queritur versus Greg. Halman de placito transgressionis sup. casum, &c. Et sunt Plegii de prosequendo, Joh. Doe. R. Roe. Et unde idem Willielmus queritur, quod cum, &c. So he shews not that any Process was awarded against the Defendant, nor that he came in by Process, nor that he was Sub custodia of any, as is the usual course in such Cases, and it was held to be a manifest Error. But it was doubted, whether it were not helped by the Statute of Jeofays, being after Verdict. A third Error assigned was, Because here was a discontinuance after the Verdict, and before the Judgment. And the Statutes do not aid discontinuances after Verdicts, but only discontinuances before Verdicts, whereof the party might have taken advantage before the Trial. But Gawdy and Fenner said, That it was aided by the Statute, which remedies all discontinuances, as well after as before. And divers other Errors were assigned for insufficiency in the Declaration; But, because they held the first to be a manifest Error, they spake not to any others; but reversed the Judgment.

(5)

1 Rol. 795.

Noy. 35.

Moor. 422.

Ow. 50.

2 Cr. 184.

2 Cr. 184.

Moor. 422.

1 Rol. 795.

Longs Case.

William Long was Endicted at Norwich, within the County of the City of Norwich of the Felonious stealing of a piece of linnen cloth, and was thereof arraigned, and pleaded Not Guilty, and found Guilty, and prayed his Clergy, and was burnt in the hand: and upon information to the Court, That this Endicting of him was by practice, and he found guilty upon small evidence, he obtained a Certiorari to remove the whole Record into the Crown Office. Which being removed, there were divers Exceptions to the Endictment, to discharge the same. For it was moved, that it might well have been discharged by Exception, and there needed not any Writ of Error to avoid it: and he could not have a Writ of Error, as the Case is, because he was a Clerk convicted only, and not attained. For when he prayed his Cler-

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gy, which was allowed him; There never was any Judgment afterwards given; And of that opinion was the whole Court. The first Exception was, Because the Enditment is, *Sessio pacis Dominae Reginae tenet, apud Guild-Hall Civitatis praedictae, &c. and Civitas Norwich was in the Margin*: And it is not mentioned, That it is a Sessions held for the County of the City of Norwich; and it may be, that it was a Sessions of the Peace for the County of Norfolk, and then they ought not to enquire there of a Fact within the City. Secondly, It is not alledged, That the Guild-Hall was within the City, *Sed non allocatur*: for it shall be intended to be within the City. And it shall of necessity be intended to be a Sessions of the Peace for the City only; because *Civitas Norwich* is in the Margin. A second Exception was, because it is alledged, *Quod apud Norwicum, within the County of the City, he feloniously stole, &c.* And doth not shew within what Parish, and Ward of the City he did it, &c. And it was alledged (as the truth is) that there be in that City twelve Wards, and two and thirty Parishes, &c. *Vid. 7 H. 6. 35. Sed non allocatur.* For the Court takes not any Countenance of such Parishes, and Wards; for it is but a surmise which they regarded not: and so are all the Presidents, That the fact is alledged apud such a City without mentioning any Parish, or Ward. A third Exception, Because the Enditment is, *Quod Felonice furatus fuit quandam peciam Panni linei cujusdam Antho. Nixon praedicti Draper, ad valenciam, &c. and doth not say, de bonis & catallis cujusdam Anthonii Nixon*: as the common form of the Presidents are, and therefore ill: for an Enditment ought to be certain to every intent, without any intendment to the contrary; And here it may be, that this piece of Linnen was not the goods & chattels of Anthony Nixon, at the time of his taking of them; But by him let out, or delivered, or pledged to another, and it ought to have been shewn whose bona & catalla they were. And it ought not to vary from all other Presidents. And the Court held it to be a material Exception for the reasons aforesaid, and for that cause the Enditment was discharged by the whole Court, Gawdy absente, and Restitution awarded to the party, for his goods seized for that cause.

Henry Earl of Lincoln *versus* Hoskins.

Mich. 37 & 38 Eliz. rot. 31.

(2)
13 El. Chap. 20.

Ante. 123.

DEbt. upon an Obligation of 50l. dated 16 July, 23 Eliz. conditioned, That if he from time to time should serve the Cure at Taterhall, and not depart without licence, and if he should make such a lease of the Parsonage of Kirkby, as the Earl should require, and if he did not any Act by Resignation, or, &c. whereby the Lease should be void. That then, &c. The Defendant pleads, That the Rectory of Kirkby was a Benefice with Cure, whereof he was Parson. And further recites the Statute of 13. Eliz. That no Lease of any Benefice with Cure should endure longer, than the Parson should be resident upon his benefice, without absence for 80. days, And recites it with this clause therein, *Tam diu* (where the words are *tam cito*) quam ea, aut aliqua pars inde veniret, ad aliquam possessionem, vel usum inhibicum, vel &c. Which words by the Statute of 14 Eliz. are repealed, and appointed to be omitted; And further recites the Statute of 14 Eliz. That all Bonds, &c. made to permit any to enjoy

enjoy any Lease, shall be of such effect as the Lease; and alledgeth, that this Bond was made for the enjoyment of that Lease: And it was hereupon demurred. First, In regard of the misrecital of the Statute. Secondly, Because it is not alledged, that he was absent. For otherwise, neither the Lease, nor Bond be void. And for these causes, without any Argument, it was adjudged for the Plaintiff that the Plea was insufficient.

Peter Roos *versus* Adwick.

Pasch. 37 Eliz. rot. 499.

T Respals for breaking his Close apud Egmonton. The Defendant pleaded Not-guilty, and an especial Verdict found, that William Normington was seised of that land in Fee, and Let it to one Nicholas Adwick, and his Assigns, during his Life, and the Lives of William and Thomas Adwick, his sons, and afterwards Let it to Peter Roos for years, to whom Nick. Adwick attorned. And afterward Nicholas Adwick the Father Let it William his son (now Defendant) at will, and died, leaving William and Thomas his sons. And the said William being in possession, at the time of the death of Nicholas his Father, Peter Roos entred, and the Defendant ousted him, Et si super totam materiam, &c. The sole Question was, Whether a Lease to one for his own Life, and the Lives of two others, be a longer and larger estate, then for his own life only? Johnson for the Plaintiff held, that it was not: For in as much as it is limited unto him for his own Life, it is the greatest estate of Free-hold, and the limitation for the lives of others is vain and void; For a man cannot have a greater and lesser estate in him at one and the same time. But against that it was argued for the Defendant, that it was a good limitation unto him for the three lives, and he had them all in him to Assign; and although he cannot have benefit in his own person of more than his own Life, yet he hath the residue of the other lives to assign over. And a man may have a greater or a lesser estate in him all at one time where the lesser is subsequent, as an Estate for life, Remainder for years; which although in his own person he cannot have benefit thereof, yet he may assign it, or devise it, as 49 Ed. 3. or to forfeit it, as 19 Ed. 3. Tit. Covenant. And he might save it in a Quid Juris clamat, as 20 Ed. 3. Quid Juris clamat is. And if it had been limited unto him for his own life, Remainder pur autre vie, It had been good, by a grant over: So if a Reversion be granted unto him pur autre vie it had been good; and so it is where it is all by one limitation, he may thereof have benefit by assigning it over, or to charge it with a Rent, or to Let it for years, which is good as long as any of the cesty que vies be living. And for express authority herein, were cited, 8 Ed. 3. 402. 31 Eliz. Diersleys and Nevels Case, and 32 Eliz. Vuedals Case, wherein it was held, but not adjudged, that it was a good Lease for the three lives, and not for the life of the Lessee only. The common experience also in Leases of Bishops, and of Tenants in Tail is to be granted to one for his own life, and the lives of two of his sons. And it hath been allowed always to be good, as long as any of them be alive: & they are made in this manner, Because a Lease for Life Remainder over cannot be good. And he would not take it in Joynture with any other, for then the other might

(8)

Gould. 157.

Moor. 398.

Co. 5. 13. a.

Ant. 182.

Ant. 58.

Ante 182.

Ante 182.

prejudice him in part, and he could not surrender, nor change it at his pleasure. And of this Opinion were Gawdy and Fenner, Justices; For otherwise, he should not take so much as was limited unto him. And there is not any inconvenience herein: But all the Estates may well stand together in him. And Fenner said, That he was of Counsel with B. Southcote in the Common Bench, where the Bishop of London made such a Lease to one for his own life, and of two others; and it was agreed to be good for all. Wherefore, they (absentibus aliis Justiciariis) gave Judgment for the Defendant. Note; Popham was there at the time of the Argument, but rose before the end thereof, but seemed to agree in opinion with them, although he delivered it not openly: Wherefore it was adjudged, *Ut supra*, but no Judgment was entred, because the Parties compounded. 5 Co. 13.

Wyld versus Cookman.

(9)
Noy 34.
Moor 404.

Action for these words, Thou wast forsworn in the Leet, innuendo a Leet holden in such a Mannor, such a day, &c. The Defendant pleads, that the Plaintiff the same day with others were sworn before the Steward, to present, &c. And they presented, that such a Ditch was not scoured, *ad nocumentum*, &c. which was false, and so justifies; And it was thereupon demurred: And now moved, that this was not any Plea, because it is not said, That they knew it of their proper notice to be false: otherwise it is not Perjury, for they make their Presentment upon evidence, which if they believe, and present falsely accordingly, it is not any Perjury. Gawdy and Fenner; It is properly and commonly intended, That they should present false upon their own knowledge. And if they presented upon evidence, the Plaintiff ought to shew it by Replication. Popham; But a man may not justify by intendment, but it ought to be precisely alledged. Gawdy; There is another incurable fault therein. For it is not alledged, that the Ditch was within the Leet, and if it be not, the Presentment thereof is out of their charge, and it is not any Perjury. Which was agreed by all the Justices: Wherefore it was adjudged for the Plaintiff. Clench demanded whether an Action lay for these words: And all the Justices held, That it did.

Ant. 135.
Post. 721.

Freeston versus Crouch.

Hill. 38 Eliz. rot. 711.

(10)
Poph. 109
Moor 460.

Error of a Judgment in the Common Bench: For that Trespass was there brought, and the Defendant pleaded at large, That the place where, is two Acres, &c. and abuttals it, and justifies as in his Freehold. The Plaintiff by his Replication made a new Assignment, That the place where, is two Acres, and abuttals them otherwise than in the Barr. The Defendant Rejoins, That the two Acres mentioned in the Barr, and in the Replication are all one, &c. And thereupon the Plaintiff demurred, and adjudged there, that the Rejoinder was ill, and adjudged for the Plaintiff; And thereupon Error brought, and assigned in the very point and matter of Law, because it might be true, that what the Plaintiff shews in his Replication and Abuttals, and what the Defendant hath pleaded in Barr may be all one. For the one may

may abut it upon the one side, and the other upon the other part, and both be true: And then there is not any reason, but he may plead it, and so is 21 H.6.21. 33 H.6.14. And so it was adjudged 20 H.8.rot.449. betwixt Tylney and Spelman Serjeant. Wherefore, &c. But Popham, Clench, and Fenner, Justices, held the contrary. For when the Plaintiff replies, and makes a new Assignment, and saith, that it is alias quam in barra, Then he waves that, whereto the Defendant hath pleaded: so as, if in truth it be the same thing, he can never take advantage thereof, but is estopped to give evidence in that, which the Defendant hath pleaded, and therefore to that place newly assigned, the Defendant should have pleaded in barr thereto, or ought to have pleaded Not-guilty, and so are 14 H.8.4. and 27 H.8.7. But Gawdy e contra. And he held the Law to be with 21 H.6.21. For it is not reason, If they be all one place, but that he ought to plead it, and not to stand upon an Estoppel, and put it upon evidence to a Jury. But notwithstanding, for as much as the other Justices were of the contrary Opinion, he assented with them, That the Judgment should be affirmed.

Beckford *versus* Parnecott.

Trin. 37 Eliz. rot. 632, vel 613.

Ejectione firmæ, upon a special Verdict, The case was, That one Richard Parsons was seised of divers Lands in Aldworth, and had issue four Daughters, viz. Barbara, Joan, Frances, and Mary, and 27 Eliz. made his Will in Writing, and thereby devised all his lands in Aldworth to Barbara and Joan his Daughters, and made them his Executrices, and after in 33 Eliz. purchased other lands in Aldworth (which are the lands in question) and after one J.S. came to the Devisor, and desired that he would sell unto him those lands, which he lately purchased. And he said, No, they shall go with my other lands in Aldworth, to my Executrices. Afterwards in 34 Eliz. he being sick, the Will was read unto him, and he said nothing thereto: But then gave divers Legacies of Goods to others, and caused them to be written and annexed in a Codicil thereto, and died. Whether those lands newly purchased shall pass to the Executrices by that Will, was the Question: viz. Whether by those words used to a stranger, or the annexing of the Codicil to the Will, being only concerning Goods, be as a new publication of his Will to make those Lands to pass, &c. First, It was agreed by the Council on both sides, and by the Justices, That if the Devisor after the purchase of that Land had made a new Publication of his Will, and shewed his intent, That those Lands should pass, it had been a good devise of them: For the words in the Will are All his Lands in Aldworth, which are apt enough, and sufficient to carry them, and he could not have added more apt words thereto. But afterwards, all the Justices (Gawdy absente) held, that it is a new Publication of his Will, and sufficient by the words to J.S. For that shews his intent sufficiently, and the Will w^{it} hath words sufficient. And Fenner held, that the annexing of the Codicil thereto, is a new Publication as to it: for therein he affirmed, that it should be his Will at that time. But the other Justices doubted thereof, because he doth not shew thereby any intent, That this Will

(11)

1 Rol. 618.

Moor. 404.

Gould. 150.

Ant. 401.

Ans. 423.

1 Rol. 618.

Will should be for his purchased Land: Nor, that he then remembered them. But for the reasons before, It was adjudged for the Plaintiff, that those Lands well passed by the Will.

Ascue versus Hollingworth.

Ante Mich. 36. & 37 Pl. 14. & Hill. 38. Pl. 7. & Hill. 39. Pl. 16.

(12)
Ante 355, 461.
Post. 544.

Ant. 231.

THe Case was now moved again to be such, H. Ascue, W. Ascue, and John Firz-Williams were bound to Hollingworth in 400 l. by such words, *Obligamus nos ad Solutionem prædictam, & si defecerimus de solutione prædicta, tunc currat super nos, & quemlibet nostri poena Statuti Stapul, &c.* Hollingworth thereupon brought Debt against H. A. only, who demanded Oyer thereof, and it was entred in hæc verba, &c. The Defendant pleaded, that it was intended to be only a Statute: and, because it was not sealed in such manner as it ought to be, with a Seal of two parts, it was a void Statute, whereupon he demanded Judgment, whether he should sue it as an Obligation: And it was thereupon demurred, and adjudged against the Defendant in the Common Bench, and Error thereof brought, and two Errors only assigned. First, that it being void as a Statute, It is not any Obligation, and so an Action of Debt lies not upon it. Secondly, If it be an Obligation, it is joyntly entered by three, and therefore he cannot sue the one without the others. *Godfrey è contra*; For the first Error, although it be void as a Statute, yet it is a good Obligation, for there be words therein Obligatory: And every Statute is delivered to the party; As 20 Ed. 3. Accompt 79 is. And an Indictment, which finds a tying as Felony, which is not so, is void for the Felony; but is a good Indictment for the Trespas, as 6 H. 7. and 18 Ed. 4. are. Secondly, although three be named in the Deed, yet it appears not that they all ensealed it: Therefore the Action brought against one of them is well enough; and so is 28 H. 6. 3. *Gawdy*; It is good, as an Obligation, because it never was any Statute. As to the second Error, he held the Judgment to be Erroneous for that Cause. For the words of the Obligation are joynt: and being a Joynt Bond, The one shall not be sued without the other; and although the party admit thereof, yet the Obligation being entred upon Record, so as it appears unto us, that the Action is misconceived, we ought to abate it, and so is 14 Eliz. Dy. 310. *Fenner*; It cannot be an Obligation, for a Deed ought to be according to the intent of the parties: and here it was never intended by the parties to have it delivered as an Obligation; but was acknowledged as a Statute, and that appears by the Bayors Seal put thereto, and the words therein. And here is not any allegation of the delivery thereof. And although in Debt upon a Bond, the delivery thereof need not be precisely alledged; for it shall be intended: yet being here alledged to be acknowledged as a Statute (which needs not any delivery) There ought an express delivery be alledged thereof, in Debt brought thereupon as upon an Obligation (if it be to be taken as an Obligation) Otherwise it never shall be so intended. And to the second Error he conceived it to be an Error apparent for the reason before alledged. *Popham*; Debt lies upon a Statute, as upon a Record, or as upon an Obligation, although it never were delivered. For it is upon Record

Record, that it was delivered. And the party is estopped to say the contrary: But here it is a void Statute; so it is not any Record to stop him. And therefore it is good, if it hath not any delivery. But the Defendant might well have pleaded Nient son fait, and given this matter in Evidence: But he hath implicitly admitted thereof by his Bar, That it was a Delivery, and therefore he hath now passed it. As to the second Error, It appears not whether the other two did seal it, or not: Nor whether they be now living, or not; otherwise the Action is well maintainable against the one only, which ought to be shewn on the other part: And prima facie, It may be good against the one. Clench absente, adjournatur. Afterwards, Hill 39 Eliz. it was moved again, and resolved, notwithstanding these Exceptions, That the Judgment should be affirmed.

Post. 544.

Eason versus Newman.

Hill. 37 Eliz. rot. 460.

Action upon the Case Sur Trover: A special Verdict was found; That one Pepper was possessed of those goods, and the Defendant found them, and Pepper made the Plaintiff his Executor, and that the Defendant, knowing them to appertain to the Plaintiff, denied to deliver them unto him upon his request. And whether, That were a conversion without any other Act done, was the Question. And all the Justices, Popham absente, held, That it was a Conversion by the sole Denial. But being afterwards moved again, Popham held it to be no Conversion: But it was cited at the Bar, That 23 Eliz. in this Court, It was ruled to the contrary: Et adjournatur.

(13)

Gould. 152.

1 Rol. 5.

Moor. 460.

Kirton versus Williams, and three others.

Trin. 38 Eliz. rot. 623.

IN an Appeal of Mayhem, Three appeared: the one of them pleads, Nul tiel in rerum natura, as the fourth named, and Quoad the Felony Not-guilty. The other pleaded Misnomer, and to the Felony, Not-guilty. The third pleaded Not-guilty, To the Pleas of the two first the Plaintiff Demurred. For Tanfield moved, That it was not any Plea to plead in Abatement, and also Not-guilty, in any Case, but where the life is in Jeopardy, which is allowed in favorem vitæ. But here this Action is but in nature of Trespass. And of that Opinion was the whole Court. For Popham and Fenner said, When one pleads in Abatement, and also in Bar of the Action, The Plea in Bar waves the Plea in Abatement of the Writ, unless it be where the life is in Jeopardy, in Case of Felony, and that is in favorem vitæ. Afterwards the Court awarded, That the Pleas in Abatement were ousted, and the Pleas of Not-guilty should only stand.

(14)

Poph. 115.

Owen 57.

Moor. 457.

Noy 36.

Ant. 223.

Kelsack *versus* Nicholson,

Ante Trin. 38. Placito 8.

(15)

Ant. 478.
2 Rol. 46.

Ant. 483.

2 Rol. 31.
Ant. 357.
Moor. 422.

THe Case was now moved again for the Plaintiff, That the Action lay. For although an Executor may give a thing in possession, and it shall bind his Companion, as 28 H. 8. 23. is, or may release a Debt, which also is good against his companion, surviving him; for they are things executed, and nothing remains to his companion: yet here, notwithstanding the Delivery of this Bond, the Debt, which is a thing in Action, remains, and by consequence he shall have remedy for the Deed, especially as this Case is; for that the Deed was not delivered to the Debtor, and so might have been a Release unto him of the Debt, but to a stranger. And it is as if Tenant in Tail should give the Deed of Intail, and die, yet the Issue, having right to the Land, shall have a Detinue for the Deed. Gawdy; The Cases be not alike: For a Tenant in Tail Cannot give the Land it self from his Issue, no more can he give the Deed of Intail. But if Tenant in Fee-simple gives the Charters of his Land, and dies, so as it descends to his Heir, yet he hath not any remedy for the Charters. So here, in regard the Executor might have released the Debt; So may give, and dispose of the Instrument of the Debt. And if there be two Lessees by Indenture, and the one gives the Indenture to a stranger, the Term shall survive to his companion; For nothing of the Term passed by the gift of the Indenture: yet his companion hath not any Remedy for the Indenture. So here, &c. Wherefore, &c. And of that opinion were Popham, and Clench: But Fenner è contra. For in as much as the Debt remains to the surviving Executor, so the Deed shall remain, and appertain unto him: Wherefore, &c. But notwithstanding it was adjudged for the Defendant.

Johnes *versus* Davers.

(16)

3 Rol. 74.

Hob. 126, 268.
Post. 865.

THe Plaintiff, being Register to the Bishop of Gloucester, brought an Action upon the Case, and declares, That the Defendant Dixit & propalavit hæc Latina verba in presentia diversorum, qui intellexerunt Romanam Linguam, viz. Inimicus meus, (the Plaintiff Innuendo) is an Extortioner, and divers others slanderous words, which were clearly Actionable. And the Defendant pleaded a vicious Bar, and it was thereupon demurred. But now Snag for the Defendant moved, That, upon this Declaration, the Plaintiff ought not to recover. First, it is supposed, that the Defendant spake slanderous words in Latine, in presentia diversorum, who understood Linguam Romanam, which well may be; for Lingua Romana, at this day, intends the Italian Tongue, & not the Latine Tongue. And then, if the words were spoken in the presence of those, who understood not that Tongue, the Action clearly is not maintainable: For it was not slanderous where none understood it. And therefore it was adjudged in the Exchequer, where one spake divers slanderous words in the Welch Tongue, the Action lay not, without averring them to be spoken in the presence of those, who understood the Welch Tongue. And of that Opinion was the whole Court, That if it might be intended, That the Latine and Romane Tongues differed

differed (as at this time it seemeth they differ: for the Roman Tongue now used may be intended the Italian Tongue) then the action lies not. Secondly, He doth not say, That the Plaintiff was an Extorioner, But he saith Inimicus meus, which cannot be intended of the Plaintiff, more than of any other. And although the Plaintiff alledgeth, that he spake them (innuendo the Plaintiff) it is not material; for it did not so appear to them, who heard it. But if it had been averred, that at the same time he was the Plaintiffs enemy: And that the Defendant had not any other enemy, there peradventure it would have been otherwise. And the whole Court were clearly of that Opinion. And Popham cited Sir John Bouras Case to be adjudged, that where three were sworn in Evidence against him, and he said, One of you is perjured, and the one of them brings an Action for these words, and alledgeth that the Defendant spake those words (Innuendo of the Plaintiff) and adjudged, that the Action lay not. Wherefore, for the last Exception it was adjudged against the Plaintiff. Mich, 43 & Post, 865. 44 Pl. 45.

• Harecourt *versus* Bishop.

ERror of a Judgment in the Common Bench in a Assumpsit. The Error assigned was, Because the Judgment was entred, Quod Querens recuperet 100. per Juratores assess. & 51. pro misis, per Jurat. hic de Incremento adjudicat. So it is per Jurat. where it ought to be per Curiam, and thereby a Misprision and Error. But it was prayed, that it might be amended; for it is but a Misprision of the Clerk in his Entry: and therefore is well amendable by the Statute of 8 H. 6. cap. 12. But the Court held, That it was not amendable; for it is the default of the Court in the Judgment, which never is amendable: for if it had been omitted by whom they were assessed, it had been clearly ill: And so it is when it is entered to be assessed by a wrong person, it is not amendable; no more, then where an Entry is, Ideo capiatur, where it should be, In misericordia, which is merely the default of the Clerk, who entered the Judgment. Wherefore it was reversed. (17)

Bacon *versus* Hill.

Trin. 37 Eliz. rot. 382.

TRespass. Upon a Special Verdict, it was found, That one Jeffery Hill was seised of three Tenements, viz. Rawlings, Rivets, and Downings, and had issue three Sons, viz. John, Richard, and Robert; and by his Will in writing devised all those Tenements to his Wife for her life; and after her decease, that his Tenement called Rawlings should be to John his Son; and his Tenement called Rivets should be to Richard his Son; and his Tenement called Downings (being the Land in Question) to Robert his Son. And further devised, That if one, or two of his Sons died; that then his part or parts should remain to the Survivors. And further devised (having three Daughters) to every of them 10 l. to be paid out of his Land by every of his Sons, as soon as they shall enter their parts, after the death

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Ant. 378.

of their Mother, as aforesaid. And in the end of the Will puts this Clause: Provided always, if it fortune any of my said Sons to marry, and have Issue, and to die, before he enters his Part: then I will, that his Part shall remain to his Heir of his Body, and not remain to his other Brothers, as aforesaid. And they further found, that the deviser died, and afterwards his Feme died; and every of the Sons entered into their Parts; and after Robert had issue the Defendant, and died: and John the eldest son had issue a daughter, married to Bacon the Plaintiff. And whether the son of Robert shall have this Land, as Heir in Tail, or Heir in Fee-simple; for that his fathers devise was paying 10 l. which being a consideration, gives unto him a Fee, or at least wise a Fee-tail: as Tanfield argued for the Defendant. And all the Court resolved, that Robert should not have a Fee-simple; for although it is devised, that every one should pay a Consideration, viz. 10 l. yet it being further limited, that after the death of every of them it should remain over; that shews his intent, that he should have it for his Life only, notwithstanding that Limitation of the payment. But Gawdy held, that he should have an Estate-Tail by this devise; for when he willed, that this issue should have it, although the father did not enter his part; a fortiori he intended, that his issue should have it by descent, when he entered his part and died, having issue. But Popham, Clinch, and Fenner e contra; for an intention shall never be taken to be against the express Letter of a Will: and here by the premises it is not limited but for life, and the last Clause doth not limit an Estate-Tail, but where he had issue, and died before he entered his part. So it is limited upon a Condition, which is not performed; wherefore, &c. And Popham said, It might be intended, that he limited it in this manner, because if the father had died before he had entered & taken the profits, that he might by such means have provided for his issue, and that then his issue should have it; otherwise not. Wherefore it was adjudged for the Plaintiff.

East versus Harding.

Hill. 37 Eliz rot. 996.

(19)
Ant. 292.
Moor. 392.
Owin 63.
1 Rol. 507. 8. 9.
10.

Ejectione Firme. An Especial Verdict was found, That Sir Henry Lea was seised in Fee of the Manor of Quarender, in the County of Bucks; whereof the Land, &c. was parcel, &c. and Copy-hold Land, and demisable in Fee, &c. And that Sir Henry Lea granted it by Copy to the Defendant: And further found, That the said Sir Henry Lea infeoffed one Keen of the said Land, who let it for twenty one years to the Plaintiff: and afterwards, viz. 32 Eliz. the Defendant cut down two Elms, being Timber, to repair his House: And that he let the Land for three years by parol only, to begin the next Michaelmas: And that the lessee died before Michaelmas: And that afterwards the lessee of the Plaintiff entered, and the Defendant re-entered, and ousted him: And that upon the Tuesday before the Verdict found, he had bestowed one of the Elms for Repairing, and that the other remained ready ad Reparationem faciendam, and, &c. And upon all this matter shewn, &c. More for the Plaintiff moved, That

That, in this Case, the Copy-hold was forfeited. First, Because there is Waste committed, which of it self is a Forfeiture in Law, as 9 H. 4. is. And although it be found, That by the Custome he might cut down for Reparations, yet he ought in convenient time to employ it: Otherwise, it is a Forfeiture. And it is found, That they were cut down in 32 Eliz. and not employed until 37 Eliz. after this Action brought, and the one of them not yet employed: So for that it is forfeited. Secondly, The Lease here made is a Forfeiture. For, by making that Lease, he took upon him to make a greater Estate, then he had any authority to do, And although it were by Parol only, yet all is one, and the making of the Lease and Entry of the Lessee, is a Disseisin: which is the reason, That it is a Forfeiture in it self. Pudley, for the Defendant, moved, That there was not any Forfeiture: And if there were, yet the Lord cannot take any advantage thereof, before it be presented by the Homage. But all the Court against it: For the Presentment is not of necessity, but for the Lords better instruction of his Title, and he may, if he will, take advantage of it before the Presentment. And all the Justices held, That the making of this Lease for years is a Forfeiture in it self, when there is not any Custome to warrant it: For he hath no Authority by the Law to make such an Estate. And although this is a Lease to begin at a future day, and the Lessee hath not entered, yet it is a Forfeiture presently: for it is a good Lease between the Parties. Secondly, As to the cutting down the Trees, they were not all agreed, whether it were a Forfeiture, in regard it was found, That they were necessary for Reparations, & that he cut them for that purpose. Gawdy, and Fenner held, That it was not any Forfeiture: For it is found, that he employed one: and it is well enough in respect of the time: For it may be they were not sufficiently seasoned before. And it is found, they were cut down for that purpose, and are not otherwise employed: Wherefore it cannot be any Forfeiture. And Fenner said, Although that Tree, which is not employed, is more then was sufficient to repair the House: Yet, seeing that he cut it down for that purpose, and peradventure did not know what would serve for that purpose, It is not any Forfeiture: for it was adjudged in this Court, where one cut down wood to make Hedges, and used the greater part thereof in Hedging: yet for the rest, which was cut down for that purpose, no Cyttes should be paid. But it was then moved, admitting there were a Forfeiture: Whether the Lessee for years of the Feoffee shall take advantage thereof. For it was agreed by all the Justices, That the Feoffee himself, if he had not made that Lease, might have taken advantage of the Forfeiture: For he is Dominus of that Copy-hold. But, Whether his Lessee might enter, Gawdy and Fenner, doubted, But they agreed, that Lessee for years of a Manor may take advantage of the Forfeiture of a Copy-hold. But Popham and Clench held clearly, That Lessee for years of the Feoffee might well take advantage of that Forfeiture. For the Copyholder, as to the Forfeiture of his Estate, remains in all degrees as before the Severance thereof from the Manor. Wherefore, &c. Et adjournatur.

Ant. 291.

Ante 351.

1 Rol. 507.

Ant. 292.

1 Rol. 508.

1 Rol. 509.

Ante. 252.

Brown versus Michel.

Trin. 37 Eliz. rot. 661

(20)
Noy. 36.

Error of a Judgment in the Common Bench, for these words, *Dr. Brown* (innuendo the Plaintiff) hath delivered untruths upon his Oath, in his answer to the Bill of *J.S.* in the Chancery. And there the Plaintiff recovered. And the Error now assigned was, That the words were not actionable. And all the Court (absente Gawdy) agreed, That the words were not actionable. For a man doth not swear all things in his answer to be true: But onely those, which are of his own knowledge; and for the others, That he believes them to be true. And it may peradventure be untrue in some matter of Circumstance, and not in matter of Substance, which is not material, nor is any Perjury, or Offence, and so no Action lies. And the Judgment was reversed. And it was said at the Barr, That the Judgment in the Common Bench was entered by the Plaintiff against the direction of that Court.

Austyn versus Twyne.

Trin. 37 Eliz. rot. 348.

(21)
2 Rol. 778.
Moor 408.
Post. 719.2 Cr. 518.
2 Rol. 778.

Fecisione firmæ. Upon a special Verdict, it was found, That one Henry Dean, being Patron of two Churches, viz. the Church of Dean, and the Church of Ab, being within a mile together: And the one of the value of ten pounds, and the other of the value of eight pounds, and more: The Ordinary by the assent of the Patron, united, and consolidated the same Churches: And the same day the Patron confirmed that Union, & afterwards the Queen, reciting that Union, ratifies, and confirms it by her Letters Patents: And, Whether it were a good Union? was the Question. It was agreed by the Counsel on both sides, That this Union rested at the Common Law, and it is out of the Statute of 37 H. 8. cap. 21. Because the Churches are above the value of eight pounds mentioned in that Statute. Atkinson, for the Plaintiff, moved, That it was not good Union; For it ought to be by a Precedent Licence from the Queen: And a Subsequent Confirmation will not serve; For he ought to be the first Agent in the making an Union: Or, at least wise, give the Precedent Assent thereto, as 50 Ed. 3. 26. 21 Ed. 3. 6. and 19 Ed. 3. Gard. 18 Foster e contra; The Ordinary is the principal Actor in the Union, and, if he doth it with the consent of the Patron, and Queen, be that Subsequent, or Precedent, it sufficeth. Vid. 40 Ed. 3. 28. 6 H. 7. 14. 11 H. 7. 6. 9 H. 6. 22. Gawdy, Clinch, and Fenner were of the same Opinion, That this Union was good, and the Confirmation is well enough for the time. Popham; I agree, That such an Union, made at the Common Law, was good, and it was not material, whether the Queens Assent be Precedent, or Subsequent. But I conceive, That it is not good at this day: For by the Statute of 37 H. 8. there cannot be any Union made of any Church exceeding the value of eight pounds. For, although the Statute is in the Affirmative; That the Ordinary may make an Union, where the Church is under the value of eight pounds: Yet therein is a Negative implied, That he shall not make such an Union, where the

the Church is above the value of eight pounds. For, by the Common Law, the Ordinary of himself might have made an Union of those Churches, which were poor, and the one not having sufficient to maintain a Minister, by the consent of the Patron, without any confirmation from the King. But what should be said to be a poor Church, was the Doubt. And this Staute of 37 H. 8. hath put it in certain, viz. where it is not above the value of eight pounds, and that such an Union shall be good without the Kings Confirmation. For, at the Common Law, the Ordinary could not have made an Union, unless where the Church was poor. And the Statute herein also hath an Implied Negative; That there never shall be an Union, where the one sufficeth to maintain a Minister, which the Law accompts to be eight pounds. For there is a proviso in the Act, That, if the people of any Church will increase the value to eight pounds, That the Union shall be void; which shews the intent of the Statute to avoid accumulation, and to restrain the authority in Uniting of Benefices, which they had by the Common Law. Gawdy, and Fenner e contra; For the Statute 37 H. 8. is onely in the Affirmative, and not with a Negative: And then it never takes away the Common Law, as appears 33 H. 8. 50. and 4 and 5 Ph. and Mary, 135. And at the Common Law the Ordinary, by consent of the Patron, without the Kings Confirmation, might have made an Union of Churches which were poor; But not of Churches, which had sufficient to serve the Cure, each of them by its self without the Kings Confirmation: But, by the consent of the King, Patron, and Ordinary, an Union may be of any Churches of what soever value it be. And this authority is not taken away by the Statute, nor restrained, but limited of what an Union may be made without the King. Wherefore, &c. Popham, We are to hear the Civilians, where an Union may be made at the Canon Law. And afterwards Doctor Steward for the Defendant, and Doctor Crompton for the Plaintiff were heard in Court. And it was agreed by both, That by the Canon Law the Ordinary, with the Patrons assent, might have made an Union of two Churches, although either of them were worth one hundred pounds per annum, and sufficient to maintain a Minister of its self, and this by the expresse Text of the Canon Law. For an Union may be made for divers Causes, viz. Poverty of the people, or Paucity of the Parishioners, or the like. And such an Union might have been made without the Popes Confirmation. And if an Union had been unlawfully made, Pet Steward said, That being afterwards confirmed by the Pope, It was for ever good, and valid. And such authority as the Pope had, the Queen now hath by the Statutes. And Crompton denied not, but that such Unions might be made, of what value soever the Churches were: But he said That, in this Case, the Union was made upon a supposed, and pretended Poverty, which appears to be false, and so the Ordinary deceived, Quia ex falsitate; wherefore it is void. But the Court said, That they were not to dispute of the Validity of the Union. For that comes in Question in the Spiritual Court. But, for asmuch as an Union in such Case might be made at the Common Law; It is not restrained by the Statute. Wherefore, by the assent of Popham, It was adjudged for the Defendant, That it was a good Union.

• Baptist *versus* Michelbourn.

Pasch. 38 Eliz. rot. 432.

(22)
C. 6. 20. b.

Co. 6. 20. b.

Co. 6. 20. b.

ERror of a Judgment, in an Action upon the Case, upon a Trover in the Marshallsey. The Trover, and Conversion being supposed at Southwark, within the Virge, and adjudged for the Plaintiff. The Error assigned was, Because none of the Parties were Del hostel le Royn, nor living within the Virge. And it was thereupon Demurred. And Godfrey moved, That for this Cause the Judgment was erroneous, For that Court cannot hold Pleas betwixt strangers: and, in proof thereof, he Cited a President, Hill. 1 Ed. 4. rot. 47. and the Book of Entries, 278 10 H. 6. 13. 7 H. 6. 31, Popham, and Fenner held, That the Action well lay; For the Statute of Articuli super Chartas, Cap. 3. Which shews, That Trespasses shall not be brought there, nor Action betwixt others, then of the Hostile of the King, is intended of Trespasses for Land, and not of such Personal Actions. And there be many Presidents, That in all times such Personal Actions have been there brought, and allowed. But Gawdy doubted thereof. But they all held, That if the Action be not maintainable there, The Judgment is void: Yet Error lies thereof. Sed Adjournatur. Note, Another President was shewn in Mich. 32. H. 6. rot. 27. betwixt Rede and Purcas, Error of a Judgment in Trespass in the Marshallsey, because that none of them were Del Hostel de Roy, and Reversed.

Parrat *versus* Carpenter.(23)
Ante 24.

Action upon the Case for Words: and Declares, Whereas he was Parson of D. and a Preacher: That the Defendant spake these words. Parrat (the Plaintiff innuendo) is an Adulterer, and hath had two Children by the wife of J. S. and I will cause him to be deprived for it. After Verdict it was moved, That an action lay for these words; for they be very slanderous to the Plaintiff, and touch him in his Credit, and profit, and are cause of Depivation, if they be true. But the Court held, That it is a Slander examinable only in the Spiritual Court, and not here. Wherefore it was adjudged for the Defendant.

Broughton *versus* Randall.

Trin. 38 Eliz. rot. 876.

(24)

ERror of a Judgment in Wales, in Dower; where the Parties were at Issue. And at the day of the Ven. fac. returned, none of the Jurors appeared: Whereupon an Habeas Corpora, with a Decem Tales, was awarded; And thereupon a Trial had with part of the principal pannels, and part of the Tales and Judgment accordingly. The Error assigned was, Because an Hab. Corp. with a Decem Tales, was awarded, where none of the principal pannel appeared. And a Tales ought not to be awarded, but where two at least of the principal pannel appeared: So that they of the Tales, with the principal Jurors who appeared, might make a Jury,

as

as 27 H. 6. 10. and 37 H. 6. Tales, Br. 12. But all the Justices held, That if upon an Habeas Corpora and Distringas, none of the Jury appeared; yet a Decem Tales shall be awarded: but not upon the Ven. Facias, and that this is the difference, and therefore, as this Case is, it is Erroneous. But it was then said, That it was altogether the course in Wales, to award Tales in such Cases. And the Court said, If it were so, it is not any Error: For the Custome of every Court is a Law in that Court; as 10 Ed. 4. and 5 Ed. 4. are. But it then was said, That he ought to have pleaded it specially: Otherwise the Court cannot be informed thereof. But the Court said thereto, they might be informed thereof by Presidents; and by a Certificate from the Judges there, whereto they would give Credit, And so was now lately done, Wherein a Quod ei deforciat, in Wales, because we were informed, That the common course was to give Judgment Final in that Action, It was no Error. And so the Court appointed here: Wherefore Adjournatur. Afterwards, because no Presidents were shewn, It was Reversed. Note here, the Title of the Feme, to recover Dower, was, That the Father and Son were Joynt-Tenants to them, and the Heirs of the Son. And they were both hanged in one Cart. But, because the Son (as was deposed by Witnesses) survived, as appeared by some Tokens, viz. his shaking his Legs. His Feme thereupon demanded Dower. And upon this Issue Nunques Seisie Dower, This matter was found for the Demandant.

Co. 10. 104. b

Co. 5. 85.

Fetherston *versus* Allybon.

DEbt against an Executor, upon an Obligation made by his Testator. The Plaintiff was Non-Suited: The Defendant had Costs by order of Court. Otherwise it is, where an Executor is Plaintiff, and is Non-suited. For it cannot be intended, That it was conceived upon malice by him. Vid. Statute 23 H. 8. cap. 15.

(25)

1 Cr. 29. 219.
2 Cr. 229. 361The Earl of Lincoln *versus* Flower.

Pasch. 38 Eliz. rot. 159.

ERror of a Judgment in Debt, upon an Obligation, in the Court of Common Bench, where the Earl pleaded Non est factum, and found against him, and Judgment given. Ideo capiat. And, thereupon Error assigned, because he was a Peer of the Realm, and a Capias lies not against him. Sed non allocatur. For by this Plea found against him a fine is due to the Queen: And none shall have any Priviledge against the Queen: Therefore Capiatur pro fine well lies. And the Judgment was affirmed, 27 H. 8. 22. 11. H. 4. 15.

(26)

Ante 170.

Elinor Blisset *versus* Johnson.

Action for these words, Thou (innuendo the Plaintiff) art a Villanous & a Murderous Quean; for thou didst murder my last Wife. The Defendant pleaded Not Guilty. The Jury found, That the Defendant spake those words of the Plaintiff to one Spinkfoot. She is a Villanous, Murderous Quean; for she did murder my last Wife. Et si, &c. Popham and Fenner held, That this Verdict is against the Plaintiff: For they be not the same words mentioned in the Declaration.

(27)

2 Rol. 718.

Ant. 224.

And

2 Rol. 718.

And if the Defendant had been found Guilty generally, and the Plaintiff had recovered, the Recovery would not have been a Bar in a new Action for these words: For they be so variant, that he cannot help himself with an averment that they are the same words. But Gawdye contra; for they are all one in substance. And the difference to whom they were spoken, is not material. And they may be well averred in a new Action for these words, that the words in the first Declaration, and these are all one. Therefore it was adjourned.

(28)

Thomson *versus* Clerk, Mic. 37, & 38 Eliz. rot. 228.

Ant. 174.

2 Cr. 246.

Action sur Trover, and Conversion of Goods, apud D. in Comitatu Nott. The Defendant saith, That he recovered against the Plaintiff a Debt of 20 l. by Bill in the Queens Bench, & thereupon had a Fieri fac. directed to the Sheriff of York, who, apud Wakefield in Comitatu Eborum, seized those Goods, and delivered them unto him in satisfaction of this Execution: and so justifies the Conversion. And it was thereupon demurred, and without argument ruled: that the pleading was ill. First, Because he shewed not where the Queens Bench was, at the time of the Recovery, it being a Court removeable; as 5 Ed. 4. 8. is. Secondly, The Trover and Conversion is supposed to be in the County of Nott. and he justifies in the County of York, without traversing; &c. Thirdly, The Sheriff upon a Writ of Fieri fac. cannot deliver the Defendants Goods to the Plaintiff, in satisfaction of his Debt. Wherefore it was adjudged for the Plaintiff.

Gypyn *versus* Bunney.(29)
Moor 465:
1 Rol. 505.Co. 4. 23.
Post. 662.

Co. 10. 47. b.

1 Rol. 505.

UPon a Special Verdict the Case was such. A Copyholder in Fee Surrendered to the use of one for Life, the Remainder to another in Fee; Tenant for Life is admitted, afterwards he in Remainder surrenders to the use of J. S. in Fee, of which surrender the Lord accepted, and admitted J. S. The Tenant for life dies, the heir of the first Copyholder enters, and J. S. ousts him; Et si &c. Coke Attorney General, moved, that J. S. should have this Land. For, first, the admittance of the Tenant for Life is sufficient for him in Remainder, to vest the Remainder in him; as 18 Ed. 4. a Signiory is granted for Life with the Remainder to another, attornment to the Tenant for Life is good to him in Remainder. So of a Devise of goods, Remainder over; the Executor consents that the first Devisor shall have them: it is good for the other. Secondly, the Lords acceptance of the Surrender is quasi an admittance; for in that he allows him to make a Surrender, he thereby admits him to have a Remainder, whereof to make a Surrender. Wherefore, &c. Popham, Tenant for Life, and he in Remainder, have but one Estate in Law; and therefore the admittance of the one shall serve the other as a livery or attornment. The Reason, which is objected against it, is, Because the Lord should then lose his fine of him in Remainder. But it seemeth to me, that there is one onely fine due upon this Surrender, which the Tenant for Life shall pay before his admittance; as where the Queens Tenant in Capite aliens for Life, Remainder over; there is but one fine due for this Alienation. So here, unless there be an especial Custome that two fines shall be due. Fenner of the same Opinion. But because the other Judges were absent, it was adjourned.

Crisp

Crisp *versus* Fryer.

Trin. 25 Eliz. Rot. 588.

T Respass. Upon Demurrer; the Case was such. Jo. Rouse was (30)
 seised in Fee of the Mannor of Royden in Suff. whereof the Noy 58.
 Land in question was parcel, and whereof the Plaintiff was a 1 Rol. 506.
 Copyholder in Fee, rendering 20. s. per annum, at Mich. And at the Moor. 350.
 Feast of St. Michael, upon the last instant of the day, the Lord came
 thither, and demanded the Rent then due, and for two years
 before; and none was there to pay it: Whereupon the Lord
 there continued demanding his Rent, untill after Sun-set; and,
 for Non-payment, entered for a Forfeiture: And whether it
 were a Forfeiture, or not? was the sole question. And it was
 moved, That it was not a Forfeiture; because it was not a Ant. 149.
 ny wilfull Denial, but only a negligent Non-payment; and
 this Diversity hath been commonly agreed; and the Lord is not
 at any mischief: for he may distrain for his Rent; as 6 R. 2. A-
 vowry 86. is. And so it was adjudged also, Mich. 36. and 37
 Eliz. in Communi Banco, in Vaughans Case, that the Lord may
 well Abow for his Rent. Wherefore, &c. Gawdy, the Lord de-
 manding his Rent upon the last instant of the day, whereon it
 is due, and the Tenant being not there to pay it; I conceive
 to be a Forfeiture as well, as if he had made an expresse denial
 to pay it. For this Non-payment is Denial in Law; As 30 H.8.
 42. is. And as Littleton saith, Non-payment of a Rent Seck upon Sect. 233.
 demand is a Denial in Law, whereof the Grantee might have
 an Assise. But if the Demand had been here at any other day,
 then the same day when it was due, the Non-payment thereof
 had not been any Forfeiture: For the Tenant is bound to attend
 upon the day of payment of his Rent, when the Lord also is
 bound to demand it, and not at any other day, And if it should
 not be a Forfeiture, it would be a great mischief to Lords to drive
 them to distrain, and abow for every, 6. d. or 12 d. which should
 be due from his Copy-holder. Fenner to the contrary. The En-
 try for the Forfeiture is for a Condition in Fait, not for a Condi-
 tion in Law; and the Condition in Law is not for Non-payment
 of the Rent, but for the refusal to pay his Rent. And a Denial in Hob. 135.
 Law shall not serve to make a Forfeiture, but there ought to be
 an expresse denial in Fait; otherwise it would be very mischie-
 vous to a Copy-holder; that for such a negligent Non-payment,
 there should be a forfeiture of his Estate. Popham; It is a
 forfeiture: for the Copyhold Estate is maintained by the
 Custome of the Mannor; and therefore he ought to per-
 form his Customes, and duties on his part to be performed,
 which he hath not done here, by his Non-payment of his Rent at
 the day it was due and demanded. And truly a denial in Law
 is as much a forfeiture, as a denial in Fait. As if the Lord de-
 mands his Rent upon the day, and if the Tenant is there, and
 saith nothing, it is clearly a forfeiture. And 23 Elizab. Sir 1 Rol. 507.
 Christopher Hattons Case against his Tenants of Wellingborough;
 It was agreed by all the Justices, That, if a Copyholder comes
 not to the Lords Court after a particular Summons made
 to their persons to come, it is a forfeiture without any ex-
 press

Ante 353.

press denial to come. Yet it was there agreed, That the not coming after a general Summons at the Church was not any Forfeiture: (Quod fuit hic per Curiam concessum) But it was there agreed, that if he might excuse his not coming upon any good cause, as Sicknels, or the like, &c. it should save the Forfeiture. And there is not any difference betwixt these Cases. And admitting here, that the Lord had warned his Tenant, that he should demand his Rent upon the Land at the day it was due, and command to be there ready to pay it, and the Lord upon the day demands the Rent, & none is there to pay it, it had been clearly a Forfeiture. So here: for the Law appoints the day for the payment as straitly, as if the Lord had given express notice thereof. Wherefore, &c. Et adjournatur.

Dame Gresham *versus* Banning.

Hill. 38 Eliz. Rot. 847.

(31)
Moor 429.
Goulds. 160.

Post. 689.

Ant. 41.

SCire facias, Upon a Reconusance made unto her by one Gerveys; who was returned Dead, whereupon she sued a new scire facias against the Heir of Gerveys, and the Terr-tenant: upon which the Sheriff returned, that he had summoned Paul Banning, who was Tenant of the Mannor of S. which was the Land of Gerveys, after the Reconusance acknowledged, whereupon Paul Banning came in, and pleaded; That one Mann was seised of three Acres in D. whereof G. was seised in Fee after the Reconusance made: Judgment, Si Actio. The Plaintiff saith, that Gerveys was not seised in Fee of those three Acres after the Reconusance, &c. And thereupon they were at Issue, and an especial Verdict found, that the said Gerveys, and one Bedingfield were joyntly seised in Fee of those 3 Acres after the Reconusance, &c. And thereof infeoffed the said Mann, who is yet seised thereof in fee, &c. Et si, &c. Coventry and Coke moved, that this Verdict is found for the Plaintiff. For the Issue being, whether he was seised in Fee of those 3 Acres? And it is found, that he was not seised, but of the Moyety of them: Which being a Special Issue, it is found against the Defendant pleading this Plea. But if it had been truly pleaded, that which is found had been sufficient to have abated the Writ, and to have put the Plaintiff by from her Execution. But being a false Plea, it is found against the Defendant; As 16 H. 8. 5. 30 H. 8. Dy 41 & 365. But Godfrey moved, that the finding of this Joynt-seisin sufficeth to maintain the Issue. For every Joynt-Tenant is seised of the Entire. But all the Justices held to the contrary, that the Verdict upon this Reason is found against him, who pleaded it. For Joynt-tenants in truth are but seised of Moyeties. But Fenner said, that in regard it now appears, upon this Verdict found, that Execution ought as well to be sued against Mann, as against Paul Banning the Defendant, it sufficeth him, and is all one, as if it had been found, that he was seised, as he hath pleaded; As 40 Ed. 3. 5. an Alienation is supposed to be in Fee, and found to be for life only, it is well enough. But Popham and Gawdy, e contra; because this is an Especial Plea, and ought to be found as it is pleaded: otherwise it will not serve. And there is difference, when the Plea is to the point of the Writ, & when it is a Collateral Plea, or in Bar. Sed adjournatur. Afterwards the Lady Gresham died, and so the matter was determined.

Brigg

Brigs *versus* Sheriff.

Trin. 37 Eliz. Rot. 359, or 354.

FRror, of a Judgment in the Common Bench in Trespas of Battery; the Error assigned was, because the Declaration is, *Quod cum* le Defendant, such a day, &c. assaulted and beat the Plaintiff, &c. So it is quasi a Recital, and not a direct Affirmation, that he beat him, &c. Clerk, The first Declaration is so: But thereto the Defendant imparled, and after entred this second Declaration against him, and in that *Cum* is omitted: and Judgment is given thereupon for the Plaintiff. Sed non allocatur. For the first Declaration is the principal. And thereupon the Judgment is given: And the second ought to accord with the first. Et non e converso. Wherefore it was reversed. (32) 2 Cr. 537. Ante 416.

The Queen against Vaughan

Hill. 36 Eliz. Rot. 8.

INformation of Intrusion against Vaughan. Upon Not Guilty pleaded, a special Verdict was found: that the Prior of Kings-Langley in the County of Hertford, Anno 31 H. 8. surrendered the Site of his Priory and all his Lands, &c. to the King, by Deed enrolled. And afterwards in 31. H. 8. the King granted the Site of the Monastery to the Suffragan of Dover for his life; who in 38. H. 8. dyed, and that Site came to the Queen that now is. That afterwards Anno octavo of her Reign, a Commission issued to inquire in what estate and reparations that house was, and that thereby it was found to be ruinous, and the Lord Treasurer, and others, by Commission, sold the Stone and Lead of the House, Afterwards Anno 16 Eliz. the Queen granted the Site of the said Priory to Grimstone with a Proviso, That if the said Lands or Tenements, or Profits thereof were not concealed, subtracted, or unjustly detained from the Queen, her Father, Brother, or Sister, before the 14 of Eliz. that the Patent should be void. And they further found, that the Queen was not answered any Rent, or Profits thereof, beside the said Stone and Lead, before the 14 of Eliz. Et si, &c. And upon this matter Coke, the Queens Attorney, prayed Judgment for the Queen. For there is not any Land conveyed by that Patent, but that, which is concealed from the Crown: But the Priory, and that Site now in question, cannot be concealed. For it was by the Priors Surrender expressly mentioned, and so revealed to the King: By the Kings Grant also it is revealed, being therein mentioned by express words. Then if once it be revealed by express words, at the time of his Title accrued, it can never be concealed, as long as the Crown hath not another Title thereto. But, if it be afterwards divested from the Crown by the Kings Grant in Fee, and afterwards comes again to the Crown by Attainder of Felony, because it is by a new Title, it may be concealed; and that is in common experience; and the Land it self shall never be said to be concealed, or unjustly detained: Et it 2 And

And therefore it was adjudged in Pasch. 23 Eliz. betwixt Smith and Petoe: That where King Hen. 4. granted Land, parcel of the Crown, by his Letters Patents under the Dutchy Seal, which was void; and the Queen, who now is, granted those Lands with a Proviso, That if the Lands were not concealed, That then, &c. It was ruled, That this Land should not pass. For Land cannot be concealed, and therefore out of that Proviso: and so it was resolved in one Shaftoes Case of Ireland. Wherefore, &c. And after divers arguments on either side, the Court resolved for the Queen. For they all agreed, that it cannot be concealed, after it once be revealed by any especial words in any Record, unless that land were absolutely given from the Crown, and afterwards came unto it by a new Title. And a Concealment is not, but where Lands are in the Queen by Attainder, or other Title, and there is not any Record to inform her what Lands they are. But here the Record of the Surrender is of the Site, and all the other Lands, &c. For the Site is expressed, that it is in the King. But for the other Lands, they are in the generality, and may be well concealed. For there is not any Record to shew what they are. So where there is any Office, to entitle the Queen, after an Attainder, or any Survey, those Lands which are particularly mentioned in the Office, or Survey, cannot afterwards be said to be concealed: for they be revealed to the Queen by those Records. But, if any Land be omitted out of that Survey, it may well be said to be concealed. And Popham said, that all this was agreed, in the Case of London and Sir Christopher Hatton. So it passed not within the proviso of the Concealment, for Patents are to be construed secundum intentionem Regis, and not in deceptionem. And here it was not intended to pass any Land, but that which was concealed, and first revealed by Grimston, which is not here, for the reasons before mentioned. The greater question then is, Whether this be within the Clause of the Lands and Profits, inde injuste detent', &c. &c. And it was held by Popham and Gawdy, that it was not. For Popham said, that nothing shall be termed to be injuste detent' from the Queen; but that, whereof the Queen had but a Right only, and never had any possession. And these words are inserted into Patents, by reason of a Judgment in the Exchequer, where an Abbot was disseised of certain Land, and afterwards the Abbey and all the Possessions being given to King Hen. 8. the Queen granted this Land, whereof the Abbot was disseised, by express words, with such a Proviso; that if they were not concealed, that then, &c. And adjudged, that they passed not. For the King never had any Title, but a right only to that Land, and therefore the Lands were unjustly detained, and therefore from that time it hath been used to have these words, Vel injuste detent', &c. But when the King had possession thereof, as he had here by the death of the Suffragan who was Tenant for life, it cannot be said a detainer from her. For She might have had an Accompt against any, who takes the profits of those Lands, which proves, that She alwayes was in possession of them: And here this Land being waste Land whereof no Profits are answered to the Queen, it cannot be said

said to be an unjust Detainment from her. Wherefore upon these reasons, it was adjudged for the Queen. Vid. 10. Co. 114.

Blodwell *versus* Edwards.

Hill. 38 Eliz. Rot. 1061.

Error: The Case was such; John Blodwell, being seised of Land in Fee, made a Feoffment to the use of himself for life, and after to the use of such Issue, and Issues Males, of the body of Margaret Loyd, from eldest, to eldest, and who by common supposition, or intendments, should be adjudged, or reputed to be begotten by the said I.B. upon the body of the said Margaret Loyd, whether the said Issue, and Issues Males, so born of the said Margaret, and reputed to be begotten upon her by the said I.B. sint per Legem hujus Regni Angliæ adjudicati & legitime mulierly begotten, or unlawfully & immulierly begotten betwixt the foresaid Margaret & the foresaid I.B. and to the heirs of the bodies of such Issue, or Issues Males, De seniore in seniore existent, nat. de prædicta Margareta in Forma prædicta. Afterwards John Blodwell had Issue by the said Margaret, Richard Blodwell now Plaintiff. And Edwards the Defendant recovered against the said John Blodwell in an Assise 12 Elizab. John Blodwell died: and Richard Blodwell brought Error, as he in the Remainder, and averred, that he was the Issue engendred of the body of the said Margaret, and was alwayes since his birth, and yet is reputed to be engendred by the said John Blodwell, &c. The first Error assigned was, because the Tenant in the Assise pleads to the Issue in Nul Tort. And at the day of the Habeas Corpora returned, the Entry is, Quidam Recognitorum Assisæ venerunt, & quidam non venerunt; Ideo a Distingas with a Decem Tales was awarded, and thereupon trial had: and therefore erroneous, because it is not mentioned, that the Tryal was deferred, and the Tales awarded pro defectu Juratorum, and it may be, notwithstanding Quidam Juratorum non venerunt, that a full Jury, might have appeared: And then the deferring of the Trial, and the awarding of Tales was without cause. Vid. 22 Ed. 4. 15. R. 3. 4. 15. H. 7. 16. A second Error assigned, was because the Sheriffs name was not to the Return of the Writ of Habeas Corpora, nor to the Return of the Writ where the Decem Tales was returned. And for not putting his name to the Return, it was vitious by the Statute of York, 12 Ed. 2. cap. 5. And for that Vid. 26 H. 8. 3. 9 Ed. 4. 19. 11 H. 6. 94. And these be not holpen by any of the Statutes of Jeofails. And the Recovery was before the Statute of 18 Eliz. Wherefore, &c. And all the Court resolved, that both Errors were manifest; and for that cause the Judgment reverfable: and the Counsel on the other side did not much insist upon them to defend them. But it was moved, that the Plaintiff had not here sufficiently entituled himself to have any Remainder, and then he cannot have a Writ of Error. For a Remainder ought to be limited to a person in Esse, or who by intendment shall come in Esse, during the particular Estate. But the Law hath not any expectancy of a Bastard Son to be born, which is not in Esse at the time of the limitation. And here it doth not appear by his Averment, that he is the lawful Issue,

(34)

1 Rol. 799.
Moor 430.
2 Rol. 43. 4.
Noy. 35.

1 Rol 799.

Ante 300.

2 Rol. 43.

Co. Lit. 3. b.
2 Rol. 43. 4.

Co. Lit. 3. b.

2 Rol. 43. 4.

Issue, Wherefore, &c. Gawdy; admitting he were a Bastard, yet the limitation unto him is good; for although he be not lawful Issue, yet he is the Issue of his Father without question; and a Remainder to a reputed Son is clearly good, as 41 Ed. 3. 19. and Dy. 113. And the Limitation here being to the eldest Issue of the Feme, he shall take it, although he were a Bastard. For so it appears to be the express intent of the Deed. Popham, although a Limitation of a Remainder to a Bastard in Elle is good, for that he is a person known, and may in time be a person known, and reputed for the Son of another: Yet it cannot be so to a Bastard before he be born. For the Law hath not any expectancy, that any such should be, nor will give liberty, or scope to provide for such before they be. And he cannot take by such a name, unless he be such a person, who is reputed a Son, and none can gain the name at the instant time of his Birth, but it ought to be by continuance of time, and reputation of the Country, and not of the Father himself. And if he cannot take it at the time of his birth, he never afterwards shall take: for the Law will not expect longer for the increasing of a Reputation. The Limitation also to one, and the Issues of his body, is always to be intended lawful Issue, and the Law will never regard any other Issue. So here, forasmuch as he hath not averred himself to be a lawful Issue, but only a reputed, which cannot be, he hath not conveyed unto himself a sufficient title to have this Writ of Error. And to that opinion Fenner inclined, and said, that they had conferred with divers of the Justices in Serjeants Inn in Fleetstreet, and that the greater opinion of them was, that a Remainder to his first reputed Son, or Bastard, is not good; because the Law doth not favour such a Generation, nor expect that such should be, nor will suffer such a Limitation, for the Inconvenience which might arise thereupon. Wherefore, because the Plaintiff was in truth a lawful Son, engendred between the said J. B. and the said M. L. after they were married together; and this Conveyance was only made in this manner to avoid scruple, which otherwise peradventure might happen, because the said J. B. was married to a former Wife, and was divorced from her, if this Divorce should be repealed, which cannot now be in question, all the parties being dead; the Plaintiff discontinued this Writ of Error, and brought a new Writ of Error Coram vobis residet; and therein averred the said Marriage, and that he was the first Issue during the Marriage. Et sic pendet.

Harding *versus* Sherman

(35)

Action sur Trover apud Paxton in Com. Hunt. The Defendant pleads a Bargain and Sale apud Royston in Com. Hertf. in the Market there, whereby he after converted them apud P. in Co. H. the Plaintiff saith, that he was possessed of those Goods apud P. in Com. H. and that J. S. there stole them from him, and by Covin betwixt him and the Defendant, at P. in the County of H. he sold them to the Defendant, as he hath pleaded. The Issue was upon the Sale made by Covin, &c. And it was tried in the County of H. and found for the Plaintiff, and it was moved to be a Mistrial, for it ought to have been by a Jury of the County of Hertf. or at leastwise

wise by a Jury of both Counties. And of that opinion was Gawdy. But the other Justices contra; For the Sale is confessed, and the Issue is upon the Tithes, which is well tried by a Jury of the County of Hertf. where it was alledged. And it was afterwards adjudged accordingly.

Wright *versus* Wright.

Prohibition, and Surmisseth: That the Bishop of Winton, and all his Predecessors, from time, whereof, &c. held the Mannor of Eastmere for them, and their Farmes and Tenants for years, or at will, free, & discharged from the payment of all Tithes; and that he, being Lessee of the said Bishop, offered this Plea in the Spiritual Court, and that they refused it there. The Defendant pleads, That the Spiritual Court received the Plea, and admitted him to his proofs, and traverseth the refusal of the Plea there. And it was thereupon demurred, Walter for the Defendant moved, that this Surmise of the Refusal of the Plea is traversable: for a Prohibition lies, where they refuse to do right to the Parties, or the Sute is where it ought not to be, and so injustice is done to the Party, otherwise the Sute in the Spiritual Court, which is the proper place to the sue for Tithes, ought not to be stayed: And then the material Cause to award this Prohibition is the refusal of the Plea. For otherwise, without this Surmise, a Prohibition lyeth not; As 7 Ed. 6. 79. and 8. Ed. 4. 14. And a surmise, which takes away the Jurisdiction from another Court, is always traversable; As 12 H. 4. 13. 13. H. 4. 16. 34 H. 6. 15. are. And so in this Court it hath been oftentimes ruled, that the Refusal of a Plea in the Spiritual Court alledged was traversable, as Pasch. 30 El. betwixt Eaton and Morris, and Tr. 30. El. betwixt Ascoll & Wigen, where in a Prohibition for a Sute for Tithes, he surmisseth, that he pleaded in the Spiritual Court, That the Parson had not read his Articles, and therefore not Parson by the Statute of 13 El. And this Plea being there refused, the Refusal was traversed by direction of the Court. The Prescription also is not good here: For one cannot prescribe De non Decimando, nor to be discharged from Tithes: And although the Bishop, being a Spiritual person, might prescribe to be discharged of Tithes, yet his Lessee shall pay Tithes, because he is a Lay person, and cannot participate of the priviledge of his Lessor. And therefore Tanfield, who argued on the same side, said, that it was adjudged 31 Eliz. in the Exchequer, that the Queens Lessee shall pay Tithes, yet the Queen never payed any: for she is priviledged by reason of her Prerogative. And the Case in Dy. 349. proves nothing against it; for the Statute there was made for the Lands of the Abbots, and not for the Lands of the Bishops; Wherefore, &c. Coke, concerning the Cases of the Graves of the refusal of the Plea, they be all to be answered with this difference, the Refusal is traversable, unless where a Modus Decimandi is in question: For therein Satis constat to the Court here, that the Spiritual Court will not allow of any Plea for a Modus Decimandi. The Refusal of the Plea for not reading his Articles is traversable. And the Prescription here is good: for before the Council of Lateran Tithes were not payable here to certain persons, nor to places; as appears 11 Aff Pl.

(36)

1 Rol. 653.

Co. 2. 43. 4.

Ante 475.

Co. 2. 45. 4.

Post. 785.

Co. 2. 44.

Post. 559.

Co. 2. 45. 2.

Co. 2. 44. b.

Co. 2. 44. a.

Mo. 425.

1 Rol. 653.
Post. 704.

Post. 578.

Pl. 9, 44 Ed. 3. 5. 16 H. 7. 18. Which is the reason also, why the King shall have the Tithes of Lands out of any Parish; because the said Council extended not unto them. And Lay-men at the Common Law were not capable of any Tithes, because they could not sue for them in a Court Christian. But by way of Retainer he may well have them; As 8 Ed. 4. 14. Register fol. 38. & Nat. Br. 41, G. And there it is held, that an Assignee may hold discharged of Tithes, & 43 Ed. 3. 34. & 7 Ed. 6. the Farmor of a Parson may sue in the Spiritual Court for Tithes. And as it is in Knightleys Case, the Pope might have discharged one from the payment of Tithes. So there may be a Prescription, that a Bishop and his Farmor may hold without paying Tithes. Wherefore, &c. And, being afterwards moved again, all the Court resolved, That this Allegation of the refusal of the Plea is not the substance of the Plea, but a Surmise, which was never traversable; Especially where a Modus Decimandi shall come in question. And that this Prescription for the Farmer is good, and as well as if it had been by the Bishop himself. For, the Lessor himself being of right discharged, the Farmer also shall be discharged against the Parson: But peradventure not against his Lessor. Wherefore it was adjudged accordingly, 2. Co. 44.

Palmer *versus* Potter and others.

Hill. 38 Eliz. rot. 693

(37)
Moer. 431.

Action upon the Case against the Bayliffs of Northampton: for that upon a Fieri fac. directed to the Sheriff of the County of North. returnable Octab. Mich. he sent his Warrant to the Defendants, being Bayliffs of North. to execute it, who returned Nulla bona, &c. before Mich. and at Mich. they were removed from their Office, and others chosen. And for this false Return the Action was brought, and all this matter found by Verdict. And it was clearly held by all the Court, That it was a void Return; for the Writ being returnable Octab. Mich. the Sheriff ought not before that time have accepted any return of Nulla Bona. For he might have had some afterwards; and before the return of the Writ: And the Writ being by them returned after Mich. they being discharged of their Office, it is void; for they have no authority to meddle with the Return after: But if they had executed the Writ before Mich. then the Sheriff might have accepted of their Return before Mich. but not after. Wherefore it was adjudged for the Defendant.

The Lord Dercies Case.

(38)
2 Ro. 193. 211.
Mo. 417.

Quo Warranto against the Lord Darcy; for that he claimed to be discharged from the Queens Purveyors in his Mannor of North-Kirby and Walton in the County of Essex. He pleaded, That King Ed. 4. granted to the Dean and Chapter

Chapter of Pauls divers Liberties within those Mannors; where-
of one was : to be discharged of Purveyance, non obstante aliquo
Statuto ; That afterwards, in 33. H. 8. those Mannors came to
the King by Surrender; that Edward the 6th. granted those
Mannors to the Lord Darcy, the Defendants Father, with all
those Liberties, Franchises, and Priviledges, as the Dean and
Chapter of Pauls, or any other, had it, by reason of any Charters, or
Prescription, non obstante aliquo Statuto, &c. Et eo warranto he claims
those Liberties. The replication was; that by the Statute
27 H. 8. cap. 24. it is ordained, that all places shall be subject
to the Kings Purveyors. Wherefore, &c. And it was thereupon
demurred : and argued by Atkinson for the Defendant, that
in as much as the Dean and Chapter of Pauls had those Liberties
and Priviledges ; and those Mannors by the grant of King
Edward the 6th. were given to the Lord Darcy, with all such Liber-
ties, and Priviledges, as the Dean and Chapter of Pauls, or, &c.
ever had ; with an express Clause of Non obstante aliquo Statuto :
the Statute thereby is dispensed with, which gives those Li-
berties to the King ; and the Patentee may well have those
priviledges. But Gawdy, and Popham held e contra ; For the
Clause being general, of all liberties and priviledges, &c. it
is to be intended of such liberties and priviledges, which the
Dean and Chapter had, and were not resumed by any Statute,
But this liberty to be discharged of Purveyance was resumed
by the Statute of 27 H. 8. Wherefore it shall not be revived by ^{2 Rol. 193.}
general words, but by an especial grant of those liberties by
their express name, with an express Non obstante of that Staute :
So that it might appear, that the King intended to grant
them, notwithstanding this Statute. And therefore it was
agreed in the Exchequer, in the Lord Pagets Case, about 20 Eliz. ^{2 Rol. 193.}
for certain Liberties claimed in the Forest of Canck-wood; That
where liberty of Catalla Felonum were granted by King H. the 6th,
to J. S. in that Forest, and afterwards, by a private Statute
28 H. 6. all liberties granted by him were resumed ; and after-
wards this Forest came to the King by Attainder; and this
Forest was granted over with all the liberties, which J. S. had
therein with a Non obstante aliquo Statuto ; Yet this Liberty, which
was reassumed, was not revived, nor passed, unless there had ^{2 Rol. 211.}
been an express mention. And they held, that this Statute
of 27 H. 8. goes to the Successor, although he be not named, &c.
Sed adjournatur, Cokes Entries, 559.

Lynch *versus* Spencer.

Hill. 36 Eliz. rot. 445.

E Jecione firmæ of a Lease of Sir George Brown. Upon Not-guilty ⁽³⁹⁾
a special Verdict was found. Sir Richard Bridges was seised ^{3 Rol. 878.}
of this Land in Fee, and thereof infeoffed one Winscomb, and ^{2 And. 44.}
others, upon Condition that they should regrant it to him, and ^{Moor. 455.}
his Feme in tail, remainder to the right Heirs of Sir R. B. who ^{Co. 3. 50. b.}
regranted it accordingly. Sir R. B. and his Feme had Issue A. B. ^{11 H. 7. c. 20}
their Son Sir R. B. dies; A. B. Levies a Fine with Proclamation
to Sir G. Brown, the Lessor, and his Heirs, to the use of him, and
his Heirs. The Mother afterwards lett it to the Defendant for
his life, and died. Sir G. Brown afterwards entred upon the
U u Defendant,

Defendant, pretending his Entry to be Congeable by the Statute of 11 H. 7. Cap. 29. and let it to the Plaintiff upon whom the Defendant reentered, and ousted him. Et si, &c. And this was argued by Glanville and Drue for the Plaintiff, and by Savil and Kingmil for the Defendant. First Whether this were an Estate tail within the Statute? because they are Donees by Feoffees; as also for that this Gift varies from the Condition: for the Condition is, that the Gift shall be made by the advice of his Council; and it was not done by the advice of his Council. Secondly, Whether a Lease for life only, and being without warranty, be a discontinuance within the Statute? Thirdly, Whether Sir G. Brown be such a person, as may take advantage of this forfeiture, by the words, or equity of the Statute? or if it be given only to the Heir, who hath disabled himself to take advantage thereof by reason of this Fine? And all the Justices resolved clearly for the Plaintiff. As to the first, there is no great doubt, but that it is an Estate tail within the Statute; for that Gift by the Feoffees is given by the provision of her Husband; and to make the Gift in tail by the advice of his Council, is no material part of the Condition; but being made unto him without advice of his Council, it is well enough. Secondly, a Lease for life without warranty is clearly a Discontinuance within the intention of the Statute; for although the words are, that if the Woman alien, discontinue, release, or confirm with Warranty, &c. yet it is not thereby intended, that a warranty is requisite to all those acts; but it shall refer to Release, or Confirmation, which otherwise without a warranty are not any Bar, or discontinuance. And therefore it was ruled in the Court of Wards, by the advice of Wray, and Anderson, that where such a Feme, Tenant in tail, accepted a Fine, and thereby granted, and rendered the Land for a 1000 years, there was not any discontinuance, nor warranty; and yet it was ruled to be within the Statute: for otherwise the Statute should be utterly defrauded. And it was so ruled by the advice of all the other Justices of England. So every act, which is a discontinuance of it self, although it be without warranty, is within this Statute. Thirdly, they also all resolved (although it be a new Case, and the more difficult) that Sir G. Brown is a person, who well may enter for the forfeiture within this Statute; for it is clear, that by this Fine levied with Proclamation by A. B. being Issue in tail in the life of his Mother, the Estate-tail is barred thereby; and it is quasi a giving of the Estate-tail to the Conusee: And, at the least wise, the Remainder in fee passed by that Fine to Sir G. Brown; so as he had the Remainder at the time of this discontinuance made, And the Tort is done unto him; and then he is within the words and intent of the Statute, to enter for the Forfeiture: for the Statute is, That all Discontinuances shall be void, and, That it shall be lawful for him, to whom the Reversion or Remainder is, to enter, &c. So the words of the Statute are clear; and it would be very hard to restrain the intent thereof, that the Entry should be given to the Heir only. And although the Proviso is, that it shall not extend to Alienations, or Discontinuances made by assent of the Heir: So therein is intended, that the Statute doth not give advantage to any, but to the Heir, to whom the Authority

Post. 524.

1 Rol. 878.

1 Rol. 878.

is given to assent, would be unreasonable to tie the general words by such a special Proviso. And this Assent may as well be given by him in Reversion, or Remainder, where there is not an Heir, as well as by the Heir. And clearly, as this Case is, A. B. who is Heir, cannot enter: For he gave all his Authority, Title, and Interest by his Fine, to Sir G. Brown, whereby he is the person, who ought to enter. Anderson said, that after this Fine levied, the Feme, who was in, might well be said Quasi Tenant in Tail, after possibility of Issue: for no Issue of hers can inherit: and so it is where Baron and Feme are Tenants in special Tail, and the Baron levies a Fine with Proclamation, and dies, having Issue, the Feme enters, she is Quasi Tenant in Tail, after possibility, &c. For no Issue had by her can inherit the Entail by reason of that Fine. And so upon these reasons they all resolved for the Plaintiff: and an Objection was made, that A. B. was not found to be Son and Heir of Sir Richard Bridges and then his Fine conveys nothing to Sir G. Brown. And although he be found to be Son to Sir Rich. Bridges and his Wife, that may be true, if he be his second Son; and so there is not a sufficient Title found for the Plaintiff. But all the Court resolved, That this, being in a Verdict, is well enough; for being found to be Son, and none other found to be Heir, he may well be intended to be Son and Heir of Sir R. B. Wherefore it was adjudged for the Plaintiff. Vid. 3. Co. 50.

Mayn versus Beak.

Triu. 38. Eliz. rot. 1738.

DEbt Upon a Lease for years, made 26 Junii, 26 Eliz. Habendum a festo Annun. ultim. præterit. for 35 years; rendering the first ten years 40. l. annually upon the first day of October, and the last of March, æquis Portionibus. And after the ten years 46. l. 13. s. 4. d. upon the same dayes; the first payment to begin the first of October next following. And for 23. l. 6. s. 8. d. due upon the last of March, 36 Eliz. the Lessor brought this Action; and it was thereupon demurred. And Savel for the Defendant moved, that he should have but 20 l. at that day; for the Lessor is to have 40 l. for every year, during the ten years; and the ten years do not expire (being accounted from the making of the Lease) untill the 26 June 36 Eliz. for from that time only the Lease had his Essence; and the Lessor is to have 40 l. for ten years, which otherwise he had not. But all the Court resolved for the Plaintiff. For although the Lease in interest begins not untill 26 June, 26 Eliz. yet, in the account of the number of years it began the Annunciation before; so that the ten years expired at the Annun. 36 Eliz. and then the first Reservation ended; and every day after 23. l. 6. s. 8. d. is to be paid. And now although the Lessor cannot have ten years together 40. l. but shall fail in one of the payments; yet that is not material; for it is impossible, that he should have it ten years and ten times, as this Reservation is. Wherefore it was adjudged for the Plaintiff.

(40)

Banyster *versus* Trussel.

(41)
Litch 145.
Jones 149.

Ant. 213.

DEbt upon an Obligation. The Defendant pleaded, That he was attained of Felony, which Attainder continues yet in its force, and demands Judgment, if he shall be put to answer; and it was thereupon Demurred. And Walmisley held, That it was a good Plea; and, that he shall not be put to answer. And so are all the Authorities in the Books, 2 Ed. 4. 1. 4 Ed. 4. 8. 6 Ed. 4. 4. 6. Hen. 4. 6. And Stamford 107. is, that he shall not be put, during that time, to answer to another Felony; for he cannot forfeit more, then he had forfeited before. And Britton 18. saith, that a Felon attained shall not answer to any thing, unless to a greater Felony: and there is no authority in our Books against it. And these authorities are grounded upon good reason; for there is a Rule, the Law will not make a man to labor in vain: and it would be in vain for one to sue, and in the end not to enjoy the effects of his Sute, viz. Execution; which he cannot have of his Lands, because they be now the Lords; nor of his Body, or Goods, for they belong to the Queen; wherefore, during that time, all Obligations and Contracts betwixt him and others are dissolved; and he may be resembled to a man, who enters into Religion, or to a Feme Covert, who cannot be sued without her Baron, to whom she hath given her body. But Anderson, Beaumont, and Owen, e contra; for in all the authorities which are vouched, there is not any Judgment, or settled Opinions; wherefore the Law is to be examined how it stands: and in truth there be more and greater reasons to maintain it, that he should be put to answer, than otherwise; for the other Construction would be very mischievous. The principal reason pretended against it is, Because the Queen hath an interest in his body, and in all that he hath, and may cause him to be executed when she will. But that is not any cause to stop the Plaintiff in his proceedings; for he may proceed, and have Judgment against him, and, if he should be at large, take his body in Execution; and yet the Queen, when she pleased, might command execution to be done on his body, notwithstanding the parties Execution. And there is a Rule, that none shall take advantage of son tort Demesn. And there is not any difference betwixt this Case, and where one is outlawed in Debt, or Trespass; for then the Queen may have his body in prison, and his Goods as forfeited, and he is disabled to sue any man: But yet it is not to be doubted, but that he shall answer to the Sute of any other. And whereas it was objected, that his body is not his own during this Attainder, that is not so; for he may purchase any Land: and if there be any personal wrong done unto him, when he is pardoned, he may have his Action for it. And the Case of a Feme Covert is not like hereto; for that is to avoid the intollerable mischiefs, which otherwise would happen to her Husband. And it is not reason, that a man doing a wrong should take advantage thereof to himself, and take away another mans Action; and therefore it is fitting he should be put to answer: for the Queen and Plaintiff may be both served; the Queen by executing him when she pleaseth; the Plaintiff in the Interim to have him in Execution. And there-
fore

fore Owen said, It was adjudged in the Exchequer, in one Crofts Case, where one had a Judgment against another in Debt, who was afterwards attainted of felony, and imprisoned at Newgate; & during that time, the Plaintiff pursued a Capias ad satisfaciendum and delivered it to the Sheriff of London; and the Felon was afterwards pardoned, and let large; and the party thereupon brought Debt upon the Escape, and adjudged maintainable. Which proves, that he might be taken in Execution during the Attainder (Sed quære, if it were not adjudged, because he being in their custody after the Pardon, should then be said to be in Execution for the party) wherefore upon these reasons, against the opinion of Walmesley it was adjudged, That he should answer. Vide Co. Entries 248.

Ante 214.

Moor 178.

Ow. 69.

Ante 213.

1 Leon. 276.

Hallings versus Conhard.

Trin. 38 Eliz. rot. 1734.

DEbt Upon an Obligation conditioned for the performance of Covenants within a certain Indenture. The Breach was assigned; whereas the Covenantor covenanted with the Covenantor, that he, at the Costs of the Covenantor, would assure such Lands unto him before such a day; That the day was past, and no assurance tendered by the Covenantor, nor Costs by the Covenantor; and whether the Covenant were broken, or not? was the Question. And it was argued by Williams for the Defendant, that the Plaintiff ought to tender the Costs first, otherwise the other is not bound to make the Assurance: and he cited 3 H. 7. 4. and Dy. 371. and a President in the Book of Entries, where Issue was taken upon the tender of the Costs. Warberton Contra; the Covenantor is to make the Assurance, and that may be what he please. viz. Fine, Feoffment, Recovery, and therefore he ought to notify his readiness to do it, and what he will do, so as the other might know what costs he is to tender: But if he had covenanted to make some certain Assurance, as Fine, Feoffment, Recovery, &c. it should have been otherwise. And so it was adjudged in this Court, 34 Eliz. betwixt Frank and Fosters; which Glanville affirmed, he being of Council therein. And of that opinion was the whole Court here; that the Covenantor ought to give notice what Assurance he will make, and to shew his readiness to do it, otherwise the Obligation is forfeited. But Walmesley said, there was no difference, whether the manner of the Assurance is left to the Covenantor, and where he covenants to make one kind of Assurance; for in both Cases he is to do the first Act, and to tender the Assurance. Wherefore it was adjudged for the Plaintiff. But the Entry of the Judgment was stayed upon the Defendants prayer, and the matter reserved to Order. 5 Co. 22. b.

(42)

Ow. 157.

Moor 454. 7.

Co. 5. 22. b.

Co. 5. 22. b.

Co. 5. 22. b.

Woodroff versus Greenwood.

Hill. 38 Eliz. rot. 912.

Covenant. Upon Demurrer the Case was. Tenant in Tail, Reversion to the Queen in Fee, lets it for twenty one years by

(43)

by Indenture; and Covenants, that the Lessee shall enjoy it against all persons, without the interruption of any besides the Queen, her Heirs or Successors; *existensibus Regibus, vel Reginis Angliæ.* The Queen grants her Reversion to Wentworth; the Tenant in Tail dies without Issue; Wentworth enters, and ousts the Lessee, and he brings Covenant; and adjudged that it lay: for none are excepted besides the Queen, and her Successors, and not her Patentee.

Fitton and the Countess of Northumberland his Wife, Sir Thomas Cecil and his Wife, Sir William Cornwallis and his Wife, and the Lady Davers, Daughters and Heirs of the Lord Latimer, Plaintiffs, against Hall and others.

(44)
Moor. 455.
2 And. 48.
Co. 5. 97.
Ante 469.

Quare Impedit. The Defendant pleads release of all Actions made by Cornwallis, hanging the Writ; and awarded, that it was in Barr to himself only; and that for the others the Writ should stand. Whereupon Glanville moved, that the Declaration was not good; for they count, that the Lord Latimer was seised in Fee of the Advowson, and granted the next Avoidance to Carew, who presented, and afterwards the Lord Latimer died, and it descended to them: and therefore ill; because there is not alledged any Presentment in their Father, nor in any who had the Inheritance, but only in the Grantee of the next Avoidance, which is not any Title. For in a Quare Impedit the Presentment ought always to be alledged in him, who hath the absolute Inheritance, and not in any other: and in proof thereof were cited 18 Ed. 3. 15. 24 Ed. 3. 37. 40 Ed. 3. 10. 43 Ed. 3. 4. 33 H. 6. 32. 7 Ed. 4. 20. 9 H. 7. 23. 16 H. 7. 7. In which Books it is held, that a Presentment by a Tenant for life, or for years, or by a Guardian, or by the Grantee of the next Avoidance, is no Title for him in reversion. And that this very Case was here in question, Trin. 26 Eliz. rot. 1108 in a Quare Impedit by the Dean of Lichfield, and a Demurrer thereupon for this very Cause. And the Opinion of the Court was, That for this cause it was ill; but no Judgment was given, because the Plaintiff discontinued his Sute: Wherefore, &c. But all the Justices, besides Owen, held, That the Declaration was good enough; for this Presentment by the Grantee is in right of the Grantor, and gives unto him sufficient Seisin: For the Books be not directly, that a Presentment alledged in the Grantee is not good; but that where a Presentment is alledged in the Grantor and Grantee, that the Presentment in the Grantor is only traversable; for that is the Principal, and the alledging of the Presentment in both is not double; And here the Title is not only alledged by the Presentment, but also by the descent principally, Wherefore, the demurrer being joyned thereupon, they awarded, that, if other matter were not shewn the first day of the next Term, that Judgment should be entred for the Plaintiff. And it was afterwards adjudged accordingly. 5. Co. 97. b.

Co. 5. 97. 8. a.

Co. 5. 98. 2.

The Queen *versus* Hussey.

Quare Impedit. Upon Demurrer, the Case was, King H. 8. (45)
 gave a Tannor, with the Abboufson appurtenant, to Charles
 Brandon Duke of Suffolk, and his heirs Males of his body
 And Ch. Br. by Deed enrolled Anno 30 H. 8. regranted that Tan-
 nor and Abboufson to the said King, and to his heirs and Suc-
 cessors. Afterward the Statute of 34 Hen. 8. cap. 20. was made,
 and after the said King granted that Abboufson to Tannor in Fee,
 from whom by mean Conveyances, it came to the Defendant.
 Ch. Brandon died without Issue Male; and, the Church being
 now void, the Queen presented, and the Defendant disturbed
 her; and she brings a Quare Impedit: And the Defendant shews
 all this matter; and that afterwards, there were three Pre-
 sentments by the Patentees, under whom the Defendant
 claimed. And, upon all this matter, it was demurred in Law;
 and it was argued by Warburton for the Queen, and by Hearn for
 the Defendant. First, whether this Grant by Tenant in tail,
 it being good to bind his Issue, (as it is agreed by all, that it
 was by the express words of the Statute of 34 H. 8.) The King
 thereby hath a base Fee in him, and his Reversion expectant there-
 upon, or whether he shall be in, as in point of Reverter? Second-
 ly, admitting, that he is seised of a base Fee, whether this
 Grant to Tannor, not reciting his Estate, be good? And, whe-
 ther it shall endure as long as the base Fee continues only, or
 be sufficient also to pass the Estate in Reversion in Fee? Thirdly,
 admitting, that this Patent is not good, whether this double
 Usurpation shall bind the Queen in this Action, and be a good
 Title for the Defendant? As to the first, all the Justices resol-
 ved, that King Hen. 8. was not seised of any base Fee, but
 of an absolute Estate given unto him; and he was in, as in
 point of Reverter; and there is not any difference betwixt this
 Case, and where Tenant in tail, the Reversion to the King,
 is attained of Treason; so he hath the Fee conjoynd in him.
 And the Statute of 34 H. 8. makes it clear, that he hath by the
 Deed inrolled an absolute Fee in him. As to the second, ad-
 mitting, that he hath two Fees in him; yet the Patent is good
 for the base Fee, and for the Reversion in fee, without reciting
 the Kings Estate; and the Estate of the Patentee shall go out
 of both Estates. And as to the third, Anderson and Beamond held
 clearly, that two, or three Usurpations shall not put the Queen
 out of Possession; nor gain any title against her; for when
 the Queen hath any thing permanent, no Subject can take it
 from her by any Tort. And they said, it hath been so adjudged
 in this Court, although the Queen had the Abboufson in right of
 the Dutchy. But Walmsley doubted of the point of Usurpation,
 being after two Presentments; because the Presentee comes
 not in only by Act of the Patron, but by the Ordinary, who ad-
 mits him. But for the other points, they all resolved; and it
 was adjudged for the Defendant.

2 And 42.
 Moor 421.
 Jones 6.
 Co. 1. 49. b.
 Hob. 323.

Co Lit. 18. a.
 Co. 1. 49. b.
 Hob. 323.

Co. 1. 49. b.

2 Cr. 123. 4.
 Cos 6. 30. 4.
 Ante 241.

Beswick versus Cumden.

Trin. 38. Eliz. rot. 1038.

(46)
Moor 449.
Noy. 68.
Ante. 402.

Ant. 466.
845.

Ant. 403.

Action upon the Case; and counts, that he was seised in Fee of Lands adjoyning to a Brook, whereof the Defendant was seised; and that the Defendant custodivit, & manutenuit quandam molem in the Brook, by reason whereof the Brook surrounded his Land, &c. Whereupon the Defendant demurred; and it was argued by Glanville for the Plaintiff, and by Lewkner for the Defendant. And all the Justices resolved for the Defendant: First, that this Action upon the Case lies not; because, if it were a Nuisance, the Plaintiff might have his remedy by any Assise or Quod permittat. And a Man shall never have an Action upon the Case, where he may have any other remedy by any writ founded in the Register; and this is only given, where there wants such a Remedy. Secondly, there is not here any offence committed by the Defendant; For he alledgeth, that he kept, and maintained a Bank; which is, that he kept it as he found it; and that it is not any offence done by him; for he did not do any thing; And if it were a Nuisance before his time, it is not any offence in him to keep it. But the Plaintiff is to have his remedy to abate it, by a Quod permittat; and therefore the Case here differs from 4 Ass. Pl. 3. For there the using was a new Nuisance, but is not so here. Wherefore it was adjudged for the Defendant.

Whyddons Case.

(47)
Post 835.
Co. Lit 31.a.
Hob. 246.

Annuity. The Defendant saith, that he delivered the Deed of Annuity to the Plaintiff, as an Escrow to be his Deed upon a certain condition to be performed, otherwise not; And that the Condition was not yet performed; and thereupon the Plaintiff demurred. And, without argument adjudged for the Plaintiff. For the delivery of a Deed cannot be averred to be to the party himself as an Escrow. Vid. 19 H. 8.8.29 H.8. Dy. 34. Vid. postea, Trin, 43. Pl. 7.

Damport versus Symphon.

(48)
2 Cr. 469.

2 Cr. 469.

Action upon the Case; and counts, that he was possessed of a Fountain of Silver to the value of 500 l. and delivered it to J. D. to transport beyond Sea, and there to sell it, and to render an account thereof to the Plaintiff, which the said J. D. brake; and converted to his own use. Whereupon the Plaintiff brought his Action upon the Case against him, wherein they were at Issue, and the Defendant being produced as a witness on the part of J. D. falsely swore, that the said Fountain was not worth above the value of 180 l. whereas, in truth, it was worth 500 l. By reason of which false Oath, the Jury gave to the now Plaintiff but 200 l. Damages; whereas they would otherwise have given more Damages; whereupon he brought this Action; the Defendant pleads Not-guilty, and found against him, and Damages assessed to 300 l. And it was moved in Arrest

Arrest of Judgment, That the Action lay not; for the Law intends the Oath of every man to be true. And therefore until the Statute of 3, & 11 H. 7 which gives power to examine, and punish Perjuries in the Star-Chamber, There was not any punishment for any false Oath of any Witness, at the Common-Law; and now there is a form of punishment for perjury provided by the Statute of 5 Eliz. And if this Action should be allowed, the Defendant might be twice punished, viz. by the Statute, and by this action; which is not reasonable. And of that opinion were Walmsley, Beaumont, and Owen; that this action lies not: for at the Common-Law, there was not any course in Law to punish perjury: but yet before the Statute of 3 H. 7. The Kings Counsel used to assemble, and punished such perjuries at their discretion: and if he should be punished in Law by this Action, there would be some president of it before this time: but being there is not any president found thereof, it is a good argument, that the action is not maintainable: and it appears by 7, & 8 Eliz. Dyer 272. That at the Common-Law there was no punishment for perjury, but in case of Attaint: but in the Spiritual Court pro Læione fidei, in Cases Spiritual they used to punish them; and here they would, in this action, draw in question the intent of the Jurors, what greater damages they would have given, unless for this Oath, which is secret, and cannot be tried, and therefore to punish a man for his Oath, upon a secret intent would be hard: and if this might be suffered, every witness would be drawn in question. Wherefore upon these reasons they held, That this Action lay not, and gave Judgment for the Defendant against the opinion of Anderson, who conceived the Action was maintainable.

2 Cr. 601.

2 Cr. 601.

4 Inst. 12.

Co.Lit.Sect.108

Ive versus Sams. Trin. 38. Eliz. rot. 1805.

WAsT, and Counts of a Demise for thirty years made to the Defendant of the Mannor of Tottenham in Essex, The Defendant pleads, Non Dimisit modo & forma, and thereupon a Special Verdict found, That J.S. Lett the Mannor to the Defendant for Thirty years, Exceptis omnibus boscis, & subboscis, and afterwards makes another Lease to the same Lessee for sixty years of all Woods, and Underwoods growing, and being upon the Mannor without impeachment of Waste: and after that made a third Lease to the same Lessee for thirty years of the Mannor, to Commence after the end of the first Term. The first Term expires, the Lessee afterwards cuts down trees; and I've having the Reversion brings Waste. Et h, &c. Hearn for the Plaintiff; the question is onely, Whether by this Exception, or the second Lease, the Wood be so severed from the Mannor, that it doth not pass by the third Lease of the Mannor, and whether this third Lease was not an implicate surrender, and drowning of the second Lease; and he held clearly, That the Woods, and Underwoods, notwithstanding this Exception, and the second Lease, remained parcel of the reversion of the Mannor, and passed by the third Lease of the Mannor: and so is the opinion of Portman in Plowd. 104. & Dyer 223. Glanville c

(49)

Co. 5. 12. 2.

F R

contra

Co. 5. 11. d.
Co. Lit. 4. b.

Co. Lit. 324. 5.

Post. 605.
Ant. 264.

2 Cr. 84.

Co. 4. 63. b.

contra. First, By the exception the Soil is excepted, as 14 H. 8. 1. is, and, during that time, it remains excepted, and divided from the Mannor, to all purposes. But if one Lets an acre, parcel of a Mannor, for years, the reversion there is parcel of the Mannor, and shall pass by a Grant of the Mannor: But a Lease of the Mannor excepting an acre, the acre excepted is not any part of the Mannor to any purpose, and shall not pass by a Lease of the Mannor: and this difference appears by Bromley, in Plow. 104. & 38. H. Then the soil of the Wood being severed for the time, it shall not pass by the third Lease of the Mannor; and the second Lease doth not conjoyn them to the Mannor: for thereby the soil is not Lett, but onely the Wood growing, &c. which extends only to a Lease of the Trees; so it remains always severed. Wherefore this issue is found for the Defendant, that he did not Lett, &c. | Walmesley; It is agreed in Culpeppers Case, 2 Eliz. Dy. That if I sell Trees growing within my Land, they are now become Chattels: but, if I buy them again, they are now rejoyned to the Inheritance; and here by this exception of the Wood, the soil is excepted, and severed from the Mannor in possession: but it is parcel of the reversion of the Mannor; and there is not any difference, where parcel is Lett, and where parcel is excepted; so it passed by the taking of the third Lease, which was clearly a surrender, or extinguishment of the second Lease presently; although this third Lease is to commence at a day future; as it hath been agreed in this Court; because by his acceptance, he allows the Lessor able to Lett the Land during the other Lease. Anderson; There is no doubt; but that the soil of the Wood is excepted, and yet it remains parcel of the reversion of the Mannor, and shall pass by a Grant, or Lease of the Mannor, and shall be recovered by a recovery of the Mannor: and there is not any difference to this purpose, betwixt a Lease of parcel, and an exception of parcel of the Mannor. And I agree, that if Trees be severed from the Mannor by Grant, yet, if they afterwards return to him, who had the Mannor, They be rejoyned, and are not Chattels in him: and that his acceptance of the third Lease was presently a surrender, or extinguishment of the second Lease. For he could not have the Land, and Trees in him, in several degrees; but the Trees shall be rejoyned to the Land by the last Lease: and if Lessee for twenty years takes a Lease for ten years, to begin at Michaelmas, there is no doubt, but that the term for twenty years is surrendered, or determined presently: for by the Lessees acceptance the Lessor hath power to make a new Lease, during the former, and at the time of the Lease making. Wherefore, &c. And Beaumont agreed with him in omnibus. Wherefore (absente Owen) Judgment was given for the Plaintiff. Note: Walmesly said, If one bargains and sells his Trees to one, and after Lett the Land unto him for years, the Trees are now rejoyned to the Land: So that if the Lessee cuts them down, he shall be punished in Wast. Sed Quære de ceo. 5 Co. 11.

Brown *versus* Terry. Hill. 37. Eliz. rot. 620.

The Case upon Demurrer was. It was found by Office, That
 J. S. who held of the King, died without Heir. W. S. as Heir
 to J. S. traverseth this Office, and was at issue with the Queen,
 that J. S. did not die without Heir; and, hanging this Issue,
 he made a Feoffment of the Land, with Letter of Attorney
 to make Livery; and after the issue was tried, and Judgment
 given against the Queen. And after that Judgment, and be-
 fore the Writ of Amoveas manum executed, the Attorney made
 Livery according to the Deed: and, whether this were a good fe-
 offment, or not, was the question. First, because the Heir,
 at the time of the making of the Deed of Feoffment, had no-
 thing, &c. Secondly, Because at the time of the Livery execu-
 ted, the Queens hands were not amoved, and so the Livery was
 during the Queens possession. Daniel, Serjeant; By the Judge-
 ment, the Queens possession is utterly defeated, and is in the
 Heir, before any Amoveas manum awarded: for that is onely
 to this purpose, To compel the Escheator to avoid the posses-
 sion, if he will hold it against the Judgment; and so the opi-
 nion of Stamford, 78. 10 Ass. 2. 10 Ed. 3 Ass. 156. And the difference is
 where the Queen seileth by Title: for then her Title being
 determined, there ought, notwithstanding to be Livery made
 to him who hath the Right: but, when She seileth without
 cause; and he, who hath Right, hath Judgment for him, he
 may enter without Livery: as 5 Ed. 3. Quare Impedit 34. And the
 Deed of Feoffment before the Judgment is good: for the
 party had always the right of Inheritance, and the Free-hold
 of the Land. Wherefore, &c. Anderson; There ought not to be a
 traverse, where the Queen by Office is entituled to the Fee in the
 Land; unless it be in Case, where an Office is found after an
 attainder of Felony, or Treason; in which Case it is given
 by the Statute of 2 Ed. 6. cap. 8. But Owen said, that this tra-
 verse is given by the Statute of 34 Ed. 3. cap. 14. Vide Stamf. 61. Sta-
 tute 36 Ed. 3. cap. 13. 8 H. 5. 19 R. 2. Title Traverse 37, & 47 Ander-
 son; if the Judgment be good, yet the Queen is not out of
 possession, untill the Writ of Amoveas manum executed; and
 then the Livery is void; and the Deed is not good. For, at the
 time of the Feoffment, he had not any authority to make Livery;
 but it is good to be advised therein. But Beaumont e contra: that
 the possession is out of the Queen by the Judgment; for the
 reasons before shewn; and the Livery is well made by the At-
 torney; the Queen being out of possession. Owen; The Deed,
 being void at the first, cannot be made good by a subsequent Act;
 as, if I make a Deed of Feoffment of Land, which I have not,
 and such a Letter of Attorney, and afterwards I purchase the
 Land; yet this Deed is void: So here. Wherefore, &c. Walm-
 sleigh absente, adjournatur: but, afterwards the same Term, it was
 adjudged, That the Livery was good: For, by the Judgment,
 the Queens hands were immediately amoved. And he had autho-
 rity to execute Livery upon the Land.

(50)

Ant. 463.

Co. 9. 98. 2.

Laughter versus Humphrey.

- (51) **R**eplevin. The Case was: That a man, and Woman, being Joynt-Tenants in Fee of a Mannor, intermarried, and after levied a Fine thereof to a stranger, who rendered it to them in tail: they have issue three Daughters. The Baron dies; the Feme takes a second Baron, and they levy a Fine, and retake it in special tail; the Feme dies without issue by the second Baron. The Daughters enter. A Lessee for years of the second Baron distrains a Copy-holder for his Rent. He brings a Replevin. The other avows, and did not aver the life of the second Baron; and, for that cause, it was held to be ill. And it was here moved, First, Whether the first Estate-tail be within the Statute of 11 H. 7. and held clearly, That, for the one Voyety, it was: But, for the other, not. Secondly, Whether the Estate in Fee be within the Statute of 11 H. 7. And it was held by all the Justices, That it was not, for it may go to a collateral Heir. And this Statute doth not provide, but for the Heir in Tail only. Thirdly, It was moved, that an Avowry cannot be made for Rent of a Copy-holder in this Court, no more, then an Ejectione firmæ, which is not for the Lessee of a Copy-holder. But all the Court e contra. For there is great difference between the Cases. For the Ejectione firmæ is brought for the Copy-hold it self. But this Avowry is for Rent due to the Lord, which is a Duty at the Common-Law; and therefore an Avowry may well be for it: as, 8. R.2. Avowry 86. i. s. Wherefore, &c.

Ant. 14.
Ant. 514.

Ant. 583.

Bonner versus Walker.

- (52) **A**vowry. The Issue was, Whether the place, where, &c. was the Free-hold of the Avower, or not? and it was found by the Verdict, That it was the Free-hold of the Avowants wife, Et per Curiam, it is found against the Avowant, For when he saith, his Free-hold, it is to be intended his sole Free-hold; and in his own Right. Wherefore, &c.

Mallet versus Mallet.

- (53) **T**respas for Lands in North-Peyton in Somersetshire, It was held per Curiam, that a Mannor in Reputation, which is not a Mannor in truth, will not pass by the name of a Mannor, in a Fine, or Common Recovery: for they shall not be taken by Intendment. But otherwise it is in a Conveyance: for there the intent of the parties will help it.

Co. 6. 64. b.
Post. 707.

Townsend versus Wale. Trin. or Hill. 35. rot. 1244.

- (54) **U**pon a special Verdict, the Case was: A Man, seised of Lands in possession, and of other Lands in Reversion, upon an Estate for life, deviseth by his Will in writing, That his Executors

Own 155.
2 And. 59.
Moor. 341. 508.

cutors should have all his Lands Free, and Customary, in D. for ten years to perform his Will, and the Will of his Father, with the profits thereof; and that after the ten years, his Executors, or any of them, should sell it for the payment of his debts. He makes three Executors, and dies: the one dies; the ten years expire; the Tenant-for-life dies; the two surviving Executors sell the Land, &c. Spurling; This Sale is not good. First, the Reversion of the Estate for life passed not; because he had other Lands there to satisfy the words, and it was not his intent to pass it, because there were not any profits to be taken thereby. Secondly, The Sale by two Executors is not good: for it ought to have been by all, or by the one of them only. But the Court resolved to the contrary in both. Wherefore it was adjudged accordingly. Ant. 26.

Soulle versus Gerrard. Mich. 37, & 38 Eliz. rot. 1149.

Ejectione firmæ. Upon Not-guilty pleaded, a special Verdict was found, That Richard Baker was seised of his Land in Fee, and held it in Socage, and had issue four Sons; and devised it to Richard, one of his Sons, and his Heirs for ever; and, if Richard died within the age of one and twenty years, or without issue, that then the Land should be equally divided amongst his three other Sons. The Devisor died, Richard the Devisee had issue Mary, and died within age; the three Sons enter, and Lett it to the Plaintiff. And the Defendant, by Maries command, ousted him. Glanville for the Plaintiff; it had been objected, That this remainder should not take effect, unless that Richard died without issue, and within age, for his Dis-junctive Or shall be taken for the Copulative And. But that cannot be: for that were to construe the intent against the direct words of the Devisor; which never shall be. Secondly, It hath been objected, that this remainder is limited to depend upon a Fee simple; which cannot be. I agree, That, at the Common-Law, as 19 H. 8. 8. & 29 H. 8. Dy. 33. a remainder cannot be limited to depend upon a Fee-simple; but, after the Statute of 32 H. 8. it well might; for the Statute gives liberty to every Owner to dispose of his Land by Devise at his Will, and Pleasure. So, thereby the Land ought to pass according to the Will of the Devisor; for so the Act of Parliament willeth. And, as a Remainder may be limited to depend upon a Fee by Act of Parliament; So it may by a Will, which is to be construed in such manner. And this is the opinion of Monson in Plowden, 413. And here, if it cannot be good by way of remainder; yet it shall be as a several Devise: so that the remainder limited shall be as a several Devise, and as a revocation of the first Estate after such an Act done; which may well be. Anderson; the words in the Act of Parliament, That, he may dispose at his will and pleasure are not to be construed so largely, as hath been said; but, He may dispose at his will, and pleasure, So as it be according to the Rules of Law; otherwise, it is a vain Will. And, if other construction should be made thereof, there would many absurdities ensue thereupon. And in this Case, if the Limitation had been single, (viz) That, if he died without issue, &c. it were plain, That it was an Estate-tail: for that shews what Heir ought to have it, and

(55)
Moot 422.

Co. 1 85. b.

2 Cr. 416.

and explains the former limitation, and is not repugnant thereto; and I conceive that this part of the limitation, If he die within age, is utterly void; for a Remainder cannot depend upon a Fee; and then it is all one, as if the limitation had been single, if he died without Issue. So Richard had an Estate-tail, which descended to his Daughter, and so the Defendants Entry was lawful. Wherefore, &c. Walmsley; the words in the Statute, At his will and pleasure, are to be construed, that he is enabled thereby, to devise by his Will to what person, what quantity of Land, and what Estate he will, according to the rules of Law; but it inables him not to make any devises against the rules of Law; and here the devisor hath given a Fee, so, as no nothing remains unto him. Wherefore he cannot to that intent limit a remainder over; For if so, a former Title, and Estate would thereby be defeated by a new one, which is against all the grounds of Law, whereby a remainder is void, which depends upon a Fee. But it seemeth here, That Richard hath an Estate-tail by the words, And if he die without issue, &c. He conceived also, That, if the remainder might pass upon his dying within age, yet it could not be until he died without issue also. For the Words being, If he died within Age, or died without Issue, Then, &c. this Then, which shews the beginning of the Remainder, shall be When he dies without issue, and not before. So it is all one, as if the Dis-junctive Or had been a Copulative. Wherefore the Plaintiff shall be barred. Beaumont accord; the Statute, That he may dispose at his will and pleasure, goes as well to Acts executed, as to Devises; but those ought always to be so intended, as that they may stand with the rules of Law. Otherwise, his Will is vain. Wherefore this Remainder to begin upon the dying within age is vain. So as the first part of the Will is of no value. Then the second part makes, that the Devisee hath an Estate-tail, although it be in a Deed; As 5 H. 5. 6. & 37 Ed. 15. A fortiori, in case of a Devise. Wherefore, &c. Owen accord; that the remainder cannot begin upon the first part of the limitation, no more, then if it had been upon a Conveyance or Grant; but that is void; Then the other part makes it an Estate-tail. And I agree, That, if the remainder might Commence upon the first limitation, yet it ought not to Commence by the words, and intent, until the other part be performed also, viz. That the Devisee died without issue. Wherefore here the Estate is in the Daughter. And it was adjudged for the Defendant.

1 Inst. 99. b.

Wentworth versus Wright.

(56)
Owen 144.
Moor 399.

2 Cr. 642.

Quare Impedit. The Case was: one Davies, Incumbent of the Church of A. was created Bishop of Saint Asaph; the Queen thereupon presented the defendant to that Church; and the Plaintiff, being Patron, brought the Quare Impedit, and, whether the Queen by Prerogative, or the Patron ought to present? was the question upon a demurrer. Yelverton, for the Plaintiff, there be in Law divers aboydances of Benefices, whereof this Creation of the Incumbent into a Bishop is one, whereby the

the Church becoming void, the Patron shall have the benefit, and Present again; and I know not any reason, why the Patron should not have the benefit of this avoidance, as well as in other cases of avoidance, as in taking of a second Benefice, Denudation, or otherwise. And there is not any Book where-^{2 Cr. 697.} by it may be proved, that there is any such prerogative in the Queen, but only 5 Mary, Br. Presentment al Elglife 31. And against that is the opinion 11 H. 4. 37. And, if a Church becomes void by the Incumbents being created a Bishop, the Queen, or Patron may present; and 5 Ed. 3. Quare Impedit 35. 21 Ed. 3. 39. 1 Ed. 3. 5. 6 H. 4. 5. Although it appears in those books, that the Church was void by the Incumbents being created Bishop, yet the Queen made not any Title to the Benefice for that cause, which is a great argument that the Queen hath not any such prerogative. And so are 44. Ed. 3. 25. and Temps Ed. 1. Quare impedit 181. where the King, (although the Benefice was void by creating the Incumbent a Bishop) made not any Title. And Doctor and Surdant, 116. b. is; That, if a Benefice be void by Death, Creation, or Cession, the six Moneths shall be accounted from the time of the Death, Creation, or Cession; which proves, That the Presentment appertained not to the Queen: for then there could not be any Lapse. And 6 Eliz. 228. the opinion is expressly, that the Queen hath not any prerogative in this case. Wherefore, &c. Drew e contra, The books vouched That the King, having Title by his prerogative, did not take advantage thereof, but made other Title, are not of any authority against the Queen. But some of them, as 41 Ed. 5. 5. & 17. Ed. 3. 40. and the greater opinion in 11 H. 4. 37. prove expressly for the Queen. And the common Experience at this day is, That the Queen, in all those cases of creating the Incumbent a Bishop, hath presented to his Benefices: and so there be many presidents thereof. And in 6 Eliz. Dyer, 228. the Plaintiff did not demur upon the Queens prerogative; but took issue, that the Church was void by resignation, before the Creation. And, although it is said, That this prerogative cannot be proved by Reason, this is not material, nor ought there any reason to be given, or enquired about the Queens prerogative: For, in regard She is the Head of the Weal publique, and defends Her Subjects, and their Possessions, the Law attributes unto her many prerogatives, for which no reason can be yielded; as to have the Tythes of Lands lying out of any Parish; to have the Primer Seisin of all Lands, as well of others, as of those, which are holden of Her in Capite; to have the Temporalities of the Bishopricks; and the like. Yet there is great reason also for this prerogative: for the Queen hath advanced the Incumbent to a great dignity, and it is Her great loss to part with the Temporalities of the Bishopricks. She was also the means to cause the avoidance of this Benefice. And it is an usual practise, That the Queen for the most part, upon creating of Bishops, grants unto them to hold their Benefices in Commendam which is good against the Patrons; because the Presentations belonged unto her. And that is as great a prejudice to the Patron, as if the Queen her self had presented thereto. Wherefore, &c.

^{2 Cr. 692.}

Post. 790.

^{2 Cr. 691.}^{2 Cr. 692.}

Dier 228. b.

Post. 542.

Marsh

Marsh *versus* Curteys.

Trin. 37 Eliz. rot. 132. or Hill, 38 Eliz. rot. 1302.

(57)
1 Rol. 427.

1 Rol. 427.

Post. 572.

Ejectione Firmæ. Upon a special Verdict it was found; That the Plaintiff was seised of a Messuage, and Lands in Fee, and Lett it to the Defendant for years, rendering Rent, upon Condition, That the Lessee shall not parcel out the Land, nor any part thereof from the House. The Lessee grants all his term in the House, and part of the Land; retaining to himself the residue of the Land, and afterwards Letts part of that residue: the Rent afterwards is Arrear, and demanded by the Lessor, and accepted. And, for the condition before broken, he enters; and, whether his Entry were congeable, or not, was the question. Glanville, for the Plaintiff; First, the Condition is here broken, for the Words parcel out the Land is a common term in Essex, which is as much as to say, That he shall not Lett, or divide any part thereof from the House; but that they should all go together: so the Condition is clearly broken; the acceptance then of the Rents afterwards shall not estop him to take advantage of the Condition: because it is collateral; but otherwise it is, where the Condition is for Non-payment of Rent; and this difference is proved by the Books, 46 Ass. 5. 20 Ed. 4. 18. Therefore, &c. And, as to the first point, all the Justices, Anderson, Walmsly and Beaumont agreed cleerly, that the Condition was broken: for although it were objected, that the Land is not parcelled from the House, but the House from the Land, and so the Condition not broken in the Words, and a Condition ought to be taken strictly: it is all one, where the House is divided from the Land, and where the Land from the House; for the intent of the Condition is broken, and also the Words: for the Land is divided, and parcelled from the House; and the dividing thereof from the House is the Matter, and Substance of the Condition; and it is not material, where it began, nor where the separation was made. Therefore, &c. and in proof thereof Vide 5 Ed. 3. Debr. 15. For the second point, Anderson, and Beaumont held; That this acceptance shall barr him of his Entry; For he accepted it, as Rent due unto him by the Lease; which cannot be, if the Estate be undone by an Act precedent; for if he had entred for the Condition broken, he could not have had the Rent; and when he accepted the Rent, he shews his intent, and Election to have the Lease continue. And there is not any difference; as to this purpose, betwixt a collateral Condition, and a condition for paying Rent: for the reason, that he should be barred of his Entry is one in both Cases, viz. Because, by his own act, he hath affirmed the Lease to have continuance after his title of Entry accrued unto him; but the acceptance of Rent, due before his title of Entry, is no barr: for, it being then due, he might have debt for it. And it doth not shew any election in him to continue the Lease, as it doth here. Therefore, &c. Walmsley e contra, in this point; for there hath been a common difference betwixt a Condition collateral, and a Condition for the payment of Rent: for, in the last case, acceptance of the Rent, due after, dispenseth therewith; but not with the first.

And this difference was agreed here in Rawlins Case, for the ship, where the condition was for the payment of Rent, and a Fine: after non-payment of both; he accepted of Rent due afterwards. And it was held to be a dispensation with the Condition for non-payment of the Rent, but not for the other part of the condition. And this difference stands upon good reason, because the acceptance of the Rent is a good dispensation with the condition. And in that he received the Rent it self (the non-payment whereof is his Title of Entry) that acceptance is a satisfaction unto him for the Rent: but it cannot be any satisfaction for any other matter. For one thing due unto me, cannot be satisfaction for another thing due unto me. And the Rent is due for the profits of the Land taken by the Lessee. But when the Lessor is satisfied of the thing, for which the Entry is given him, it is good reason to barr him of his re-entry as where the Lord hath cause of Cessavit, acceptance of the Rent shall barr him. Wherefore, &c. Owen absente, adjournatur. Afterwards, it was adjudged for the Plaintiff, 3 Co. 65.

Lee and his wife *versus* Colehill.

Pasch. 38 Eliz, rot 1707.

DEbt by them, as Executors of Smith upon an Obligation, against the Defendant, as Executrix to Colehill her husband. The Defendant pleaded the condition to be for the performance of Covenants within a certain Indenture betwixt Smith on the one part, and Colehill on the other part: Whereby Colehill, being Customer of London, made Smith his Deputy in the said Office, and Covenanted to surrender those Letters Patents before a certain day; and to procure new to himself, and the said Smith. As also, that if Smith died, living C. that C. should pay to the Executors of Smith 300l. and shews the Statute of 5 Ed. 6. cap. 16. That all promises, bargains and contracts, for the buying of divers Offices (whereof this is one) shall be void, and thereupon the Plaintiff demurred. Glanvil prayed Judgment for the Plaintiff for there be many Covenants within the Indenture, whereof some are good and lawful: and for them, doubtless, the Obligation remains good. For, although, the Statute makes the Covenants concerning the buying of the Office, and the Obligation as to it void, yet for the other Covenants therein recited, being lawful, the Obligation continues in force. Vid. 20 H. 6. 23. and 4. H. 7, that an Obligation may be avoided, or discharged in part, and stand good for the residue. Drew e contra. All the parts here of this Indenture concern the exercising of this Office. And if any of the Covenants concerning other matters in the Indenture should be accounted good, yet the Obligation is void in all (but for the good Covenants peradventure an Action of Covenant would lye, if they be not performed) for the Statute saith, the Bond to that purpose shall be void. And then, it is not possible, it should be void to this intent, and be good for another: And, it hath been held in the Queens Bench, if a Parson makes a Lease; which is void by the Statute for non-Residence; and there is an Obligation for the performance of Covenants; Although there be some Covenants therein, which do not concern the Lease: yet the Bond is intirely void. Otherwise, all the meaning

(58)

Co. 3. 82.

5. E. 6. c. 16.

of the Statute should be defrauded by putting in a lawful Covenant, within the Indenture, wherefore the Court here did not deliver any great opinion: but, absente Walmesley, adjournatur. And it was afterwards adjudged, that this Obligation was void in every part, being against Law. Co. 82, 83.

Wilkinson versus Netherfol.

- (59) **I**nformation upon the Statute for buying of Leather, brought in the Court of Pye-Powders of D. The Defendant was there condemned, and in Execution: and being brought hither by Hab. corp. it was moved, that the Judgment was void et coram non Judice. For, although it be the Kings Court, yet Sute shall not be there upon any penal Law, but within one of the Queens usual Courts at Westm. As Plowd. 208. Stradlings Case. And hereto all the Court agreed, that a Suit is not maintainable there. But because they have power to hold Pleas in Actions of Debt, and so had colour to hold Plea in this Action, the Judgment is not void, but voidable only by Error. And Anderson said, the Court of Pye-Powders had his name, because they are there to hold Plea only of things Parvi ponderis, viz. of Contracts, and other things done in the Fair.

Co. 6. 20. 2.

4. Inst. 272.

Willis versus Fletcher. Pasch. 38. Eliz. rot. 1137.

- (60) **R**eplevin. The Defendant made Conusance for Damage fesante, as Bayliff of A. and shews, that B. was seised of the Land, which was held in Capite, and devised it to A. And because it appeared upon the matter, that A. was but Tenant in Common with the Heir, exception was taken to the Conusance: Because it ought to have been made in the name of the Heir also. Walmesley held that the Tenants in common ought to joyn in the Avowry, and the Conusance ought to be in both their names: for the Damages are to both. But Anderson and Beaumont held the contrary. For a Tenant in common may solely defend, and he only may take a Distress; although his Avowry is by way of Action, and yet may justify it. But, because he shewed not in the Conusance, what Estate the Devisor had at the time of the Devise; but, only, that he was seised of the Land, it was held to be ill. And therefore adjudged for the Plaintiff.

Ant. 143.

Aldworth versus Peel.

- (61) **D**ebt against Peel as Executor. The Plaintiff had Judgment to recover de bonis Testatoris; And thereupon a Scir. fac. was awarded, and the Sheriff returned, quod nulla habuit bona Testatoris; And the Plaintiff surmisseth, that he had wasted the Testators Goods: Whereupon he prayed a Scir. fac. Why he should not have Execution de bonis propriis: and ruled by the Court, That this Writ shall not be awarded upon the surmise of the party, upon a devastation; nor, in any Case, where the Judgment is de bonis Testatoris, unless it be upon return of the Sheriff, where he returns a Devastavit. Vid. 9 H. 6. 9. and 57. Fitz. H. Execution. 9.

Ant. 216.
Post. 859.

Grego-

Gregory *versus* Hill.

R Eplevin. The parties being at issue upon a Prescription to (62)
 have Common in certain Land called Stich-Hah in Comitatu War. Ant. 390.
 it was held by Anderson, Walmsley and Beaumont (absente Owen) who
 delivered their opinion so to the Jury; that, where one pre-
 scribeth to have common appurtenant to his house, and twenty
 acres of Land, and it appears upon the Evidence, that he hath
 but eighteen acres, or a lesser parcel, yet he hath not failed of
 his prescription. But, if he had twenty acres, and ten acres are
 Free-hold, and the other Copy-hold, he there fails of his prescrip-
 tion: For he cannot make a prescription for both. So it is, if
 it appears upon the evidence, that part of the Land was Co-
 py-hold an hundred years since; but now is his Free-hold. Ant. 390.

Huberts Case in Camera Stellata.

O Ne Hubert of Norfolk was convicted in the Star-chamber upon a (63)
 Bill exhibited against him, for procuring one Webster to coun-
 terfeist himself to be one Alexander Gellibrand (who was then be-
 yond sea) and to acknowledge a Fine of his Lands by the
 name of A. G. There being then in Court the Lord Keeper, Pop-
 ham Chief Justice, Gawdy, one of the Justices of the Queens Bench,
 and Walmsly one of the Justices of the Common Bench, & divers
 Lords: the Sentence was, that he should make Fine to the
 Queen; and should be imprisoned, and that the Fine levied un-
 to him should be void (if it could be so done) by entering a Va-
 cat upon the Roll, or otherwise, as the Justices of the Common
 Bench should best approve. And, if it cannot be so made
 void, That then Hubert, by Fine, or otherwise, as A. G.
 should Devise, should reconvey the Land to him, and his
 Heirs, in the same manner as it was before, at the time of
 the Fine levied. But Popham said, that it might be well
 made void by entering a Vacat upon the Roll. And he said, that
 it was ruled in the Case of one Holcomb in the Common Bench,
 where one brought Debt against Holcomb, and procured a
 stranger in his name to appear, and confess the Action in the
 name of Holcomb; Whereupon Judgment was entered. This
 practise being afterwards examined in Court, and discovered
 by confession, a Vacat was entered upon the Roll. And to war-
 rant this, another precedent was shewn, Tempore H. 6. And the
 Lord Keeper said, that he had always noted this difference. If
 one of my name Levies a Fine of my Land, I may well confess,
 and avoid this Fine, by shewing the especial matter: for that
 stands well with the Fine. But if, a stranger, who is not of my
 name, Levies a Fine of my Land in my name, I shall not be re-
 ceived to aver, that I did not Levie the Fine, but another in my
 name: for that is meer contrary to the record; and so it is of all
 recognisances, and other matters of Record. But I conceive, when
 the fraud appears to the Court, as here, they may well enter a
 Vacat upon the Roll; and so make it no Fine: although the
 party cannot avoid it by averment, during the time, that it re-
 mains as a Record. Co. 12. 123. Co. 5. 68.

Bon *versus* Smith

(64)

G Lanvile, Serjeant prayed the opinion of the Court in this Case, A Man had issue, a Son, and a Daughter, and devised his Land to his Son in Tail, and if he died without issue, that it should remain to the next of his Name, and died; The Son died without issue, the Daughter being then married, whether she should have this Land was the question; and held per Curiam that she should not, For she had lost her name by her marriage. But it should go to the next Heir Male of the name. But, if she had not been married at the time of her Brothers death, the Daughter should have had it: For she was the next of the Name, Vide postea.

Post. 576.

Hollingworth *versus* Ascough.

(65)

A Uditia Querela upon a Defeasance of a Statute of 2000l. and grounded the Audita Quer. upon the Defeasance; the Defendant saith, that he made another Defeasance Absque hoc, that he made that Defeasance. And it was thereupon demurred; because he ought to have pleaded the general issue, non est factum; for this Plea amounted no more. And of that opinion, after argument by the Serjeants, was all the Court. Wherefore it was adjudged against the Defendant,

Block *versus* Pagrave, & Pagrave.

Hill. 37 Eliz. rot. 631.

(66)

D Ower. Upon a special Verdict the Case was. That one devised his Land to Mary Pagrave his Wife, until Faith his Daughter should come to the age of Twenty one years, and then to Mary Pagrave, and Faith, for their Lives; and the said Faith, the Daughter, hath not yet attained her age of Twenty one years; And in Dower against Mary P. and Faith, they plead, that they be not Tenants of the Free-hold modo & forma, prout, &c. And whether upon the matter, Mary and Faith be joynt-Tenants, or Tenants in Common, or how otherwise they hold, was the question. Anderson and Beaumont; if it be a Term for years in Mary P. the Mother, and a Free-hold to the Mother, and F. the Daughter; this Term for years cannot stand with the Free-hold: and therefore it is drowned, and they are immediate Joynt-Tenants of the Free-hold; and the issue is found for the Demandant. But, if the Term be drowned only for the Woyety, as they said it was clear, that it should be; and she is Tenant for years, remainder to Faith of the other Woyety: it is then found for the Defendant, that they be not Tenants modo & forma, prout, &c. But they held that they were Joynt Tenants for the reason aforesaid. Walmsley agreed, that if it should enure, as an immediate Devise; That the Term should be extinct, and

Co. Lit. 182. b

and they are joynt-Tenants of the Free-hold. But peradventure the Will was to make it a Term in the Mother, and, after the expiration of the years, a Free hold; according to the intention of the Devisor it shall be construed, that it should not be a Devise of the Freehold until after the years expired: and in the mean time the Land should descend to the Heir. But afterwards, upon realease of Damages, the Defendants confessed the Action.

John Leak, and John Michel, for themselves, and the Queen,

versus John Howel, and John Hall. Trin. 33 Eliz. rot. 24.

(67)
Information upon the Statute of Primo Eliz. cap. 12. and For that That divers persons unknown, betwixt the First of January 33 Eliz. and the First of March 33 Eliz. in quibusdam Navibus, to the Plaintiffs unknown, brought in from the parts beyond the seas, Usq; Ratcliff in Comitatu Middl. within the Port of London, one hundred forty four pieces of Buckram, fourteen pieces of cloth of Gold, one hundred twenty four pieces of Linen cloth, and divers other parcels therein mentioned; and the said Goods and Merchandises, 15 Feb. 33 Eliz. out of the ships, by way of Merchandise, put upon the Land, and discharged after four of the clock in the afternoon, the Custome, and Subsidie for them due, not being paid, nor agreed for with the Customer of London, nor in any other Port, nor with their Deputy, against the form of the Statutes in such Case provided: and that, by reason thereof, all the said Goods became forfeited; Whereof the one Moiety should be to the Queen, and the other Moiety to him, who seized, or sued for them; and, that those Goods came to the Defendants hands. Whereupon he prayed Process against them, &c. The Defendants plead, that the said Goods, and Merchandise were not, at the time mentioned in the information, put upon the Land, or discharged by way of Merchandise, prout in the information, &c. Et hoc paratus est verificare. The Queens Attorney, by replication saith, That they were put upon the Land, and discharged by way of Merchandise, prout, &c. in the information, &c. Et hoc petit, quod inquiratur per patriam, & prædictus Defendens similiter. And hereupon a special Verdict was found, viz. That all those Goods were taken by way of re-prize, and brought within the Port of Penryn in Cornwall, and that 15 Feb. 33 Eliz. about Twelve of the clock at Noon-day, put into two Lighters, and by them brought to the Sea-shore, aqua ab inde refluxa, about Two of the clock post meridiem; And, that the greater part of those Goods were put on Land before four of the clock post meridiem; and, that the said fourteen pieces of cloth of Gold, and the one hundred twenty four pieces of Linen, were put upon the Land out of the Lighter after four of the clock post meridiem; and that there was an agreement, before the said Goods were taken out of the ship, made at the Custom-house in Penryn, with Rich. Enys, Deputy of John Basset, Deputy to Thomas Peyton, the Customer there, and with the Comptroller of the Custome there, to answer to the Queen all Customs, and Duties; which should be found due to the Queen for the said Goods,

Co. 5. 17. b.

Goods upon view of them; And, that the said R. Enys had exercised that place as Deputy there, for three years before, &c. And if upon all this matter, &c. And it was argued divers times before the Barons; and moved first, whether for these Goods, taken by way of Repize, any Subsidie is to be paid: for the Statute of Primo Eliz. cap. 19. is, That for Goods brought into the Realm by way of Merchandise, or carried out of the Realm by way of Merchandise, Custome shall be paid: so the Statute therein extends only to Merchants, which Traffique, and not to Goods wracked, nor to the Goods of Ambassadors, or of any other man brought in for his proper use, and provision; and so of Goods taken by way of repize, which are taken with the hazard of the lives of the takers of them, which are not brought in by way of Merchandise. But the Court resolved as to it, That Subsidy was to be paid for them: For the Statute extends not onely to Merchants, but to all Goods brought in by any man to make a benefit by the Sale of them, and so it hath been often ruled before these times. Secondly, Whether there were here any agreement with such a person, as the Statute intends; For the Statute is, that the Custome not paid, nor the Customer, or his Deputy, by, and with the consent of the Comptroller in the Custome-house, not agreed with; and here the agreement is not with the Deputy himself, but with the Deputy of the Deputy, with the Assent of the Comptroller, &c. And it was moved, that this is good enough: for the Deputy of the Deputy is Deputy of the first customer; and, although there be twenty, the one under the other; as the twentieth Assignee shall vouch by Warranty made to one, and his Assignees, as 38 Ed. 4. 21. and 7 Eliz. Dy. 238. a Deputy certifies falsely, it is his Masters Act, for the supplies his place; and 32 Ed. 3. Bar. 259. Commission to one to make purveyance for Carriage, another, as his Deputy did it, and held well enough. And here Rich. Enys was Deputy in Facto, and exercised the place in the Custome-house: And, although he were not de Jure, that shall not prejudice the Merchants, who made their Compositions with him: For it would be very mischievous unto them to examine by what authority they sit, and make their composition. And for that purpose vide 9 Ed. 4. 5. grant of liberty by a King an usurper 21 H. 6. Attornment by a Disseisor 18 Eliz. Lord Arundels Case, surrender to a disseisor, and a Regrant by him, held to be good. And of that opinion were all the Barons, that it was sufficient for them to make their composition: for he being deputy in Facto; and sitting in the Custome-house with other Officers, they making their composition there, it was well enough. Thirdly, Whether this agreement, being incertain, be good? &c. And it was held, that it was; for, being Goods taken by way of Repize, They could not by Intendment have notice what the quantity, and parcels of the Goods were, to make a more certain composition. And it is all one in reason with Fogssas Case. Fourthly, Whether this were any putting upon the Land after four of the Clock post meridiem against the Statute of 1 Eliz. cap. 12. And all the Barons resolved, that in regard it was found, that the said Goods were unladen out of the Ships in Lighters, and by them brought to shore at two of the Clock post meridiem, aqua ab inde refluxa, that was a putting them upon the Land before the fourth hour

Post

post meridiem. And so, for the matter in Law, they all resolved for the Defendants. And divers exceptions were taken to the manner of their proceedings. First, because it is not alledged in the Declaration, that they were brought into the Realm by way of Merchandize, but only laid upon the Land by way of Merchandize; which is not any offence against the Law: for Goods may be brought in not by way of Merchandise, and yet laid upon the Land by way of Merchandise, as Goods of an Ambassadour brought unto the Land, who afterward dies before they be unladen, and then laid upon the Land to be sold, this is no offence against any Law. And the Court seemed to incline, that it was a material Exception. Secondly, the Defendants Plea ought to be concluded; Et de hoc ponit se super patriam. And the issue ought not to be by Replication, where an Affirmative and Negative is before. Thirdly, Twelve of the Jury appeared, and were adjourned to another day. And the Record is, that at the day, four of those Twelve made default, therefore a Decem tales was awarded, where it ought to have been, that, although four of them adjourned, made default, yet twenty others appeared, and therefore it ought to have been, Et quia octo only appeared, Et residuum Juratorem made default, therefore a Decem tales was awarded, and in proof hereof was cited 1 R. 3. 4. 15 R. 7. 16. But the Barons doubted, whether it were not helped by the Statute of 32. H. 8. And whether it should extend to informations for the Party and Queen. But, at the end of the Term, Judgment was given for the Defendants upon the matter in Law,

Goodwin versus Longhurst.

UPon a special Verdict, the Case was: that a Copy-holder had Licence from his Lord to let his Land for Twenty one years, he lets it to the Plaintiff for three years, who entred, and being Ejected, brought an Ejectione firmæ. And it was moved; First, if a Lease be made by a Copy-holder for years, and the Lessee is ousted, whether he may maintain an Ejectione firmæ thereof at the Common Law: and all the Barons held clearly, that he might, for it is a good Lease between the parties, and against all others, but the Lord. And, as this case is, it is good against him also, by reason it is done by his Licence. Secondly, it was moved, whether this Lease being but for three years, be warranted by his Licence to make a Lease for twenty one years: but the Barons spake not much thereto: Sed adjournatur. But afterwards, upon another motion, they all resolved, that it was a good Lease, and this Action well maintainable thereupon at the Common Law. And was adjudged accordingly for the Plaintiff.

(68)

Ant. 469.
Post. 623.

Antea 69.

Buskyn versus Edmunds.

Mich. 38 & 39 Eliz. in Camera Scaccarii.

ERror brought in the Exchequer Chamber, and assigned, because the Plaintiff declares in debt against the Defendant, as Assignee, and supposeth, that he Lett to J. S. for years, rendering Rent; and that J. S. by his Will devised to the Defendant, and he entred, and was possessed, &c. And shews not, that the Lessee made any Executor; nor, that the Defendant entred with the Assent of the Executor, nor Virtute Legationis; nor hath he conveyed any lawful Estate to himself; but is in merely by Tort

(69)

1 Rol. 459. 618.
2 Rol. 428.
Ant. 415.
Post. 636.

and

and so the Action was not maintainable : and for this cause all the Justices and Barons held the Declaration to be ill, and therefore reversed the Judgment. But for the principal matter, whether there ought to be a demand of the Rent: all the Justices and Barons held, that there ought to be a Demand, although it were payable out of the Land, besides Anderson, who held the contrary: for he said, it being appointed to be paid out of the Land, it is but a Summ in gross, and no Rent. Ant. M. 37. pl. 7.

Bagshaw *versus* Playn. Mich. 37, & 38. rot. 524.

(70)
2 Cr. 88.

Error of a Judgment in Debt; where the Plaintiff declared against the Defendant, as Executor to J.S. in Debt upon an Obligation, and Demands 47 l. 8 s. 8 b. monetæ Flandriæ attingen, ad valenciam 40 l. 2 s. 6 d. The Defendant pleaded Plene Administravit, and found against him, and Judgment thereupon, Quod recuperet Debitum prædictum. The Error assigned was ; because it was not inquired by the Jury upon taking the Verdict, nor by Wit to inquire of the value of the money, and to give Judgment accordingly. But Daniel, Serjeant moved, that it was well enough, and the Value shall be intended to be, as it is in the Declaration, and to that purpose cited a President in the Book of Entries, fol. 157. and another President in the Queens Bench, Hill. 32. Eliz. rot. 637. betwixt Davidgs and Wychalls, where Debt was brought for 20 l. and declares upon sale of certain Pilchards for 22 l. Portugalæ, quæ attingunt ad valenciam 20 l. Legalis Monetæ Angliæ; And upon a Nihil dicit, had Judgment to recover the 20 l. and it was much debated, and argued, but all the Justices and Barons here held it to be Error: For the value of Flemish Money is not known to us no more than the value of Twenty Quarters of Wheat, or the like, whereof the value is to be inquired ; as 11 H. 7. 5. and 9 Ed. 4. 49. which is the reason, that the Plaintiff in his Declaration, ought to express the value thereof. But of current Money here, whereof the value is known, it needeth not. And therefore the Judgment here ought to have been Quod recuperet the 47 l. 8 s. 8 d. Flemish Money, and a Wit have been awarded to inquire of the value thereof. And therefore, as it is given, it is erroneous. And for that cause the Judgment was reversed.

2 Cr. 88.

Post. 800.

Stafford *versus* Pooler. Trin. 36. Eliz. rot. 223.

(71)

Action upon the Case for these words; Whereas the Plaintiff, Anno 34. Eliz. was, and yet is a Justice of Peace in the County of Gloucester, that the Defendant apud A. in Comitatu Gloucestræ, spake these words; One Web, being Arrested, as accessory of Felony for stealing his own Goods, Mr. Stafford (innuendo the Plaintiff) knowing thereof, discharged the said Web by an agreement of 3 l. whereunto Mr. Stafford was privy, whereof 30 s. was to be paid Mr. Stafford, and was paid to his man by his appointment. The Defendant pleaded Not-guilty, and found against him, to his Damage of 40 Marks; and Judgment given in the Queens Bench for the Plaintiff. And now Error thereof brought, and assigned; that the words were not Actionable: for they be insensible, and it is impossible, that one should be Arrested as accessory of Felony for stealing his own Goods: for although one peradventure may be a Felon for stealing his

his own Goods from his Bayliff, with an intent to charge him with them; yet he cannot be an accessory in Felony for stealing his own Goods; for he is therein principal, or nothing. And although he said, he discharged him by agreement, &c. yet that is not any Offence: for it is not averred, that there was any offence committed. And, although he were Arrested, yet it may be he was not guilty of any Offence; and he might also discharge him by agreement, and yet it is not any offence; for it may be, that in an appeal of Robbery he compounded. But all the Justices (besides Walmshy) held, that the Action was maintainable: For one may be an accessory in Felony for stealing his own Goods, viz. where he procures another to steal them. And, although there were not any Felony committed, yet being arrested for that cause, he ought not to discharge him upon an agreement for Money. For it is a great offence, being done by a Justice of Peace: and, being false, is a great slander unto him; And shall be intended to be spoken in the worst sence, that he was privy to the agreement to conceal the Felony. Wherefore the Judgment was affirmed by all the Justices and Barons, besides Walmshy.

Ant. 68.

Woodward *versus* Parry.

DEbt upon a Bill Obligatory of 14 l. The Defendant Woodward demanded Oyer of the Bill, which was; that Woodward acknowledged, that he owed him 14 l. solvendum una cum 6 l. upon accoupt between them. And it was entred in hæc verba. And the Defendant thereupon demurred in Law; because it is a debt of 20 l. and not of 14 l. And he ought to have Counted accordingly, or at leastwise ought to have counted upon the Bill, as it is. And it was thereupon adjudged for the Plaintiff. And the Error now assigned in this Point. But all the Justices and Barons resolved, that it was good enough: for there is but 14 l. due upon this Bill. And that, which comes after the Solvendum, is void; as that, which comes after an Habendum. A second Error assigned was, for that this Action was brought by Parry, and his wife, for a Debt due to the Feme before the Coverture. As also because Parry, being a Clerk of the Queens Bench, It was entred upon the Declaration Querens in propria persona, &c. which cannot be. For although the Baron hath a priviledge; yet the Feme hath not. Sed non allocatur: For every Plaintiff, if he will, may be in propria persona, and this Entry is not by reason of his priviledge; but because they are there in person. Wherefore the Judgment was affirmed.

(71)

Grymston *versus* Reyner. Hill. 38 Eliz. rot. 943.

Assumpsit. For that the Defendant, in consideration of such Clothes delivered at such a place, promised to pay 8 l. And, in Consideration of a Debt upon arrearages of Accoupt, the Defendant being indebted in 18 l. the Defendant promised to pay it. The Defendant pleaded Non Assumpsit; and found against him, and several Damniages assessed; but entire Costs, and Judgment accordingly for the Plaintiff. And Error thereof brought and held, That the Consideration upon the second

(72)

2 Cr. 343.

Assumpsit was not sufficient. But for the first, and for the Entire Costs, the Judgment was affirmed. And for the second Assumpsit, it was reversed.

Bedell *versus* Stanborough. Pasch. 38 Eliz. rot. 480.

2 Cr. 341.

- (73) **E**jectione firmæ of a Lease apud Denham of Lands in the Parish de Denham prædicta. After Not guilty pleaded, and Issue, a Ven. fac. was awarded de Vicineto de Denham: And Error therefore assigned; because the Ven. fac. ought to have been de Parochia de Denham, where the Land lies. Sed non allocatur: For, in regard it is de parochia de Denham prædicta, the Parish, and Village are intended to extend, and to be all one, and no more. Secondly, because that an Habeas corpora Juratorum was awarded upon the Roll; but a distringas issued. Sed non allocatur: For it is a misconveyance of the Process, and it is helped by the Statute. Wherefore it was affirmed. And Trin. 40 Eliz. rot. 243. betwixt Morley, and Clapham, it was so adjudged.

Dioxon *versus* Adams.

1 Rol. 28.

(74)

Assumpsit, for that J. S. and J. D. were obliged to Adams in 40l. and thereupon he sued J. S. in the Queens Bench, in which Sute Dixon became Bail, Adams recovered, and upon a Scire fac. against Dixon, the Bayl, had Judgment against him. And he, without other Process, paid the condemnation, and Adams in consideratione inde, assumed to Dixon to deliver unto him the principal Obligation, and a Letter of Attorney, to sue it against J. D. and for not performance hereof the Action was brought. And upon Non Assumpsit pleaded, and found for the Plaintiff, he had Judgment. And thereupon Error brought; because it was not a sufficient consideration. And so it was held by the whole Court: For Dixon had not done any act, whereto the Law would not have compelled him. Wherefore the Judgment was reversed.

Ant. 429.
1 Rol. 28.

Termino Hillarii,
Tricesimo non ELIZABETHÆ,
in Banco Reginae.

Greningham *versus* Ewer. Ante, Trin. 37. Pl. 1.



He Case was now moved again. And Gawdy, Clench & Fenner held; That the bar was good: For the Defendant hath Election to deliver the Obligations, or to make an Acquittance, as the Plaintiff shall Devise. Then, if the Plaintiff will not devise the Acquittance, he is discharged of the making thereof, by the Default of the Plaintiff, and, by consequence, from the delivery of the Obligation: For he, having Election to do the one thing, or the other, It is not reason that the Obligee should compel him to perform the one only. Popham; If it were an absolute disjunctive Condition, that the Obligor should do the one thing, or the other; then the Election should be to the Obligor absolutely. And, if the Obligee disables him to perform the one part, the Law shall discharge him of the other: but it is here but a conditional Election, viz. if the Obligee will Devise an Acquittance, And, if he will not devise it, he is absolutely obliged to deliver the obligations. And, if the condition had been, that he should deliver the obligations, or should make an acquittance before Michaelmas, if the Plaintiff would require it, it had been cleer, that he ought to deliver the Obligation, unless the Obligee required an acquittance: So here. Gawdy; There is great difference betwixt the Cases. Wherefore it was adjudged for the Defendant.

(1)

Ante 396.
Post. 718.

1 Rol. 447.

Mo. 395. 6.

1 Rol. 447.

The Arch-Bishop of Canterbury *versus* Kemp.

Action sur Trover of divers Trees apud D. in the County of Surry. The Defendant pleads, that Queen Mary was seised in Fee of the Mannor of D. in the County of Sussex, where those Trees were growing, and granted it to the Defendant in Tail, wherby he was seised thereof; And, that J. S. cut the said Trees, and granted them to the Plaintiff, who lost them, and the Defendant found, and converted them, &c. The Plaintiff replies De injuria sua propria, &c. And thereupon Issue was joyned. Coke moved, That the Replication was ill: For De injuria sua propria is not any Plea, where the Defendant makes justification by

(2)

Post. 812.

Co. 8. 67. a.

Ante 14.

by claiming an Interest in the Free hold to himself, As 16 Ed. 4. 44 Ed. 3. 18. & 14 H. 4. 32. is, upon the same reason. But where one claims not any Interest, but Justifies by Command, or Authority derived from another, it is otherwise. And of that Opinion was the whole Court. Wherefore a Repleader was Awarded.

Holcomb *versus* Rawlyns. Pasch. 38 Eliz. rot. 401.

(3)
Moor. 461.
2 Rol. 554.

Co. 11. 51.
Hob. 98.
2 Rol. 554.

T Respass, for his Close breaking 1 Aug. 31 Eliz with a Continuando unto the 36 of Eliz. The Defendant pleaded, That long time before, &c. Thomas Clerk was seised in Fee, and Lett in unto him for years, &c. and gives Colour to the Plaintiff. The Plaintiff replies That he himself was seised, until by the said Tho. Clerk, disseised, who Lett it to the Defendant, prout in Barra; And, That after he re-entred: And the Trespass mesne betwixt &c. And thereupon the Defendant Demurred. Tanfield for the Defendant moved; That, forasmuch as it appears, That the Defendant is in by Title, (viz. by a Lease from the Disseisor) the Disseisee, after his Re-entry, shall not punish him for his occupying the Land: For he never was a Trespasser unto him. And, in Proof thereof, relied upon 34 H. 6. 30. 37 H. 6. 35. 2 Ed. 4. 17. 13 H. 7. 15. But Popham, Gawdy, and Fenner e contra: For, by the Re-entry of the Disseisee, he is remitted to his first Possession, and as if he never had been out of Possession; and then all, who occupied in the mean time, by what Title soever they come in, shall answer unto him for their time. As, if a Disseisor had been Disseised by another: the first Disseisee re-enters, he shall in Trespass punish the last Disseisor: For, otherwise, it would be mischievous unto him; For after his Re-entry he shall have no Remedy for the mesne Profits. And it is not to be doubted, but that the Disseisee, after his Re-entry, shall punish the second Disseisor, and the Servant of the first Disseisor, who occupied under his Master, Which was not denied by any. And by the same Reason he shall punish him, who comes in by Title: for that is now as a Trespass done unto himself. Wherefore, &c. But Clench e contra; Because the Tort was not done by him, who comes in by Title, but by another. And the Disseisor, who made the Lease, and received the Rent, is only punishable, and not the other. Wherefore, &c. But notwithstanding, for the other Reasons, It was Adjudged for the Plaintiff. 33. H. 6. 46.

Goff *versus* Byby, and others.

(4)
Mo. 461.
Co. 4. 43. b.

A Ppeal of Murder against divers: One, as Principal; and the rest, as Accessories: some, before the Fact; the other, as Accessories after. The Principal was found Guilty of Man-slaughter only. And it was now moved, That the Accessories should be Discharged; For there is not any Appeal against them of Man-slaughter. And they cannot be Arraigned, as Accessorie to the Murder; The Principal being acquitted. But all the Court held; That, as to the Accessories before the Fact, They ought to be Discharged; For the Verdict for the Principal hath found, That there was not any precedent Intent to Kill: But for

for the Accessories after, They should answer. For every Appeal, and Declaration therein includes as well Homicide, as Murder; which the Common Plea proves, viz. That he should answer to the Felony, and Murder, Not-Guilty. It was then moved Whether they should be tried by one Ven. fac. or severally? And all the Clerks said, That the Course was to try them by several Ven. fac. in an Appeal; But upon an Indictment, They used to try divers together. But it was afterwards moved, That the Principal, after Conviction, had his Clergy, and was never Attainted: And therefore the Accessory is to be Discharged. And of that opinion was the whole Court; That if the Principal had his Clergy, or Pardon before his Judgment, although it were after Conviction, the Accessory shall be discharged. But, if he prays, his Clergy after he hath had his Judgment, (as he well may) or if he be pardoned, yet the Accessory shall be Arraigned. And afterwards, Coke, Attorney-General, coming into Court, was demanded what he could say, why the Accessories should not be Discharged: And he answered, That he had considered thereof, and conceived, That the Difference taken was good. Whereupon they were Discharged. 3 H. 7. 1. Vide 4 Co. 43.

Co. 4. 44. 2.
Co. 11. 35. 2.

VanSPIKE versus Cleyson.

Action for words, and declares; Whereas he was Merchant, That the Defendant, to discredit him, said to one Dudley, Doth VanSPIKE (the Plaintiff) owe you any Money? To whom he said, That he did; He then said to Dudley, You had best call for it, Take heed how you trust him, And it was thereupon demurred, and Adjudged for the Defendant: For it is not any slander to the Plaintiff; But good Counsel to Dudley.

(5)
1 Rol. 67.

Grymes versus Blofield, Trin. 36. Eliz. rot. 844.

DEbt Upon an Obligation of 20 l. The Defendant pleads, That J. S. Surrendered a Copy-hold Tenement to the Use of the Plaintiff in satisfaction of that 20 l. with the Plaintiff accepted, &c. And it was thereupon demurred. Popham, and Gawdy held it to be no Plea: for J. S. is a meer stranger, and in no sort privy to the Condition of the Obligation: and therefore satisfaction given by him is not good. Vide 36 H. 6. Barr 166. 7 H. 4. 31. Afterwards, Pasch. 31 Eliz. by Popham, and Clench, ceteris Justiciariis absentibus, It was adjudged for the Plaintiff.

(6)
1 Rol. 471.

1 Rol. 471.

Bade versus Starkey, Trin. 38. rot. 143.

Error of a Judgment in Debt in the Common Bench. The Error assigned was; because the Plaintiff sues by Attorney, where he was an Infant, and ought to sue by Guardian. But, because the Action was brought by him, as Administrator, so that he sued in Auter droit, Infancy is no Impediment unto him, no more then Outlawry: And therefore he might well sue by

(7)
1 Rol. 288.

2 Cr. 441.
Ante 404.

by Attorney. And it was thereupon Adjudged for the Defendant That the first Judgment should be affirmed.

Clarencius *alias* Brook, *versus* Dethick, *alias* Garter.

- (8) **A**ction for Words. The Defendant pleads, that the Queen by her Letters Patents, dated, &c. created him King at Arms, Et Nomen ei imposuit, Quod nuncupetur *Garter* Principalis Rex Armorum; And, that he should Sue, and be Sued by that name: And, because he was not named according to his Creation, he demands Judgment, Si Actio, &c. And it was thereupon demurred. Gawdy and Popham held, that he was named well enough: for this Sute against him, as a private person, and therefore it sufficeth to name him by his proper name. But if he had been sued, or were to sue for any thing concerning his Office, it should be otherwise. And Gawdy said, although it were otherwise ruled here upon an Endicment, yet it was always against his opinion. But Fenner said, that it is a name of Dignity, and parcel of his name, as Knight, and therefore ought to be named by it in every Sute: otherwise it should abate. Et Adjournatur.

Ante 224.

Armiger *versus* Holland.

- (9) **P**rohibition. The Case was; That Doctor May, being Parson of North-creak in Norfolk, was created a Bishop; and the Queen, by her Letters Patents Licenced him to hold that Parsonage in Commendam; And afterwards the Queen presented Holland thereto, who was inducted and sued for Tithes; And upon this matter, a Prohibition was brought. Coke prayed a Consultation; For the dispensation by the Queen only is not sufficient; For the Statute of 25 H. 8. appoints how a Dispensation shall be granted by the Arch-Bishop of Canterbury, and confirmed under the Great Seal. And the Statute hath words in the Negative; That it shall not be granted in any other manner. Godfrey; This Statute only transfers the Authority of the Bishop of Rome to the Arch-Bishop: But the King, by his Prerogative, at the Common-Law, might have granted such a Dispensation, which is not taken away by this Statute. Gawdy and Fenner held, That the King had this Prerogative at the Common-Law: For the Benefice is made void by the Queens Act, and she may well dispense with her own Act: Then although there be general Negative words in the Statute, the Queen shall never be restrained by them; unless she be expressly named. And this Prerogative the Statute never intended to take away from the Queen. But Gawdy said, He doubted whether a Presentment upon such an Avoidance appertained to the Queen by her Prerogative, or to the right Patron. Coke; I can shew you the Resolution of all the Justices, That the Queen in this case shall Present. Popham, So is the common experience at this Day. Vide 6 Eliz. 228. & Adjournatur.

Hob. 6. 146.

Adte 527.

Hargreave *versus* Arden. Trin. 38 Eliz. rot. 1117.

Error of a Judgment in the Common Bench in a Replevin (10)
upon a Non-sure. The Error assigned; because that the Pleint
in the County, and the Recordare, whereby it was removed, was
Inter Arden & Hargreave: But the Declaration, and all the Pro- Ant. 170.
ceedings, and Judgment, was Inter Arden & Hargreave. And
for this variance the Error was assigned: For that Proceeding
was without Warrant, and without Original upon the matter.
But it was held by the Justices (absente Popham) That this variance Ant. 170.
is not material: For non refert what the Pleint was in the County;
for it is determined, when the Record is once removed, and
the party declares in Banco. Wherefore, without any great Ar-
gument, the Judgment was affirmed. Vide 3 H. 6. 2. 21 Ed. 4. 6.

Durming *versus* Kettle. Mich. 38, & 39 Eliz. 449.

After Verdict, It was moved in Arrest of Judgment, That (11)
the Ven. facias was Vice-Comitibus London. Salutem: præcipimus 1 Rol. 200.
tibi, &c. where it should be vobis; and therefore Ill: but, because Ant. 203.
it was a judicial Writ, it was ordered to be amended; and the
Plaintiff had Judgment.

Gower *versus* Capper, Mich. 38 & 39 Eliz. rot. 211.

A Sumpsit, and declares; Whereas the Defendant was en- (12)
debted unto him by Bill in 201. The the Defendant, in 1 Rol. 337.
Consideration the Plaintiff assumed unto him to deliver him the
said Bill, assumed to procure two sufficient Sureties to be
bound to the Plaintiff for the payment of the said 201. and
alleged in fact, That he delivered the said Bill to the De-
fendant; And, that he, intending to deceive the Plaintiff, pro-
duced two Sureties to be bound, that were of no value. The
Defendant pleads, that the Plaintiff had not delivered unto
him the said Bill. And it was thereupon demurred; And, with-
out Argument, adjudged for the Plaintiff. For the alleging, that
he had delivered the Bill was but Surplusage; for the conside-
ration was, the promise to deliver it: and therefore he needed
not have alleged, that he delivered it. But a promise against a
promise is a sufficient ground for an Action. And although it be
alleged, that he found Sureties, yet when it is alleged, that
they are insufficient (which is allowed by the Defendants plea,
and demurrer) it is all one as if he never had found Sureties.
Wherefore it was adjudged for the Plaintiff.

Wolf versus Meggs. Trin. 37 Eliz. rot. 1063.

(13)
1 Rol. 578.

1 Rol. 578.
Co. 10. 116. 117
Post. 568. 866.

Error of a Judgment in the Common Bench. The Error assigned was; Because the Plaintiff declares in Debt upon an Obligation of 16 l. to his Dammage of 10 l. And, upon Non est factum Pleadet, the Jury found Dammages to 7 l. and 40 s. Costs; and the Court increased the Costs 4 l. So he had Judgment to recover his Debt, and Dammages, and Costs to 13 l. which is more, then in his Count, And this was assigned for Error. Sed non allocatur. For, although the Jury cannot give more Dammages, then the Plaintiff Counts, yet the Court may increase them, as they please. Wherefore the Judgment was affirmed. Vide. 13 H. 7. 16. 2 H. 6. 7. Dy. 258.

Gadley versus Whitecor. Mich. 38 & 39 Eliz. rot. 464.

(14)
1 Inst. 63.
2 Cr. 644.
Ante 77.

Error of a Judgment in Ludlow; For that the Plaintiff was Sued there in Debt upon the Statute of 5 Eliz. for using a Trade, not being an Apprentice to that Occupation, and there recovered. The Error assigned was; Because it is Enacted by the Statute of 18 Eliz. that lites upon Penal Statutes shall be by Original, or Information; and it is here by Pleint. And it was therefore Reversed.

Corus versus —

(15)
1 Rol. 427.

Post. 675.
Hob. 35.
1 Rol. 427.

Deht upon an Obligation Conditioned for the performance of Covenants. The breach assigned was; that the Defendant Lessor covenanted, that it shall be lawful for the Plaintiff, being Lessee, quietly to enjoy the Land; And that the Lessor himself ousted him. And it was thereupon Demurred, For this illegal Duster is no breach of the Covenant. But without Argument, the Plaintiff had Judgment.

Ascue versus Hollingworth, Ante M. 38 & 39. Pl. 12.

(16)
Gould. 190.
Mo. 405.

Ante. 495.

The Case was now moved again, and all the Justices Resolved, that Debt was well brought upon it, as upon an Obligation; because it never had any Effect, as a Statute; as also, That the Declaration against one of the Obligors only was good enough; although the Words of the Obligation are joyned; because it doth not appear, that the other two did ever Seal it, or that they are yet alive, Which ought to be shewn by the Defendant, if he will have the advantage; For otherwise the Court will not intend it. But now another Error was assigned; because the Record is, that the Plaintiff appeared per Attornatum suum, and he gives him not any Name, and the Record was viewed, which was Quod Querens obtulit se per Attornatum suum, without naming any Attorney. But, when the Defendant appeared, he then declared against him per J. S.

Attornatum

Attornatum suum, and so it was said, was all the Course in the Common Bench, and it was so certified to the Court by the Prothonotaries, that their course was in this manner. Wherefore the Judgment was affirmed, Ante 75.

Dodingtons Case.

Information in the Exchequer, in nature of an account, was brought against Dodington Executor of Sir Walter Mildmay, supposing, That Sir Walter Mildmay had received Money of the Queens amounting to 1500 l. Upon a special Verdict, The Case was; That Sir Walter Mildmay had received annually out of the Exchequer 50 l. as a Fee for his Dyet for 30 years together, which was paid him by the command of the Lord Treasurer: who had authority by Privy-Seal to make allowance, and payment of all Fees, Dues. But, in truth, these were not any due Fees. And, Whether his Executor shall be charged with these summs so received? was the question. And after argument, it was adjudged that he should be charged: For it was held, That this payment of the Money, by the appointment of the Lord Treasurer, was not allowable; for the Privy Seal is not sufficient authority to dispose of the Queens Treasure, unless where it is due; And, he disposing of it otherwise, it is out of his Authority. Secondly, it was held, That this Money, delivered by the authority of the Lord Treasurer who is quasi a Judicial Officer, and it was quasi a Judicial Act by him: Yet it shall not bind the Queen; for it was without his Authority, and without Warrant, to make allowance thereof, not being due, and it is at his peril, who receives it, or demands allowance thereof. It was also objected, that Money could not be known, whether it were the Queens Money, and it would be hard to charge him with the receipt thereof: As if one sells Land, or any other thing bona Fide, to one of the Queens Officers, who pays unto him the Queens Money, it would be hard to make him accountable for that Money so received; for he cannot know it to be the Queens Money. But it was held here, That, in regard he received it out of the Exchequer by colour of a Fee, where it was not due; and by Colour of a Warrant, where it was not sufficient; he could not be misconusant, that they were the Queens Money, and shall be charged with them; so in every other Case, where he receives the Queens Money, knowing it to be the Queens Money, he is chargable: but if he received it in payment, not knowing it was her Money, and whereof by Intendment he had not any Conusance, it is otherwise. And, for these reasons it was adjudged for the Queen against the Defendant, And although he were Executor, he should answer for it, as a Debt from the Testator. 11 Co. 90. b. (17) Moor. 475. Co. 11. 90. b.

Co. 11. 92. 2.

Co. 11. 91. b.

Matthewson *versus* Lydiate. Ante, Hill. 38. Pl. 22.

(18)
Ante 408. 470.
Co. 5. 23. 2.

THe case was now moved again. And now all the Court agreed, that the breaking off the Seal of one of the Obligor's shall not avoid the Deed, but against him only. For the Deed is several by every of them; and a release to the one will not serve the other. But if the rased the Deed in any Clause, which concerns them all, or in the Date, That should have avoided the Deed, as to all. But otherwise, the Deed is intended several to every of them. Wherefore the pulling off the Seal from one is no discharge against the other. And afterwards, it was adjudged accordingly for the Plaintiff.

Lovelace *versus* Reynolds, Pasch. 37 Eliz. rot. 723.

(19)
Post 563.

Ante, 415.
Post. 563.

Ante. 405.

Co. 5. 78. b.

Co. 7. 11. 2.

TRespafs de Clauso fracto. The Defendant prescribes to have Common. And Issue thereupon. The Jury found, That the Defendant had Common there by prescription, prout, &c. paying for it every year a peny to the Plaintiff. And, Whether this Verdict were found for the Plaintiff, or Defendant? was the Question. Lewkner moved, that it was found for the Plaintiff: for the prescription ought to be alledged entirely, as it is. And this paying of the Peny is part of the prescription: For otherwise the Plaintiff hath not any remedy for it; Wherefore he hath failed of this prescription, not alledging it. Spurling & Harries e contra: for he hath alledged as much of the prescription, as serves for him. And the Non-payment of the Peny shall be shewed on the other part; and the not alledging thereof is not material. And so it hath been adjudged in the Queens Bench, Trin. 37 Eliz. bewirt Gray & Fletcher, quod vide ante, Trin. 37. Pl. 15. And, for his Rent, The other hath his remedy by distress; as 26 H. 8. 5. Wherefore, &c. Anderson; This is not any Rent: for Rent cannot be reserved out of a Common, or other thing, which is not in Demesne. But here, Whether the paying this Peny be a Condition precedent, or subsequent, is all the doubt. Walmsly, it cannot be called a Rent: for that is only out of a thing, whereon an Entry may be made, unless out of Mesnalty; as 1 H. 4. is. And that is for the possibility of the Escheat. And a Rent-charge cannot be granted out of a Mesnalty. But although it be not a Rent, yet a Distress may be taken for it; As 26 H. 8. is: because the Commoner hath a benefit there by. And, by Intendment it began with the Common by Agreement of the parties: and it will be hard to prove it to be a Condition. And, if it be a Condition, it is subsequent, and need not be shewn by the Defendant, no more then in the Case, adjudged in this Court of Pourtel; where an Annuity was granted pro consilio impendendo, it was adjudged, that he needed not shew, that he gave Counsel. Beaumont; It is a Condition, but subsequent. And therefore, it is not requisite, that the Defendant should plead it. And therefore he held, That the Verdict was found for the Defendant. Et Edjournatur. Vid, postea; Pasch. 39. Pl. 22. 5. Co. 79. a.

Myles versus Willoughby.

R Eplevin. The Case was. One, having a Reversion in Fee expectant upon an Estate for life, Devised a Rent of 4 l. to one for life; the Tenant in Fee dies; and after seven years incurred, The Devisee made his Executors, and died. The Executor distrained, and Avows for that Rent. And it was thereupon Demurred in Law; Because he doth not aver, that the Land remains in the Seisin of the Tenant, who ought to pay it, or in the hands of some other, who claims by him by Purchase, or Descent, according to the Statute of 32 H. 8. cap. 37. And Anderson, and Walmley held it to be a material exception: for he ought to have pursued the words of the Statute, which gives him the remedy; although he needed not shew how he was seised; for that would be mischievous unto him, being a stranger, who cannot know it. But it sufficeth to shew it generally, according to the words of the Statute. Walmley said, There was another Exception; because he did not aver, that the arrearages incurred after the death of the Tenant for life. For, if he in Reversion upon a State for life grants a Rent-charge, it shall not begin untill after the death of the Tenant for life. And, although arrearages incur in the life of the Tenant for life, they be not due. Quod Anderson concessit. But, in the principal Case, because it appeared upon view of the Record, that it was layed, that the Heir of the Devisee was seised in Fee, & adhuc seiscitus existit, It was held good enough. Wherefore it was adjudged for the Avowant.

Bowlston versus Hardy.

A ction upon the Case. Whereas he was seised of certain Lands in Fee, and the Defendant was seised of other Lands adjoining, the Defendant had made two Cony-burrows in his lands adjoining; and had put Conies in them, which increased to a great number, and went into the Plaintiffs Land, and destroyed his Corn, and made it barren, whereby he lost the Profits of his Land; And therefore brought the Action. The Defendant pleads, that the Plaintiffs Land was late parcel of the Mannor of D. and that Qu. Mary, being seised of that Mannor, granted it to Sir Will. Peto, and granted unto him to have Warren in the said Mannor, and that the Plaintiff Lands was conveyed unto him; and that Sir W. P. bargained, and sold the Mannor to the Defendant, and all Warrens, &c. thereto appertaining, or accepted, and reputed, as part of that Mannor; whereby he justifies, &c. And it was hereupon demurred. And all the Justices, without argument, resolved, that the Plea was ill: for he hath shewn a Warren in Gross in the Patentee, which is not conveyed unto him by the Bargain, and Sale; for a Warren is not parcel, nor any member of a Mannor, but it may be appertaining, but that is by prescription. But, whether an Action upon the Case lay upon this matter? was the only question. Anderson, The Action lies not. For, although one hath Conies in his Land, he hath

Post. 8.6.

Co. 5. 104. b.

not any property in them; because they be fera Naturæ. And to have an Action against one for Damage done by Savage, and Wild Creatures, wherein he hath not any Interest, and they cannot be known, whether they come out of his Land, is unreasonable. And he, who hath the Damage thereby, may well kill them, and they may be said to be his Conies, when they are upon his Lands. And, if other men have other Warrens adjoining, against whom shall the Action be brought? truly against none of them. Walmsley accord; for the property of the Conies is not in any, nor can any man so keep them, but that they will break out of themselves; which is reason, that none can have them in his own Land, unless by Grant from the King, or by Prescription: if otherwise, he is punishable in a Quo Warranto. For the Queen hath the Royalty in such things, whereof none can have any Property. And this Cause is not like to the Cases put, on the other side, of erecting a Lime-kill, Dye-house, or the like: for there the annoyance is by the Act of the parties, who make them; but it is not so here. For the Conies of themselves went into the Plaintiffs Land and he might take them, when they came upon his Land, and make profit of them. And none may erect a Dove-house, but he, who is Lord of a Manor. And, if any other private man erects it, he is punishable in the Leet, as a Common Nuisance. But no Action upon the Case lies by any Private man against him who erects it. Quod Anderson, & Beaumont concesserunt. And they said, they had seen it to be inquired of before the Lord Dyer at the Assises, as a Nuisance. And this Case is not like to other Cases, which were put of Nuisances; for there the Tort is by the party himself, who doth it; but here the putting the Conies into his own Land is not any Tort. And, if there be any wrong, It is by the Conies themselves, who are fera Naturæ; Wherefore it is not reasonable to punish any other. And Beaumont agreed with the other Justices in omnibus. Wherefore afterward, by the Assent of Owen also, It was adjudged for the Defendant. 5 Co. 104. b.

Capp versus Lancaster.

(22)

Post. 721.

DEbt. Upon a Bill of 70 l. to be paid upon Demand. And, forasmuch as the Plaintiff did not shew an actual Demand, Williams, for the Defendant, demurred: For he shewed, That the Demand was parcel of the Contract; So that the Money was not due, until Demand. And a Demand being requisite, a Demand in Law, by bringing the Action, will not serve the turn; As 11 H. 4. 18. where one is bound to levy a Fine upon Request, &c. But Walmsly, Beaumont and Owen held it to be well enough: For it is a Duty Maintenance, and therefore there needs not any Demand, as in the other Cases; For there the Plaintiff had not any cause of Action, until a Precedent Act done by him: but it is not so here. Wherefore they Adjudged it for the Plaintiff.

The Countess of Warwick *versus* the Bishop
of Coventry.

DEbt Upon and Obligation conditioned, that, if he paid 15 l. at the Feast of St. Michael next following, and 15 l. Annually at the Feast of S. Michael, until Hockinhall (the Plaintiffs Chaplain) were advanced to a Benefice, that then, &c. he pleaded, That he was presented to a Benefice before the first Feast of S. Michael. And adjudged to be no Plea: For the first 15 l. is to be paid, notwithstanding he were advanced. For the limitation until he be advanced, &c. goes only to the other subsequent payments. Wherefore it was adjudged for the Plaintiff. (23)

Edmunds *versus* Marks.

DEbt upon an Obligation conditioned, That if the Defendant should come to the Kings-head, &c. upon the 12 of October, and there elect two Arbitrators, who, with two others to be elected by the Plaintiff, shall arbitrate of all such sums, which the Plaintiff hath disbursed for the Defendant, and promised to be paid to the Plaintiff by the Defendant; that then, &c. The Defendant pleads, That, upon the 12 of October, he came to the Kings-head, &c. and there elected two Inhabitants of the said Ville Arbitrators, ad faciendum Arbitrium of all Summs, &c. And that the Plaintiff was not there, &c. And hereupon the Plaintiff demurs. And, after argument, it was Adjudged for the Plaintiff. For Walmsly said, That the Plea was not good; because he saith he came thither upon the 12 of October, &c. And he sheweth not at what hour of the day, nor how long time he continued there: For it ought to be to the last instant of the day, and to be there at such a convenient time before, That the Arbitrament may be made. The Plea also is not good; because he doth not shew, That his two Arbitrators were there present. For they ought to be there: For the words are, That they together with the Plaintiffs Arbitrators, &c. Wherefore, for these Causes It was Adjudged for the Plaintiff. (24)

Read *versus* Burley.

REplevin. The Defendant avows the Taking, by reason, that he was seised of an House, being the Place, where, &c. & Lett it to Brett for years, rendring 6 l. Rent. And for Rent arrear he avows the taking of so much Parn, and of an Horse, and prays Return Averiorum. The Plaintiff saith, that he is a Cloth-worker, and delivered certain Wooll to be spun; and the Cloth-workers used to take back their Parn by Weight; And, because there were no Weights there, he sent to the next Village for Weights; And, in the mean time, The Avowant Distrained that Parn being upon his shoulders, and the Horse, which he had there to carry the Parn; And upon this the Avowant Demurres. Walmsly, Beaumont, and Owen (absente Anderson) held, That this Parn, being upon the Plaintiffs shoulders, could not (25)
Post. 596.

Co. Lit. 47. a.

Post. 596.

Post. 596.

not be distrained, no more then a Net in a mans hand; as as 6. R. 2. is, or an horse whereupon a man rides, or which is in a mans hand. But Walmly held, that the horse is distrainable. For it is not to be resembled to an horse in a common hostry: for that is in favor, for the benefit of the Common wealth; because a common hostry is a common place, where men are to herbage. But, if a man puts his horse in the house of any private man, he is distrainable, and it is not material, although he be not Levant and Couchant. For the Reason, that beasts distrainable shall not be distrained for Rent, unless they be Levant, and Couchant, is, Because that otherwise, the Owner, by Intendment, cannot have notice, that they are there, that he might have them again. But here the horse was put there by the consent of the owner, and with his Privity. But if this House were a common place for weighing, it would peradventure be otherwise. But Beamond & Owen e contra: For this Trade of Cloth-workers is necessary, and to be favoured; and this horse is not to be distrained no more, then an horse, which carries Corn to Market, and is put into a friends house for the time, he is not distrainable. Which Walmley denied. And where an horse carries Corn to a Mill, and is tied at the Mill-doors, during the grinding of the Corn, he shall not be distrained. Which Walmly agreed; because it is a common place, and for the publick weal: but they be not alike. But they all agreed, that the praying the Return Averiorum, where there was but one horse, was ill: but they doubted, whether this fault was of Form only, and then it was helped by the Statute of 27 Eliz. It was therefore Adjourned Mich. 39 & 40. C. B. placito 41.

Termino

Termino Paschæ,
Tricesimo nono ELIZABETHÆ,
in Banco Reginae.

Edwards *versus* Stapleton.

Mich. 38, and 39 Eliz. 470.

Assumpsit by an Executor of a Promise made by his (1)
Testator. The Defendant pleads Non Assumpsit;
and found for the Plaintiff and Judgment for him.
And, this being in Kingston. Error was thereof brought
and assigned; because he did not shew in Court the
Testament in the Declaration mentioned. Whereof
it was said, That it was but default of Form, which
is ayded after Verdict: But all the Court held it to be matter
of Substance; for otherwise he doth not Entitle himself to the
Action, without shewing the Testament. For which cause it was
reversed. Post. 592.
2 Cr. 299.

Doctor Barrow *versus* Andr. Gray of the Inner Temple.

Pasch. 38 Eliz. Rot. 521.

Assumpsit, and declares; Whereas one Halshed was seised in (2)
Fee of certain Land in the County of Hertford, and was
bound in a Reconusance of 1000 l. to the Plaintiff, and Infeoffed the
Defendant of his Land; that the Defendant, in Considerati-
on, That the Plaintiff should assign unto him his Reconusance,
assumed to pay the Plaintiff 80 l. before such a day; and alleg-
eth in fact, That he assigned over the Reconusance, &c. The De-
fendant pleaded Non Assumpsit; and a special Verdict found,
That, at the time of the Reconusance made, Halshed was seised of the
Land sold to the Defendant, and also of a Close called Walkley,
and infeoffed one Hyde of the Close called Walkley; and the Plai-
ntiff released to Hyde all his Right, Interest and Demand in the
Land called Walkley; and afterwards, Halshed infeoffed the De-
fendant; and the Defendant assumed ut supra, &c. And, that the
Plaintiff assigned the Reconusance to the Defendant. Et si, upon
all this matter, the Assignment of this Reconusance be a suffici-
ent

Ante. 40.

Co. 10. 50.

ent consideration. They found for the Plaintiff. Et si, &c. And it was now moved by Snag and Gray himself; That this Verdict is found for the Defendant. First, That a consideration to assign a Reconuſance over is illegal; and maintenance, and therefore it is no good Consideration; because against Law. Secondly, That by this release of all his Right, and Demand in the Land to Hyde, who had part of the Land chargeable with the Reconuſance, The entire Reconuſance was discharged; and then it could not be assigned over: And, That the assignment over was void, and was not any Consideration: And, that a release of all the right in the Land is a Discharge of the Reconuſance, although it be made before Execution sued. And in proof hereof a Preſident was shewn, Mich. 26. & 27. Eliz. rot. 1702. in the Common Bench, Hyde versus Morley, Audita Querela was brought to avoid the Execution of a Statute; because the Conuſee by Deed shewn in Court, had Released unto him, being then Tenant of the Land, and Purchasor; all his Right, Interest and Demand in the Land; and it was adjudged to be a good cause of discharge: but all the Court resolved for the Plaintiff in both points; and as to the first they held, that the assignment of a Debt, or Reconuſance to a stranger is an illegal and void consideration; but to assign it to the Tenant, by way of discharge of his Land, is clearly Lawful. And as to the Second, That this release to Hyde of all his Right, and Demand in the Land, is not any discharge of the Reconuſance; for, at the time of the Release made, he had no right, nor cause of Demand in the Land; for the Land is not the Debtor, but the Person, and the Land is only charged in respect of the person; and here at the time of release, being before the Execution sued, he had not any right, nor demand in the Land; Wherefore it is not any discharge of the Reconuſance. And Popham said, that he had conferred with the Justices of the Common Bench concerning the Judgement cited; and they did not remember any such Judgement: But were of opinion, that such a release was not any discharge of the Execution. Wherefore it was adjudged for the Plaintiff. Vide 25 Aff. 7. 45 Ed. 3. 22. Vide Trin. 27. Placito secundo.

Hyde versus the Dean and Cannons of Windsor.

Ante Pasch. 38 Placito primo

(3)
Co. 5. 24. 2.
Ante 457.

THE Case was now moved again, and the sole Question of difficulty was, Whether this Action lies against the Assignee for this Covenant broken, he being not named in the Covenant? and Tanfield, for the Plaintiff, in the Writ of Error moved, that it lies not: for a Covenant lies not against the Executor of the Covenantor not being named; as 48 E. 3. 2 and Dy. 114. A multo fortiori it lies not against the Assignee, not being named: As old N. Br. 102 is. But, if it be covenanted for him, and his Assigns, it is otherwise; as 25 H. 8. Bro. Coven. 32. Wherefore &c. But Popham, Clench, and Fenner (absente Gawdy) held clearly, that

that an Action of Covenant lies against an Assignee in this Case, although he were not named: For a Covenant, which runs, and rests with the Land, lies for, or against the Assignee at the Common Law (*Quia transit terra cum onere*) although the Assignees be not named in the Covenant. And a Covenant lies against an Executor in every Case, although he be not named; unless it to be such a Covenant, as is to be performed by the person of the Testator, which they cannot perform. Wherefore the Judgment was affirmed. N. Br. 146. Dy. 257. per Brown. 5 Co. 24.

Harvey *versus* Oswald. Trin. 38 Eliz. rot. 391.

Ejectione firmæ. The Defendant claims by a Lease for years from the Lessor of the Plaintiff. The Plaintiff pleads a Condition, that, if he assigned over any part of his Term, that his Lease should be void; and, that he had assigned parcel of his Term, whereupon the first Lessor entred, and Lett to the Plaintiff. The Defendant rejoyns; that the first Lessor, after the Condition broken had accepted Rent of him, due after the breach supposed, The Plaintiff sur-rejoyns; that at the time of this accepting of the Rent, he had not any notice of this breach of the Condition. And it was thereupon Demurred, And Argued by Barker for the Plaintiff, and by Towse for the Defendant: Clench and Popham only being in Court. And Clench held that the Entry of the Lessor was not congeable: For, by his acceptance of the Rent, he hath affirmed him to be his Tenant after the Condition broken, and thereby hath dispensed with the forfeiture. Popham-e contra, true it is, when the Condition is broken, the Lessor hath Election to continue the Lease, or to avoid it: But, without privy, that such election was in him, he cannot make an election. And it appears here, upon the Demurrer, that he had not any notice, that such election was in him: and therefore his liberty of Entry cannot be taken from him by his Acceptance of the Rent. Which is the reason in the books, that, for an Entry upon a Condition broken, as for Waste, or Alienation, &c. or such collateral Conditions, an acceptance of the Rent, after the Condition broken, is no Barr of Entry; because, by Intendment, he had not any notice of the breach of the Condition: which being collateral to his knowledge, no acceptance of his shall affirm the Lease. But, if he had taken notice of the Condition broken, and had made an Acquittance of the Rent, it had barred him of his Entry. But if the Condition be of such a Nature, that he performance, or non-performance thereof lies in the Conscience as well of the Lessor, as of the Lessee, it is otherwise. Et adjournatur. Trin. 39. Plac. 12. 3. Co. 94 a.

Shere *versus* Dickenson. Mich. 38. & 39 Eliz. rot. 490.

Error of a Judgement in the Common Bench, and Assigned; because the Ven. fac. was awarded upon the Roll in this manner, Ideo præceptum est Vice-Comiti, quod Ven. faciat, 12, quod sint hic and a space left for the day of the Return; so there was not any day for the return upon the Roll, although the day of the

B h b h

Return

2 Cr. 64.
Polt. 677.

return was expressed in the Ven. fac. And it was said, that the Ven. fac. ought to be awarded upon the Roll, and to have a day certain. For that is the Warrant for the Writ of Ven. fac. and, if it be not according to it, it is Error, and not amendable. And of that opinion were Popham and Fenner. But Gawdy held it to be amendable. Et adjouratur. But afterwards the Judgment was affirmed.

Goodale versus Castle.

- (6) **A**ction for these Words, Thou art a common Filcher, companion of Cut-throats, and a Forger of Writings. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That these Words were not Actionable. And all the Justices held, that for all the Words, besides And a Forger of Writings, no Action lies. But for those words, Popham and Gawdy held, That the Action well lay: For the Words shall be intended of such Writings, whereof there may be a Forgery. But Fenner e contra; For it may be of Writings, the forging whereof is not punishable, as a Church-Book. And Forgery shall not be intended, unless it be precisely alledged, Clench absente: adjournatur.

Deering versus Moor.

- (7) **T**respas. The Defendant pleaded Not-guilty. The Jury found, that the Plaintiff was seised of that Land, with two others as Heirs in Gavelkind. And that the Defendant entred. Et si, &c. And upon motion, without argument, by Popham, and Fenner (ceteris absentibus) it was adjudged for the Plaintiff. For although it had been a good Plea in abatement, for the Defendant to say, that the Plaintiff was Tenant in common with a stranger; yet, forasmuch as he hath not pleaded it, he hath lost the advantage thereof: and the finding it by the Jury is not material. And so it was said to be adjudged in this Court, in one Stowells Case; wherein Trespass brought the Defendant pleaded Not Guilty. And the Jury found, that the Plaintiff was Joynt-Tenant of the Land with a stranger not named: yet there the Plaintiff recovered. Wherefore it was adjudged ut supra for the Plaintiff.

Ante 143.

Moor 466.

Auslie versus Mason.

- (8) **A**ction for these Words. Thou hast made a forged Bond, and I will prove it. The Defendant pleaded Not Guilty. After Verdict, it was moved, that the Action lay not; for he said not, That he had forged a Bond. And it may be he was a Scrivener, and might write a Bond, which was afterwards forged, and yet be no slander unto him. Sed no allocatur: And it was adjudged for the Plaintiff.

Kynnersley versus Barnard. Hill 38 Eliz. rot. 424.

- (9) **A**ction upon the Case for Trover of an Horse, and selling him, and converting the Money to own use. The Defendant confesseth, That it was the Plaintiffs Horse, and that one

J. Courtorl

J. Courtнал found, and delivered him to the Defendant, to restore upon request; whereupon he re-delivered him to the said J. C. before the Action brought. Absque hoc, that he sold him, and Converted the Honey to his proper use. And it was thereupon demurred; because he ought to have pleaded the general Issue, and he could not traverse the Conversion. But all the Court held, although it be doubted in the Books, 27 H. 8. 2. 33 H. 8. 4 Ed. 6. Bro. Action sur le Case, and Dy. 121. yet, forasmuch as in this Action the substance is the Conversion, and without it, the Action cannot be founded; that it well might be Traversed. But in regard he hath here traversed the Conversion of the Honey to his own use, which is not materially alledged in the Declaration, but is superfluous; and by his Traverse hath made it to be part of the Issue: the Traverse therefore is ill in that point. And the Demurrer being upon the Traverse, it was adjudged for the Plaintiff.

Ant. 434.

Blomfield *versus* Roswick, Mich. 38, and 39 Eliz. rot. 259.

Audita Querela. For that he, and one May, were bound to the Defendant in an Obligation, and he recovered against them in Debt, and had May in Execution. And May was Discharged by the Sheriff out of Execution: and afterwards, by another Capias, took Blomfield in Execution; whereupon he brought this Audita Querela to be discharged. And it was hereupon Demurred. And after argument by Godfrey for the Plaintiff, and by Richardson for the Defendant, it was held by Popham, Clench and Fenner (absente Gawdy) that this was not any cause to Discharge the Execution. For if one be in Execution, and escapes de son Tort demesne, it hath been adjudged in an Audita Querela, to be no cause of discharging himself; no more shall it be for his companion. And it hath been also adjudged in this Court, betwixt Symplon and Boyton, That, if he escapes by the Sheriff's permission, and be re-taken, yet it is a good Execution for the party, if he will: and it shall not conclude the party to enforce him to take his remedy against the Sheriff: a multo fortiori, where two be in Execution, the escape of the one, shall not give his Companion any advantage, and make the Plaintiff to lose his Execution, and be put to his remedy against the Sheriff, who peradventure is nothing worth. Wherefore it was adjudged for the Defendant. 5 Co. 86. Residuum, Trin. 39: Placito 14.

(10)
Ant. 478. 9.
Post. 573.

Ante 102.

Overton *versus* Sydal. Hill. 37. Eliz. rot. 1042.

Debt against an Executor for Rent reserved upon a Lease for years. The case upon demurrer was: That the Prebend of Tervyn in the County of Chester Lett that Land for years, rendering Rent; which Lease was confirmed by the Dean and Chapter. The Lessee dies: the Executor assigns over his Term: the Prebend resigns; A new Prebend is made; and for Rent due, after the Assignment, he brings Debt against the Executor of the first Lessee; and, whether this Action lies against the Executor, after the assignment of the Term, was the sole Question. Gawdy; the Action lies not; for the first

(11)
Co. 3. 24. c.

Moot. 351. 2.

b b b 2

Lessee

Moor 351.

Co. 3. 22. 3.

Co. 3. 23. b.
Ant. 328.

Mo. 352.

Lessee was chargeable, as well by reason of the Possession, as also for the privity of Contract; and therefore, although he assigns over his Term, yet, by reason of the privity of Contract, he shall always be chargeable to the Lessor for the Rent, as well for that due afterwards; as before: as 44 Ed. 3. 6. And a Case lately adjudged in this Court, between Walker, and Harris, Mich. 28. and 29 Eliz. But where he is not chargeable, by reason of the privity of Contract, but by privity in Law, by reason of the Estate in him, if the privity be transferred, either on the one side, or other, the Action, upon the privity of Contract, is Determined: as where the Lessee assigneth over his Term, and the Lessor assigneth over the Reversion, the Grantee shall not charge the Lessee for the Rent due after the Assignment; as it was adjudged in this Court, Hillary, 36 Eliz. rot. 420. betwixt Humble and Glover; and as it is, where the privity is removed on the part of the Lessor, so it is in this Case: For the Executor here is not chargeable by the Contract, but by the privity in Law, viz. that he hath the Term; which being removed, the Action against him faileth: For there is not any Cause of Action betwixt them, but by reason of the Term, which is in him, and his Interest therein. And *Sublata causa tollitur effectus*, Wherefore, &c. Fenner accord; the Executor is not party, nor privy to the Contract, as the Testator is; For he shall not be charged but only in the Detinet, and not in the Debet & Detinet. *Quod Popham concessit, sed Gawdy negavit*. For, in regard he occupies after the Testator's death, there is no doubt but that he shall be charged in the Debet & Detinet. And then Fenner said, that this Charge is, by reason he hath the Term, and not by reason of the Contract. For no doubt, if the Testator himself had assigned over his Term, although he himself had been chargeable for the Rent, during his life, yet when he dies, his Executors are not chargeable for the Rent due after his death. The same Law is here, when the Executor Assigns over the Term, whereby he was only chargeable, he shall not be charged for any Rent afterwards due. Here also the privity of the Contract is removed from the Plaintiffs part; For, the Plaintiff not being Lessor, but his Successor, he is not party, but privy only in Law: so the Executor is only chargeable for the privity in Law. Wherefore the Plaintiff cannot have this Action against him, but during the time that this privity, by reason of the Estate, and interest in the Term continues; and therefore the Plaintiff, after this Assignment, cannot maintain this Action against the Defendant. *Clench accord in omnibus*. Popham e contra at the first; For he held, that the Executor should be as well chargeable, as the Testator; because he comes in loco Testatoris, and as he shall partake of every benefit which his Testator should have done, so shall he be subject to every charge: wherefore, he by his own Act, shall not avoid this Action against him. But afterwards, upon better advisement, he held; In regard the Plaintiff is not party to the Contract, but only privy in Law; and the Defendant is not chargeable, by reason of his own Contract, but by a privity in Law, the cause of his Charge being removed by the Assignment of his Term, that this Action lies not for the Plaintiff against him. Wherefore it was adjudged accordingly, 3 Co. 24.

Hampton

2 Vent. 209. The contrary is
held. 7th Id.

Hampton versus Boyer.

DEbt against an Executor, upon an arbitrament, made in the time of the Testator. It was demurred in Law, whether it lay, or no? because the Testator might have waged his Law. And adjudged, without argument, that it lay not. (12)

Meryll versus Robyns. Trin. 26. or 36 Eliz. rot. 786.

Error of a Judgment given a Writ of Entry upon Disseisin. The Error assigned was; because the Sheriff returned not the names of the Summoners, or Veyors. And held for this cause to be Error; for if there be no Summons made, the party cannot have a Writ of Deceit Et non constat de Record, against whom he should have it. Wherefore it was reversed. (13) Moor. 459.

Williams versus Williams.

Trin. 38 Eliz. rot. 740. Hill. 35 Eliz. rot. 597.

SCire facias, by John Williams, as Executor of Emme Williams his Mother, against Williams, the Defendant, to have Execution of 240 l. Damages, recovered in a Writ of Dower. The Defendant pleads, that he had brought a Writ of Error upon this Judgment, against the Demandant, in the Writ of Dower; and Assigns for Error, because the recovery was against him by default, being an Infant. And that, pendente ceo indiscusso, The Demandant in the Writ of Dower died. And that he had brought a new Writ of Error Coram vobis residet against the Plaintiff, as Executor, quod adhuc pendet: and Demands Judgment; si pendente Breve de Error indiscusso, Executionem habere debet. And it was thereupon Demurred. Fenner; I doubt whether a Writ of Error lies in this Case; because, the Demandant in the Writ of Dower being dead, the Estate recovered is Determined, which is the principal; and therefore the Writ of Error is determined. Secondly; conceive, that the Error Assigned is not Error: For Dower is favored; and a Feme shall not tarry for Dower during the Minority of the Tenant. Wherefore a recovery against him, although it be by default, is good enough. (But to this point none of the Justices spake; for it came not now in Question upon this Action.) Thirdly, if a Writ of Errors lies, I conceive it to be a good Plea; for it is not reason to have Execution of an erroneous Judgment, when no Default can be assigned in the Plaintiff in the Writ of Error. And of that opinion was Gawdy, as to the last point; Because there appears not any default in him, who pursued the Writ of Error, in not proceeding, or neglecting to proceed therein. But the default which was, was occasioned by the death of the Defendant, in the first Writ of Error. But if the Plaintiff in the first Writ of Error had been Non-suited in the first Writ of Error, or had discontinued, or were slack in the proceeding therein, there peradventure it would have been otherwise. But as to the first point whether a Writ of Error, to reverse the Judgment for the Damages, the principal being determined by (14) Moor 342. Post 567.

Vide Pasch.
34 B. R.
Plac. 2. p. 223.

by the death of the Demandant. Popham and Gawdy held; that this Writ of Error was maintainable, to avoid the Judgment of the Damages; for it is as well a grievance, as the loss of the Land. And if there be a recovery in a real Action of the Land and Damages, and the Tenant, against whom the Recovery is, dies, and the Heir, who ought to have the Writ of Error, in respect of the Land, will release all Writs of Error; yet the Executor may sue a Writ of Error, to avoid the Judgment for the Damages: for every one, who hath loss, shall have a remedy to redress it. And so it was ruled in this Court in one Nichollsons Case; that an Executor shall maintain a Writ of Error, to reverse an Attainder against his Testator, to the intent to be restored to the Testators Goods; Although by his Attainder he had lost his Land, which is the principal. Which Case Fenner said he remembered; and that it was so ruled by the opinion of three Justices against one. But, as to the Plea, Popham held, that it was a good Plea: if it had been also alledged, that he assigned Errors upon this Writ of Error; otherwise it is not any Plea. For this Scire fac. to have Execution, &c. is the means to compel the Plaintiff to Assign his Errors; otherwise the Plaintiff will never Assign them; and if the Plaintiff hereupon Assigns his Errors, it is well enough for the time, as Dyer 77, is, otherwise Execution shall be awarded against him. And it was not any answer, to say, that a Writ of Error is yet depending. Vide Trin. 36. B. R. Placito 1. Residum.

Heddy *versus* Wheel-house. Trin. 38 Eliz. rot. 963.

(15)
Moor 474.
Post 591.

TRESPASS for the taking of a Cow. The Defendant Justifies; because the Town of Northampton is an ancient Town, and that King H. 7. Anno 11. Regni sui, granted to the Mayor, and Burgesles of Northampton, unam Feriam annuatim to be holden upon the Feast of St. Hugh, cum omnibus libertatibus, & liberis consuetudinibus ad hujusmodi Feriam spectant. vel pertinent. And shews, that at such a Fair their holden, J. S. sold that Cow to the Plaintiff: whereupon he demanded a Penny for Coll, and because the Defendant refused to pay that Penny for Coll, he Distrained that Cow, as Bayliff, for the Non-payment. And the Plaintiff thereupon demurred in Law. The sole question was, Whether by this Grant there be any Coll to be demanded? For if it were due, it was agreed on both sides, that a Distress might be taken for it: and that the Defendant, as Baliff, and one of the Corporation, might well distrain for it. But it was argued for the Plaintiff that Coll was not demandable, unless by Grant from the King, or by Prescription. And it cannot be here by Prescription, because it is a Fair newly Created: Nor by Grant; for there be not any words of Grant of Coll: And it is not any Liberty, or Custom of common Right appertaining to a Fair; and therefore it passed not by the general Words cum omnibus libertatibus, &c. But it was argued for the Defendant, That Coll is a thing of Common Right, due for the Entry of things sold in Fairs or Markets; and for the better knowing of the things sold, and into whose Property they be passed: And therefore by the Grant of a Fair, cum libertatibus ad Feriam pertinent.

tinent, &c. it well may pass. And of common Right a Penny shall be paid for such; unless in places, where nothing, or a greater Summe is by prescription to be paid. Vide 9 H. 6. 45. & 12 Ed. 4. 9. Ant. 485.
 Therefore, &c. Popham; Coll is not a thing of necessity, nor incident to a Fair for there be many places where no Coll. is Paid: and if Coll had been used to be paid, no doubt, but that by grant of a Fair it had well passed, without the words, cum pertinentiis. And questionless also, the King may grant a Fair, and that Coll shall be paid, although it be a Charge upon the Subject; because his Subjects (viz. the Mendees) Post. 711.
 have benefit, and ease by such Fairs: But the King cannot appoint a burthensome Coll, but it ought to be a Petit Sum, as a penny or two-pence, which are the smallest Copys, or of lesser, 2 Inst. 220.
 but not of any greater value, to charge the Subject. But without Grant, or Prescription, Coll is not of Common Right to be demanded. Therefore, &c. Clench inclined to that Opinion: But, because the other Justices were absent, Adjournatur. Vide Residuum postea, Mich. 39, & 40 Placito 29.

Cadogan versus Powel.

Error of a Judgment given in Assise in Monmouth. The Error Assigned was; Because Andrew Powel had brought an Assise against William Cadogan, and John Cadogan, de quadam portione Decimarum renovant, de 300 acris Terr. in Staveney. William Cadogan pleads, Nul Tenant de frank-tenement Tenementorum prædictorum in visu positorum, & in Querela specificata named in the Writ, and if not found Nul tort, &c. John Cadogan pleads, Nul tort. And the Assise taken, Quoad placitum Willielmi Cadogan, finds, Quod non fuit aliquis Tenens eorundem Tenementorum in visu recognitorum posit. & in Querela specificat, in Brevi nominatus. Et quod idem Willielmus fecit nul Tort, &c. And they further find, that the Plaintiff was seised of the Tithes, until by the said John Cadogan disseised, &c. And thereupon Judgment was given, Quod querens nihil capiat per breve versus Prædictum Willielmum, sed sit in misericordia. Et quoad J. C. That the Plaintiff should recover, &c. And it was assigned for Error, that the Judgment ought to have been intirely against the Plaintiff: For, when it was found, that there was Nul Tenens nofme, &c. the Writ abated in all against them both; And Judgment ought to have been given for the Defendant. But it was thereto said, That this Assise of Tithes, which is given by the Statute of 23 H. 8. of Tithes, is well maintainable against any, who takes the Tithes. And it is not requisite to name the Terrtenant: and then, although it be found Quod die Impetrationis Brevis non fuit aliquis Tenens eorundem Tenementorum, &c. That is to be intended, Quod non fuit tenens of the Land, out of which the Tithes, &c. which is not material. And in proof thereof vide 12 Ed. 3. Brev. 267. 31. Ass. 31. Dy. 84. But all the Court held, that Tenementorum in visu posit. & in Querela specificat are intended of the Tithes themselves; and of necessity there ought to be a Tenant named; otherwise the Assise is not maintainable; then the Assise finding, That there is not any Tenant named, it ought to abate. Quære how it can be; For, when it is found, that he was seised, until by John disseised, It is therein found, That John was the Disseisor, and Tenant: For it being of Tithes, which are in pernancy, he remained

(16)

remained always Tenant of them to every Action; And could not dispose of it, as he might of the Land it self. But notwithstanding, for this cause, the Judgment was reversed.

The Earle of Pembroke *versus* Sir Henry Barkley.

Quod vide Ante, Pasch. 37. B. R. Placito 8.

(17)
Ante. 384.

Co. 2. 71. b

Co. 5. 110. 2.
Co. Lit. 114. 2.

Co. 2. 72. a

ERror was brought of a Judgment; and amongst the Errors Assigned, the point in Law, that the Proviso was not a Condition, was Assigned. But the Justices and Barons would not hear any argument, in regard it had been disputed amongst them before the Judgment given; and, for the greater part, holden to be a Condition, and by their advice adjudged accordingly. But now divers other Errors were assigned; First, Because the Action is an Action upon the Case for disturbing him to exercise the Office of the Keeper of a Walk in the Forest of Fromesel-wood; and supposing that he was seised of the Mannor of Stok-Trister; to which Mannor the Office of the custody of the said Forest appertained; and that he, and all those, whose, &c. time, whereof, &c. by reason of the said Office, had had, &c. Omnia bona, & catalla foris-facta within the said Forest, except bona, & catalla foris-facta secundum assisam Forestæ, &c. whereas there cannot be a prescription to have omnia catalla foris-facta, &c. And then there be Damages demanded, and given for a Profit, which he could not have. A second Error assigned was; because the disturbance is alledged, that he 23 Decemb. 35 Eliz. deputed William Wheeler to keep Staver-dale-walk within the Forest, made an Assault, and hindered him to receive the custody of the said Walk, ac alia proficua (and doth not shew what Profits) in the said Walk emergentia colligere non permisit, sed impedivit (And he shews not how the disturbance was) 11 Ed. 3. Tresp. 112. A third Error assigned was; because the disturbance is alledged 23 Decemb. per quod a prædicto 23 Decemb. 35. usq; 10. Feb. next following, he lost the Profits of the Office; and he shews not any cause whereby he lost the Profits from the 23 of Decemb. nor that he lost the Profits the said 23 of Decemb. And yet Damages are given for that time also, where Damages are not to be given. For, it is not alledged, that he was kept out from the exercising of the Office, nor any disturbance after the 23 of Decemb. nor with a Continuando. Wherefore for these Errors, and Imperfections in the Declaration, and divers others, without regarding any matter in Law it was awarded, that the first Judgment should be reversed.

Rofs versus Moss.

Error brought in the Erchequer Chamber of a Judgment given in the Queens Bench in an Assumpsit; where the Plaintiff declared, that, in Consideration he would relinquish such a Suit, the Defendant promised to discharge him against all Suits of J. S. and alledges in fact, that he relinquished his Action; And, that the Defendant had not discharged him from such an Action. And hereupon Judgment was given for the Plaintiff; and Error thereof brought, and assigned, that this is not any consideration; for he might relinquish it to day, and afterwards begin it again: He ought also to have averred, That the Action, which he was to discharge, was actionable. And, for both these causes, it was held to be Error, and the Judgment was reversed. (18)

Post. 869.
Ant. 455.

The Lord Audley versus Pollard.

Ejectione firmæ. It was held by all the Justices, That where a Fine was levied with Proclamation, and a friend of him, who had the Right, entred to his Use, to avoid this Fine without his appointment; and the Comisee re-entred, and the five years passed: that this Fine is not avoided, but shall bind. For by the expels words of the Statute of 4 H. 7. a Fine shall bind, unless it be avoided by Entry, Claim, or Action of him, who hath right thereto, within the five years. And it is not sufficient for a stranger to Enter, unless it be by his command, who hath the right. But Gawdy said, That the agreement peradventure of him, who had the Right, within the five years after such an Entry made in his name, would serve: but an agreement afterwards would not serve. Quære. Note, Popham said, that he demanded the opinion of all the Justices in Serjeants-Inn about the principal Case, and they were of the same opinion. 9 Co. (19)

Mo. 450.
Co. 9. 106. a.
St. 4. H. 7. c. 24.
Co. Lit. 258. a.
Co. 9. 106. a.
Moor. 450.

Co. 9. 106. 2.

Morgan versus Johnson.

Pasch. 39 Eliz. in Communi Banco.

Debt upon a Bill, which was in this manner, Memorandum, That I, Thomas Johnson, do bind my self to John Morgan, to pay unto him all such monies, as my Brother oweth him. In witness whereof, &c. And in the end of the Bill underneath was written, That William, the Brother of Tho. Johnson, owed to Morgan 40 l. And the Plaintiff in his Declaration avers, that William, the Defendants Brother, then ought unto him 40 l. and it was thereupon demurred, and it was moved for the Plaintiff. That although this Bill was uncertain at the first; yet by the averment, and Writing under it, it is certain enough: as a Lease by Deed for so many years, as J. S. shall name, when J. S. had named them, it is sufficient and certain enough. And all the Justices agreed for the Plaintiff, That by the averment the Debt is sufficient, and the Deed may be referred to a Collateral matter. As an Obligation to perform Covenants within an Indenture. Wherefore it was adjudged for the Plaintiff. (20)

Co. Lit. 45. b.

C c c

Wiseman

Wiseman *versus* Crow. Trin. 38 Eliz. rot. 2302.

(12)

Post. 570.

Co. 3. 60. b.

St. 14. El. c. 8.

Co. 10. 46. 2.

Co. 10. 46. 2.

T Respass: upon Demurrer. The Case was. Tenant for life, the remainder to Tho. Wiseman in tail; remainder to John Wiseman the Plaintiff, in Fee. A Writ of Entry is brought against Tenant for life. He voucheth Tho. Wiseman the first Tenant in Tail, who voucheth the common Vouchee. And so a Recovery was had. Tenant for life dies; Tho. Wiseman dies without Issue. John Wiseman the Plaintiff enters upon the Defendant, who ousts him, and, upon all this matter disclosed in pleading, after Argument of the Serjeants, it was adjudged for the Defendant, by the opinion of Anderson, Beaumont, and Owen. For this Recovery is out of the Letter, and intent of the Statutes of 32 H. 8. and 14 Eliz. For they extend only to restrain the Recoveries against Tenant for life only, as tenants; which at the Common-Law was a bar to him in remainder, and as Recoveries; also where Tenants for Life are only vouched, and none who have the Inheritance, was party thereto. But here, by his voucher of the first Tenant in Tail, the Judgment being given against him, that is not to be said a Recovery against Tenant for Life, But against Tenant in Tail, and he who hath the Inheritance, being Party to the Record, it binds every other. But, if one in Remainder was only in assenting, and no Party to the Recovery; it might peradventure be otherwise. But here it is more, than Assent: and the common Case, if Tenant in Tail bargains, and sells the Land, and a Præcipe is brought against the bargainee, and he vouches the Tenant in tail, and he voucheth the common Vouchee: there all agreed, that this shall bind all in remainder; and yet there the Bargainee is but Tenant for Life. And Anderson said, this very Case was so adjudged in the Queens Bench: and although Writ of Error was thereof brought, and the Error assigned in this point in Law, the greater part of the Justices of the common Bench, and the Barons of the Exchequer agreed to affirm the Judgment. But it was afterwards reversed for a point in pleading, and not for the matter in Law. But Walmesley argued to the contrary. For the Letter, and intent of the Statute of 14 Eliz. is to restrain Recoveries against Tenants for Life; that they should not bar any, but those who are party, or assenting thereto. And he in Remainder, who is not party unto it by Voucher, nor assenting unto it, shall not be barred by such a Recovery, which the Statute reputes to be false, and covinous, and to the prejudice of him in Remainder, who had a good and rightful Remainder; which was not to be bound by such a fained Recovery, and, whereas it is said, that this Recovery is not against Tenant for Life only, but also against Tenant in Tail in Remainder: that is not material. For the Recovery is principally against Tenant for Life; and the Judgment is only against him for the Land; and against him in remainder only for the Recovery in value. So it is directly within the Letter, and Purview of the Statute, and within the intent to be remedied. Wherefore, &c. But, notwithstanding these reasons, it was adjudged for the Defendant, 10 Co. 43. Co. Entries.

Lovelace *versus* Reignolds. Ante, Hill. 39. Pl. 19.

THe Case was now moved again. And all the Court resolved, (22)
 that the Verdict was found for the Plaintiff, and against him, Ant. 546.
 who pleaded the prescription. For the prescription is entire, Co. 5. 79. a.
 and the payment of a Penny annually is parcel of the prescrip-
 tion, and it shall be intended to be as ancient as the Common;
 and that they began at one time. Wherefore, when he prescribes
 to have Common generally, and it is found, that he used to
 have it, paying 1 d. for it, The Common, which is found, cannot
 be intended the same Common, which he hath prescribed to have.
 As in 10 Ed. 4. 17. Prescription to have Common in gross, evi-
 dence to prove, that he hath Common appertenant, doth not
 maintain the Issue; for it is not the same Common. If this
 part also of the prescription should not be shewn for the Com-
 mon, the Tenant of the Land should not have any remedy for
 his 1 d. And as to the Judgment cited in the Queens Bench,
 there is a plain difference between that Case, and the Case in
 question. For there the Copy-holder prescribes to have Com-
 mon in the Lords Land, and it was traversed: and it was found,
 that he had Common according to his prescription. And it
 was further found, That the Copy-holders in the said Manor
 had used to pay to the Lord, Pro eadem Communia unam Gallinam, &
 quinq; Ova per annum. And adjudged, that the prescription was well
 pleaded. For there were two prescriptions, the one for the Com-
 moner, the other for the Lord. Wherefore, it was sufficient for the
 Commoner to alledge the prescription for the Common, and he
 needed not meddle with the other. And this being found is suffi-
 cient, and the finding the prescription on the Lords part is not
 material, which was the reason of the Judgment there, as
 Popham and Fenner affirmed unto us. But here the prescription
 is entire, whereof the payment of 1 d. is parcel, which ought to
 have been entirely alledged. And of that opinion were Popham and
 Fenner. Wherefore they all agreed, that Judgment should be gi-
 ven for the Plaintiff.

Anonymus.

Action upon the Case for these words, Thou art a Corn-stealer. (23)
 After Verdict for the Plaintiff, upon Not-guilty pleaded, It
 was moved: That an Action lay not for these words. For it is
 not alledged of what value: and it might be under 12 d. value,
 and so not Felony; It might be also that the Corn was growing,
 and so no Felony. Sed non allocatur. For the value is not material,
 because the Action would lie for calling him Thief generally. It
 shall not also be intended, but of such Corn, which might be
 stolen, and not of Corn standing. Wherefore it was adjudged
 for the Plaintiff. 2 Cr. 674.

Francis Throgmortons Case.

Action upon the Case against Francis Throgmorton; because he (24)
 procured the Plaintiff to be Endicted as a Common Bar-
 retter before the Justices of Peace in the County of Warwick;
 And that afterwards, he was lawfully acquitted thereof, before
 C c c 2 Anderson,

Ante. 71.

Ant. 248.
F. N. B. 42. g.

Anderfon and Clench Justices, Justices of Assise there. The Defendant pleaded Not-guilty, and found against him. And it was alledged in Arrest of Judgment, that the Declaration was not good. For he hath shewn, that he was acquitted before A. and C. Justices of Assise, which is not good: for he cannot be acquitted before them, as Justices of Assise, but as Justices of Oyer and Terminer. And it was held to be an apparent fault by the whole Court. Anderfon and Beaumont held, that the Action lies not for the matter. For when one prefers an Enditement, and is sworn thereupon, it is to be intended, that he prefers it lawfully, and in zeal of Justice. And, although the other be found Not-Guilty, it is not reason he should be punished for exhibiting a Bill; no more, then where a Bill is exhibited in the Star-Chamber for matters examinable there, an Action upon the Case lies not, although it be false; no more here. But where two or more conspire together, to procure one to be Endited of Felony or Trespass, and he is afterwards acquitted: it shall be intended by Law to be maliciously done; for which, Conspiracy lies: But no Action lies, where only one prefers a Bill of Enditement; for it would be in hinderance of Justice. Wherefore, &c. But Walmsley doubted thereof; for the Declaration supposed it to be Malicious. And there is not any reason, if any one, without cause, will procure another to be Endited, but that an Action will lie against him. Whereupon it was adjourned.

Hunt *versus* Singleton.(52)
Ant. 473. 4.
13 El. c. 10.
14 El. c. 12.

TRespass. It was found by special Verdict, that the Dean, and Chapter of Pauls, made a Lease for forty years of an house in London. The which house was then in Lease for ten years to a stranger. Whether this were a good Lease, or no? was the Question: And it was held by the whole Court, without Argument, that it was not a good Lease, but meerly void by the Statute 13 Eliz. and not warranted by the Staute of 14 Eliz. which made Leases of Houses in Cities to be good for forty years: So as it be not made in reversion of any other Lease. For, although this Lease is to Commence immediately; Yet it is in Law a Lease in reversion, and therefore within the words of the Statute. And the Statute here needs not to be found by the Verdict: Because it is a general Law. Wherefore it was adjudged accordingly. Vide ante, Pasch. 38. Pl. 37. 3 Co. 60. a.

Wheatley *versus* Christopher Best.

(92)

Co. Lit. 32. a.

Dower. The Tenant made Default after Default; Whereupon Thomas Best prayed to be received for his Term made unto him before the Coverture: and he was received, and his Term saved. The Question now was, how the Judgment and Execution shall be; for if it should be Quod cessat executio during the Term, he should not then have the Rent reserved upon the Lease. And all the Justices agreed, that the Judgment should be entred generally, that he should recover Seisin of the Moety of the Land, (the Land being Gavel-kind) And, that the Writ of Execution should be special, that the Sheriff should not oust the Termor; But that he should come upon the

the Land, and demanded Seisin for the Feme; and thereby she should have the Moety of the Kent, with the Reversion. And Beaumont said, that so it was done; Eliz. in his Mothers Case, upon a Petition of Dower; the Reversion being in the Queen. Wherefore the Court commanded to have it to be done so in this Case.

Bradbury versus Reynel.

DEbt against him as Executor of Tyrrel. The Defendant pleads, that Tyrrel died Intestate, and, that certain of his Goods came to the Defendants hands, and afterwards Administration was committed to J. S. to whom he had delivered the said goods. Et per curiam, it is not any Plea; For if the Administration had been committed unto him, it would not have purged the first Tort. So here, although Administration is committed to a stranger, in regard that he hath once made himself chargeable to the Plaintiffs Action, as being Executor de son Tort, &c. He shall never afterwards discharge himself by matter ex post facto. Wherefore, &c. Adjournatur. Et vide 21 H. 6. 8. 9 Ed. 4. 47. 2 R. 3. 20.

(27)
Ant 406.

1 Cr. 89.
Ante 102. 469.
Ant 406.
Co. 5. 34.

Matthews Case.

DEbt upon a Lease for years made at Northampton of Lands in D. in the County of Northampton. The Defendant pleaded Nihil debt, and found against him; and it was moved in Arrest of Judgment, that the Ven. fac. was awarded de North. whereas it ought to have been from D. where the Land lies. But, if the Lease had been traversed, it should have been from the place, where it is alledged to be made. But the Court held the Trial to be good enough; for the Debt is due by reason of the Contract which was at Northampton. Wherefore, absente Anderson. It was adjudged for the Plaintiff.

(28)

Ante 259.

Blundens Case.

DEbt upon an Obligation, Conditioned to pay an Annuity at the Annunciation of our Lady, or within twenty days after. The Issue being joyned upon a Collateral matter, and found for the Plaintiff. Drew moved in Arrest of Judgment, that the Original was brought the eight of April, and he alledgeth the breach to be at the Annunciation last past, which was within the twenty days after the Feast of the Annunciation, and so the Action brought before he had cause of Action, and the Court held it to be an apparant Fault. For the Annuity was not due until the end of the twenty days. And Walsally said, that it hath been adjudged, where one makes a Lease for years, rendering Rent a Mich. or within twenty days after, and dies after Mich. and within the twenty days, that the Rent was due to the Heir, and not to the Executor. Whereupon the Judgment was stayed.

(29)

Co. 10. 128. 6
Post. 575.

Fereby versus Lurkyn.

Assumpsit, and Declares, that the Defendant in Consideration the Plaintiff would make a Lease unto him of such Land, assumed to pay 20 l. And alledged in Facto, that he had Lett the Land

(30)

Land to the Defendant for five years; and the Defendant had not paid him the 20 l. The Defendant pleaded Non Assumpsit, and found against him: and after Verdict, it was moved in Arrest of Judgment, that the Plaintiff had not performed the Consideration. For, he being to make a Lease, it shall be intended for Life. But the Court held, that the promise being general, to make a Lease, it may be any Lease, viz. at Will, which he might determine presently: and it is not any consideration to ground an Action. Wherefore the Judgment was stayed.

Willoughbies. Case. Pasch. 39. Eliz. rot. 1250.

(31)

2 Cr. 686.
Co. lib. 8. b.

2 Cr. 686.

Percival Willoughby, and Bridget his wife, one of the Coheirs of Sir Francis Willoughby, (because Sir Francis Willoughby died Seised of a great Inheritance, having five Daughters, whereof the eldest was married to Perc. Willoughby; and not any Son; And the said Sir Francis, leaving his wife Dorothy, who, at the time of his death, pretended her self to be with Child by Sir Francis, which if it were a Son, all the five Sisters should thereby lose the Inheritance descended unto them) prayed a Writ de Ventre Inspiciendo out of the Chancery, directed to the Sheriff of London, that he should cause the said Dorothy to be viewed by twelve Knights, and searched by twelve Women in the presence of the twelve Knights, & ad tractandum per Utera, and Ventrem Inspiciend, whether she were with Child, and to certify the same into the Common Bench. And if she were with Child, to certify for how long time in their Judgments, & quando sit paritura. Whereupon the Sheriff accordingly caused her to be searched, and returned, that she was twenty weeks gone with Child: And that within twenty weeks suit paritura. Whereupon another Writ issued out of the Common Bench, Commanding the Sheriff safely to keep her in such an House, and that the doors should be well guarded; and that every day he should cause her to be viewed by some of the Women named in the Writ (wherein ten were named) and when she should be delivered, that some of them should be with her to view her Birth, whether it be Male, or Female, to the intent there should not be any Falshy. And, upon this Writ, the Sheriff returned; That accordingly he had caused her to be kept, &c. And, that such a day she was delivered of a Daughter. Note, This Writ, and the Proceedings thereupon are grounded upon Bract, lib. 2. fol. 69. and upon the Writ in the Register, fol. 227.

Termino

Termino Trinitatis,
Tricesimo nono ELIZABETHÆ,
in Banco Reginae.

Williams *versus* Williams.

Ante, Pasch, 39 Plac. 14.



He Case was now again argued, and only upon the Errors Assigned. The first was, That the Recovery was against him by default in Dower. And, that he, at the time of the Recovery, was, and yet is within age. The second Error was, That he was not Terr-tenant at the time of the Action brought, nor ever since. For the first Error Assigned, vide 6 H. 8. Savers Default; Br. 50. Dy. 104. 17 Ed. 2. Savers Default 30. For the second, for that he is not Terr-tenant: although it be said, That he lose nothing in the Land, and then he cannot have a Writ of Error: yet here he loseth Damages; and to excuse himself from them, it is reasonable, that he should have this Writ of Error. And in 6 Ed. 3. 8. It is holden, that he, who pleads Non tenure, might have a Writ of Error. For, although, he hath not therein free-hold, yet he may have in Reversion what he may lose by the Judgment: but it is otherwise of him, who disclaims. Wherefore, &c. Gawdy, as to the first held it to be Error; for a Recovery against an Infant by Default differs not from another Præcipe. And in Primo Mariæ, Dyer, in Andersons Case, it is Ruled after long Argument, that a Recovery against an Infant by Default in another Præcipe is erroneous. But Popham, and Fenner e contra. For Fenner said, That a Writ of Dower was favoured: and it is not reasonable, that the Demandant should be prejudiced by the Tenants Infancy: For, if thereby the Demandant should be delayed, Women should never recover their Dowers, to have the fruits, and benefit thereof. For the Tenancy might be in an Infant, who never would appear, but suffer the Judgment to pass against him by Default and have it afterwards Reversed for this cause. And Popham said, there was not any difference betwixt a Writ of Dower, and another Præcipe. For a Recovery against an Infant by Default, is good in both Cases. For it would be mischievous, if the Demandant, who hath Right, should be delayed of her Right, because the Tenant is an Infant, & will not appear. For, if that should be suffered, all Land, wheretoe another hath Right of Action, would be put in an Infant against whom there could not be had a good Recovery, and it is not as mischievous on the other side. For if an Infant, having Right, loseth it, he may have his Writ of Right. But Gawdy said, Although

(1)
Moor. 342.
1 Rol. 796.
Ante 557.

Ante 557.

2 Cr. 111. 392.
Co. Lit. 35. a.
Post. 638.
1 Rol. 796.

though it were a greater mischief: yet it is to be suffered rather, then have the Law to be changed, unless it be by Parliament: As, at the Common Law, Le parol demurrera for the Non-age of the Demandant, which was mischievous unto him: and therefore the Statute of Gloc. cap 2. was made to redress it: and so of others, &c. Clench agreed with Gawdy; for it would be dangerous to compel Infants to appear, and plead, who know not their own Title; especially, if they have the Land by descent. But if it may appear, that an Infant hath the Land by Purchase: that privilege peradventure would not then be allowed him; because the Chancery might purposely of Covin be put into him, to delay the Demandant. Wherefore, &c. Fenner as to the second Error held, that he might well assign it for Error, to discharge himself of the Damages: but the other Justices did not speak thereto. Sed adjournatur.

Rivers *versus* Oodskirt. Trin. 38. Eliz. rot. 794.

(2) Error of a Judgment in the Common Bench, in an Action Sur Trover, where the Plaintiff Declared, Quod cum possessionatus fuit de 40 l. in quadam Crumena existent, ut de bonis suis propriis, and lost them; and the Defendant found, and converted them to his own use in retardationem Executionis Testamenti, to the Plaintiffs damage of 40 l. The Defendant pleaded Not-Guilty, and found for the Plaintiff, and the Jury assessed for Damages 40 l. and for Costs 20 s. And the Plaintiff had Judgment accordingly, and thereupon Error was brought. The first Error assigned was; Because he alledgeth not, that he was possessed of a Purse, but only of 40 l. in the Purse, and the Conversion is alledged of both, and Damages given intirely for both. Sed non allocatur. For it shall be necessarily intended: and so is 21 H. 6. in Detinue. Secondly, Because it is alledged, that he was possessed of 40 l. ut de bonis propriis, and that the Defendant converted them in retardationem Executionis Testamenti, which is contrariant, &c. The Goods being his proper Goods, that they should be converted in retardationem, &c. And for this repugnancy it was ill. And of that opinion was Fenner Justice, and in proof thereof, relied upon 25 Ed. 3. 40. and Sales Case 31 Eliz. But all other Justices e contra; for the Executor is possessed of the Testators Goods, as de bonis suis propriis, & so may declare. And yet the conversion of them is in retardationem Executions Testamenti; & this exception was taken in the Countess of Rutlands Case in this Court, & yet held to be good: for these words are but Surplusage, which do not abate the Count. The third Error Assigned was; because he counts but of 40 l. Damages; and the Damages and Costs assigned by the Jury exceed the sum, whereof he declares; which ought not to be, and therefore it is erroneous: and to that purpose 13 H. 7. 16. 18 H. 6. 17. & 2 H. 6. 7. were cited. Sed non allocatur; for the Damages ought not to be assessed more, then whereof the Plaintiff himself hath counted; but, because the Suit might for a long while have depended, they may be further assessed, and increased. For Non constat at the time of the Declaration what the costs of Suit would amount unto. But, if the Damages and Costs had been intirely assessed at more then are mentioned in the Declaration, it had been ill. For Non Constat but that the Damages exceed the Damages mentioned in the Declaration. Wherefore it was adjudged accordingly, and the first Judgment affirmed.

Ante 544.

Co. 10. 116. b. 7

Co. 10. 117. b.

Web

Web versus Poor.

Action for these words. I will call him in Question for poisoning my Aunt, and I make no doubt to prove it. After Verdict for the Plaintiff; it was moved in arrest of Judgment, That the Words were not actionable; for it is not any direct affirmation that he poisoned his Aunt. Sed non allocatur; For it cannot be more direct, when he saith, He will call him in Question, and maketh no doubt to prove it. Secondly, it was alledged, That the Action lies not, because it is not averred, that his Aunt was poisoned, for otherwise it is not any offence. Sed non allocatur; For his credit is impeached, although he never did any such Fact: as to say, That he was perjured in this Court, although he never were sworn, is Actionable. Wherefore it was adjudged for the Plaintiff.

(3)
1 Rol. 50. 72 77Ante 6.
2 Cr. 331.*Yielding versus Fay.* Trin. 36. Eliz. rot. 948.

Action upon the Case against the Defendant, as Parson of Quarleys in the County of Southampton. Whereas, within the said Parish there is a Custom, that the Parson there at all times of the year had used to keep within the said Parish a common Bull, and a common Boar, for the common use of the Kine, and Sows of the Parishioners at any time Quandoocunque necesse foret, for the encrease of Calves, and Pigs within the said Parish, that the Defendant being Parson there for three years, had not kept any Bull or Boar there, by reason whereof the Plaintiff being an Inhabitant there, had lost the increase, &c. The Defendant protestando, that there is not any such Custom, pleaded Not-guilty, and thereupon the Plaintiff demurred: For in an Action for a Non-feasance, Not-guilty it is not any Plea; For they be two Negatives, which cannot make an Issue, no more, then two Affirmatives; 32 H. 6. 23. But in an Action for a Misfeasance it is otherwise. And of that opinion were the Court; And, that it is a good and reasonable Custom; and, that every Inhabitant, who hath prejudice by the not keeping of the Bull, or Boar, may well maintain his Action. Wherefore it was adjudged for the Plaintiff.

(4)
1 Rol. 109. 559
Moor. 355.*Sedburrough versus Raunt.* Mich. 38, & 39. Eliz. rot. 155.

Error of a Judgment in the Common Bench in Debt upon Non sum Informatus. The Error Assigned was, That the Defendant, at the time of the Judgment, was within age, and appeared by Attorney, Whereas he ought to have appeared by his Guardian. And upon two Scire facias two Nihil were returned: Whereupon it was prayed, That, for this cause, the Judgment might be Reversed. And by Gawdy, and Fenner (cæteris Justiciariis absentibus) it was therefore reversed. For Gawdy said, If he were within age, at the time of the Judgment given, although he were not so at the time of the Error brought, it is reverfiable,

(5)
1 Rol. 287.
2 Rol. 573.
2 Cr. 581.2 Cr. 581.
2 Ro. 573.

D d d

and

Co. Lit. 380. b.

and is triable per Pays; and not like to an Error upon a Fine, or a Statute acknowledged by one within Age: For they be not reverfable but by Infpection. But here, in regard the Defendant made default upon two Nihils returned, it is not now Triable, but it as a Confeflion. Wherefore it was for this caufe reverfed.

Bradshaw verſus Eyr. Hill. 39. Eliz. rot. 532.

(6)
Mo. 462.

Hob. 131.

T Respaſs de Claſſo fracto in Abney. The Defendant pleads, That long time before, &c. one Nicholas Bagshaw was Seized of the place, where, &c. in Fee; and, that one Godfrey Fuliamb was Seized in Fee of an Houſe, and twenty Acres of Land in A. aforeſaid, And, that the ſaid G. F. and all they, whoſe Eſtate, &c. have had for him, his Farmers, and Tenants of the Premises, common in the ſaid place, where, &c. for all their Beaſts at all times of the year, as to the ſaid Tenement appertaining; And, that the ſaid G. F. infeoffed of the ſaid Tenement the ſaid N. B. and, that afterward the ſaid N. B. Lett unto the Defendant the ſaid Houſe, and twenty Acres of Land, with all Commons, Profits, and Commodities thereto appertaining, vel occupat: vel uſitat: cum prædicto Meſſuagio; and thereby juſtifies the putting in of his Cattle to uſe the Common, &c. And it was thereupon demurred. The matter in Law was only, Whether this Common, being extinct by the Unity of Poſſeſſion, may be revived by any of thoſe words? Or, whether it may not enure, as a new Grant of Common for ſo many years (and by Gawdy, and Fenner (Popham, and Clench abſentibus) it was held clearly, That this Common was extinguished by thir Unity of Poſſeſſion; it being Common appertenant, and cannot be revived again; although a Feoffment had been made of the Land. And Gawdy ſaid, that ſo it is of Common appendant, and, as to this purpoſe, there is not any difference betwixt them. But they held, That by the Word of the Leaſe Of all Commons, Profits, &c. occupied, or uſed cum Meſſuagio, &c. It is a good Grant of a new Common for the time. For, although it were not Common in the hands of the Feoffor, yet it is Quasi Common uſed therewith; and, although it be not the ſame Common it was before, yet it is the like Common. But becauſe there was not a ſufficient averment, that this Common was uſed by the Leſſee at the time of the Leaſe, it paſſed not, and it was therefore adjudged for the Plaintiff.

Wiſeman verſus Gennings. Trin. 48. Eliz. rot. 505

(7)
Ante 562.
Co. 3. 60. b.

Ant. 562.

U Pon a Special Verdict the Caſe was; That A. Tenant for life, remainder to B. in Tail, remainder to R. in Fee; A. ſuffers a Common Recovery with voucher of B. A. dies, B. dies without iſſue. Whether R. ſhall avoid this Recovery by the Statute of 14 Eliz. was the queſtion. Popham; it hath once been here adjudged a good Recovery to bind the remainder in Fee, notwithstanding the Stat. of 14 Eliz. And being brought into the Exchequer Chamber, all the Juſtices agreed with the Judge

Judgment for the matter in Law; but reversed it for the Form. And to that opinion the whole Court now agreed, and would not hear any further argument in this Case. Wherefore it was adjudged for the Plaintiff.

Southwel *versus* Brown. Mich, 35, & 36. Eliz, rot. 141.

Covenant. The Plaintiff declares, That the Defendant per Scriptum Articulorum betwixt the foresaid Defendant on the one part, and the Plaintiff on the other part, convenit, &c. After Verdict, it was moved in arrest of Judgment, that the Declaration was not good; because he doth not alledge, That that writing was Sigillo defendentis sigillatum. But Glanville moved. That it needed not: For it is per Scriptum suum factum, &c. convenit, &c. and therefore the Sealing, and Delivery shall be intended; for it cannot be Factum without those circumstances, And the Court said, if this word Factum were in, it might peradventure be good for the reasons before alledged: but, because upon view of the Record, it appeared, That this word Factum was left out, and it was only as it is before recited, it was adjudged for the Defendant, that the Declaration was not good.

(8)

John Rogers *versus* Gravat, Parson of St. Pulchers.

Action for these words, Thou art a Witch, and a Sorcerer. After Verdict it was moved, that the words were not Actionable; But the Court resolved e contra. For Gawdy said, If he witcheth men so as they die, it is Felony: and, if he use witchcraft in any other manner, he shall stand upon the Pillory. So, in every respect, it is a slander, and a good cause of Action. Wherefore it was adjudged for the Plaintiff.

(9)

2 Cr. 531.

Gervys *versus* Hallewel.

Prohibition. A Sentence in the Spiritual Court at Litchfield was had against the Plaintiff, who afterwards appealed to the Archbishops, where the Sentence was affirmed, and adjudged ut supra against the Plaintiff: Whereupon he sued a Commission to the Delegates, and the matter was re-examined, and Sentence then given for the Plaintiff. And thereupon another Commission was sued forth to re-examine this matter. And now a Prohibition was prayed to stay this: For it was said, That by the Statute of 25 H. 8. It is appointed, that a Sentence before the Delegates shall be final; and then this second Commission is not well awarded. But it was thereto said, that the Queen hath by Law an absolute power to grant Commissions to re-examine, which is not restrained by the Statute of 25 H. 8. And that it hath been so ruled before these times. And of that opinion was Popham. But, because it was a new Case, they would advise thereof.

(10)

Mo. 462.
St. 25. H. 8. c. 19.Hob. 146.
Post. 601.

Rogers *versus* Bird.

- (11) Debt upon an Obligation. The Defendant pleads to Issue, and found for the Plaintiff. After Verdict it was moved in Arrest of Judgment, That the Ven. fac. was returnable Die Sabbathi post Octab. Trin. And the Distringas issued bearing Date the day after Crastino Trinitatis, and Trial had thereupon. And, because it was without warrant, being before the return of the Ven. fac. it was therefore ill. But, because by the Roll the Ven. facias, was awarded returnable Crastino Trinitatis, which is the Warrant to make the Ven. fac. and was well awarded, and it was the Default of the Clerk, who did contrary to the Roll, it might be well amended. Wherefore it was ruled, that it should be amended according to the Roll. And the Plaintiff had Judgment. But Popham said, If the Trial had been upon the Ven. fac. it was Erroneous, and had not been amendable. Vide 7 Ed. 4. 15. 2. Rr. 3. 11.

Ant. 433.

Ante 433.

Harvie *versus* Oswel. Ante, Pasch. 39. Placito 4.

- (12) The Case was now moved again. Fenner held, That the Plaintiff might well Enter, notwithstanding his acceptance of the Rent; because he had not any notice of the breach of the Condition; as 4 Ed. 3. Release 11. Tenant in feoffs his Son, and Heir, and dies, the Lord accepts the Rent from the Heir, not having notice of the Feoffment, yet he shall have his arrears, and reliefs. So 2 R. 2. Title Attornment, where a Feme Grants a Reversion, and takes the Grantee to Baron, the Tenant pays the Rent unto him, not knowing of the Grant, this is not any Attornment. The Condition also being collateral, the Acceptance of the Rent is not any barr. Gawdy; There is not any difference betwixt a Condition annexed for Non-payment of Rent, and any other Condition. But, in both Cases, if the Lessor accepts the Rent, which is due after the Condition broken, it dispenseth with the Condition broken, if he had any notice at that time of the Condition broken: but here, because he had not any notice of the Condition to be broken, as it is confessed by the demurrer, and by possibility he could not take notice thereof; It is not any dispensation with the Condition; and therefore no barr to his Entry. But, if the Lessee had aliened parcel of the Term, and the Lessor had accepted the Rent from the Alienee, that would have affirmed the Lease: For thereby he took notice of the Alienation. Wherefore, &c. Popham continued his opinion as before. And thereupon it was adjudged for the Plaintiff.

Ant. 553.
Co. 3 64.
Moor. 456.

Ante 528.

Bate *versus* Rookwood. Pasch. 39 Eliz. rot. 97.

- (13) Error of a Judgment in the Common Bench, in an Action for these Words, Thou art a forsworn Fellow; For by thy false Oath thou hast hanged as true a man, as thy self. The Error assigned was, That these words were not Actionable: but all the Court held the

the contrary; For, although the first words, A forsworn Fellow, will not maintain an Action; yet, when he declares, that by his false Oath he had caused a man to be hanged, that cannot be intended, but to be a false Oath judicially taken in evidence against a Prisoner. And the Words, Thou hast hanged, shall be construed to be, Thou hast caused to be hanged. Wherefore it was awarded, That the Judgment should be affirmed. Another Exception was taken; because the Declaration was, Quod propalavit quædam scandalosa verba, prout in his Anglicanis verbis sequent. (viz.) Thou, &c. and it may be the words were spoken in another Language, which they, who were present, understood not; and then there is not any cause of Action, as it hath been adjudged before these times. Sed non allocatur. For it shall be intended, that he spake Anglicana verba. And the words, Prout in his Anglicanis verbis sequent, is tant amount, as if he had said, Hæc Anglicana verba sequentia. Wherefore it was adjudged, ut supra.

Ante 135.

2 Cr. 204.

Blumfield *versus* Rosewith. Ante, Pasch. 39 Plac. 16.

THE Case was now moved again, and recited to be such; May (14) and Blumfield were obliged jointly, and severally to the Defendant: he sues them severally by several Bills, and had Judgment against them severally, and afterwards sued a Capias ad satisfaciendum against May, who was taken in Execution, and the Sheriff suffered him to escape, and afterwards he sued Execution against Blumfield, who, being thereupon taken, brought an Audita Querela, comprising all this matter: and, whether it lay, or not? was demurred in Law. Gawdy, and Fenner held; That the Execution was well sued against the Plaintiff. For the difference will be, where one is discharged out of Execution by the Act of the party himself, to whom he was indebted, as by a Release, or making him his Executor, or the like. And where one is discharged by his own Act, or the Act of a stranger, as by the Sheriffs permitting him to escape. For, in the first, it is a discharge for both; but it is not so in the last. And, if one of them die in Execution, it is not any discharge for the other. And, if they were sued by one Original, and several Præcipes, yet he might have had several Capias ad satisfaciendum against them; And so both should be in Execution, at one, and the same time; As 29 H. 8. is. And although the Entry upon such a Record is, Quod unica fiat executio, yet that shall be intended to be an Execution with satisfaction. But, when they are sued by several Originals, or by several Bills, as this Case is; there is no Question, but that several Executions might be sued. Wherefore, &c. Popham conceived, that the Plaintiff should be relieved: For the Obligee hath taken against his Companion as great satisfaction, as possibly he might have; For, he being in Execution and discharged, no new Execution might be against him of his Body, Goods, or Land, &c. And because it is an Execution with so great satisfaction, as may be, the other shall not be charged. But I agree, when the one is in Execution, that the other may be taken in Execution, when they are sued by several Originals, or Bills; for Non constat Curie, that it is all one Debt: But, when they be sued by one Original, and several Præcipes, I doubt, that

Ante. 555.

Co. 5. 86. b.

that when the one is in Execution by a Capias, whether the other might be taken by another Capias. For it appears to us upon the Record, that all is but for one Debt; and the Entry of the Record is *Quod unica tantum fiat executio*. And it is clear, That, if one of them be taken by a Capias ad satisfaciendum, A Fieri fac. or Elegit cannot be awarded against the other; and so is 4 Ed. 4. 38. 5 Ed. 4. 5. Et adjournatur.

Morgan versus Wye. Trin. 36. Eliz. Rot. 1074.

(15)

Yelv. 15.
Moor. 356.

Post. 586.

Error in the Exchequer-chamber of a Judgment in the Queens Bench. The Error assigned was; because the Ven. fac. was awarded to the Coroner, for Consanguinity in the Sheriff; and it was returned by the Coroner, and afterwards a Tales was awarded, and it was returned by the Sheriff. And it was tried, and a Verdict given, and Judgment; and, for this cause held to be Erroneous, and not aided by the Statute of 32 H. 8. or 18 Eliz. Wherefore the Judgment was reversed.

Termino Trinitatis, 39 Eliz. in Communi Banco.

Willis versus Stroud.

(16)

Post. 844.
Co. 7. 1. b.

Action upon the Case. Where the Defendant recovered in this Court against the now Plaintiff in Debt, of which Judgment the Plaintiff now hath brought Error in the Queens Bench; and, by reason thereof, the Record was removed into the Queens Bench; that the Defendant notwithstanding, well knowing thereof, had taken forth here at Westm. a Capias ad satisfaciendum directed to the Sheriff of Dorset, by reason whereof the Plaintiff at D. in the County of Dorset, was taken in Execution, the Defendant pleads to Issue, and it was found against him. And now alledged in arrest of Judgment; First, That the Action is not well brought in Middlesex; For the Tort was in the County of Dorset, by the taking him there in Execution, But Walmsly, Beamond and Owen held; That the bringing of the Action in Middlesex was well enough; For the ground of all the Tort is the suing out of the Capias, which was here in Middlesex. But Walmsly held; that the Action lay not, unless it be alledged, that it was purchased in an undue manner by fraud between the Defendant and others, and without notice of the Court: For, if it were granted by the Court, he is not punishable; but Beamond, and Owen held, that the Action well lay; because it is alledged, That he, maliciously intending to charge him, had pursued this Writ, &c. Anderson absente. Adjournatur.

Wythers versus Rooks and Smith.

(17)

Ante. 145.

Replevin. The Parties were at Issue: Rooks afterwards died. And it was shewn to the Court, and moved, Whether the whole Writ should abate, or not? and the opinion of all the Court was, That it should not abate, but stand good for

stand good for the other. And Walmsly said, he had known it to have been twice so adjudged in his time. Wherefore, &c. Vide Dyer 175. a.

Pilkinton versus Dalton.

DEbt; upon a special verdict the Case was. A Parson made a Lease for years, rendering Rent at Michaelmas, or within a moneth after; the Lessee Enters, the Lessor dies within ten days after Michaelmas, Whether the Executor hath any Remedy for this Rent? was the Question, and Ruled, That he had not: For the Rent was not due in the Testators time, nor until the end of the moneth. And, in such Case it hath been adjudged that such Rent belongs to the Heir, where it is reserved by a Lay-Person, and he dies after Michaelmas, and before the moneth ended. Wherefore it was here adjudged accordingly. Vide 10 Co. 129. (19)

Ant. 565.
2 Cr. 310.
Co. 10. 128. b.

Ordwey versus Godfrey. Pasch. 39 Eliz. rot. 1433.

Scire facias against an Administration to have execution of a Judgment against the Intestate. The Defendant pleaded, Quod nulla habet bona, quæ fuerunt Intestati, tempore mortis suæ, in manibus suis administranda, nec habuit diu Impetrationis Brevis, nec unquam postea. And it was thereupon Demurred, and held by all the Court, that it was not any Plea: for a Judgment cannot be answered without another Judgment; And it may be she had Administered all the goods in paying Debts upon specialties, which is not any Administration to Barr the Plaintiff. Or as some said, It may be she had paid Debts upon a Statute, or Recognisance which are not allowable against a Judgment. But Anderson denied it; For there is not any Priority of Debt upon Record, unless in Case of the Queens Debts, which is first to be paid. And here the Defendant ought to have pleaded Specially, how she had Administered. Wherefore it was Adjudged for the Plaintiff. (20)

Co. 5. 28. b
Post. 822.
Post 822.

*Wolley versus Bradwell, and his Wife, Executrix
of Sir Thomas Manners.*

THe Defendant pleaded Outlawry in the Testator, 29 Eliz. not Reversed. And it was thereupon demurred. Here for the Plaintiff moved, that it was not any Plea; because (admitting it to be a Plea) it should be, in regard the Testator, being Outlawed, could not have any Goods, but they appertained to the Queen, and then the Executors might not have any Goods to satisfy: but that is not so: for the Testator might have a Debt due upon a Contract, which is not forfeited; or, it might be, that the Testator devised Lands to be sold by his Executors, which are sold, Money is Assets in their hands, and in 3 H. 6. 17 & 32, It is holden to be no Plea. And of that opinion were Walmsly, and Owen. For a Person Outlawed may well make a Will. (21)

Post. 851.

Will, and have Executors. And the Executor may have Assets to satisfy, over, and besides the Goods forfeited to the Queen; as in the Cases before put, and in others of the same nature. But Beaumont *e contra*: for the bar is good to a common intent. And these kind of Assets shall not be intended, unless they be shewn: Wherefore *prima facie* the Plea is good. Anderson *absente*, adjournatur. Afterwards, for defect in the pleading, without regard to the matter in Law, it was adjudged for the Plaintiff. 8 Ed. 4. 6. 21 Ed. 4. 5. 39 H. 6. 27.

Coniers, Sheriff of Durhams Case.

- (22) **D**ebt upon an Escape. The Case was, That upon a Reconuissance in Chancery, the Conuisee sued Execution by a Capias *ad satisfaciendum*, by force whereof the Conuisor was taken, and escaped, and Debt brought thereupon. Savel moved, That a Capias lay not in this Case; and there the Sheriff is not chargeable. Wherefore, &c. And the Court held, That the Capias *ad satisfaciendum* was erroneously awarded: yet the party, being taken by force thereof, it is a good Execution for the Party, as long as it continues unreversed, and the Sheriff is chargeable for the Escape. Wherefore it was adjudged accordingly.
- Ant. 164. 3.
- Ant. 165.

Jobsons Case.

- (23) **J**obson devised certain Land in New-Castle in Tail, the remainder to the next of his Kin of his Name: and, at the time of the Devise, the next of his Kin was his Brothers Daughter, who was then married to J. S. The Devisor died. The Tenant in Tail died afterwards without Issue. Whether this Daughter should have the Land was the Question upon a special Verdict, and adjudged without argument, that she should not: For she is not now of the Name of the Devisor, but of her Husbands Name. But if she had been unmarried at the time of the Devise and death of the Donor; although she had been married at the time of the death of the Tenant in Tail without issue, yet she should have had the Land. Wherefore it was adjudged accordingly.
- Ante 532.
- Ante. 532.

Anonymus.

- (24) **A** Dedimus potestatem was awarded to take the Conuissance of a Fine of four persons. The Commissioners return the Conuissance of three only, It was moved to the Court, what should be done to make this to be a Fine against those three. And two of the Cursitors were called into Court, and opposed, whether the Name of the fourth might not be razed out of the Dedimus potestatem, and make the Writ of Covenant to accord therewith: and it was answered, that it might be done very well, and that it had been so done about thirty years since; And it was shewn to the Court, That a Dedimus Potestatem was awarded to take the Conuissance of a Fine from Baron and Feme; And the

the Conufance of the Baron onely was returned, and the Feme would not acknowledge it. And the now Lord Keeper, upon this Matter shewen unto him, Ordered, That a new Dedimus potestatem should be awarded, to take the Conufance of the Baron only: and, That it should be of the same date as the first was; and, that the Return of the Commissioners should be annexed thereto, Anderson; So it may be done here, or otherwise, If the Fine be levied betwixt the Plaintiff and the three others only, it shall be good without Question: for there is not any prejudice to the fourth. Or the Writ of Dedimus potestatem might be amended, and the Writ of Covenant made to accord with it. And any of those three ways would be well enough. And there is no doubt, if a Dedimus potestatem be awarded to take the Conufance of a Fine of three Persons, but that the Commissioners may take the Conufance of the Fine of one of them at one time, and of another at another time: for it may be, they cannot come to one place, at the same time; and when the Conufance of one is duly taken, it is against reason, that the refusal of another should impeach it. Quod alii Justiciarii concesserunt.

E e e e

Termi no

Termino Michaelis,
Tricesimo nono, & Quadagesimo
ELIZABETHÆ,
in Banco Regina.

Blinco *versus* Barksdale, Vicar of Marston.

Pasch. 39 Eliz. rot. 258.

(1)
Mo. 910.
2. Rol. 335.
Ant. 479.

P Rohibilton: Upon Demurrer the Case was such. A Parsonage was appropriated in the time of King Hen. 3. to a Priory, and at the same time a Vicarage was endowed by these Words; *Salva Vicaria, quæ consuevit in Alteragio, & in Minutis Decimis totius Parochiæ prædictæ ad Ecclesiam prædictam spectante; Et ulterius, si contigerit ipsos Monachos in propriis usibus Instauramenta habere infra Parochiam prædictam, Quod tunc ipsi a præstatione Decimarum omnino immunes essent.* At the time of which Appropriation, There were six Ward-Lands of the Parsonages Glebe within the same Parish; which Parsonage came by the Statute of 31 H. 8. at the Dissolution (being then in the Priors hands discharged de minutis Decimis) to the said King in the same manner: And the King granted those six Ward-Lands to the Plaintiffs Ancestor in Fee, from whom it descended to the Plaintiff. And for the small Tythes of those six Ward-Lands the Vicar sues, and the Plaintiff brought the Prohibition containing all this Matter. And it was thereupon demurred. And, on the Plaintiffs part, it was argued, That by this Endowment of the Vicarage no Tythes shall be paid unto him of the Glebe of the Parsonage, quamvis Dotatio sit de minutis Decimis totius Parochiæ; and this Land is parcel of the Parish: For, at the time of the Endowment, this Land was not Tythable, and the very Point was adjudged in this Court 32 Eliz. betwixt Yong and Core; That no Tythes should be paid for Glebe Land. Coke, Attorney General e contra: For the Endowment is de minutis Decimis totius Parochiæ; and this Land is within the Parish, and therefore Tythes shall be paid thereof. But, as long as it continues in the Parsons hands, no Tythes shall be paid thereof; Because the Levite ought not to pay Tythes to another Levite: But, when the Glebe Land is conveyed into the hands of a Lay-man, as here it is, It shall be otherwise; And therefore, if a Parson had Let his Glebe-Land, the Lessee should have the Great Tythes from his Lessee, and the Vicar should have the small Tythes. And therefore it was ruled of late in the Exchequer, in one

2 Rol. 335.

Ant. 479.

Ant. 512.

Gr. elleys

Griesleys Case, where certain Glebe Land upon the Endowment was allotted to the Vicar, and all the small Tythes within the Parish; That he should not now pay Tythes of that Land: But, if he had Letted it over, his Lessee should have paid Gross Tythes to the Parson, and small Tythes to the Vicar his Lessor: So here the Parson himself should be discharged; But in regard the Plaintiff hath not the Parsonage, but the Land only, he shall pay Tythes. But all the Justices held clearly, that Tythes shall not be paid in this Case: For the Vicar cannot by this Endowment demand small Tythes of the Glebe Land of the Parsonage; But he shall have the small Tythes from all the Parish, where they were due at the time of the Endowment; But that was not of the Parsons Glebe Land: Ergo, &c. But an Endowment by express Words of Minutæ Decimæ of the Glebe Land of the Parsonage might well have been, and then the Parson himself should have paid them to the Vicar. And Popham said, This Clause *Et si ulterius contigerit, &c.* was put into the Endowment for the benefit of the Priory, to discharge them from the payment of Tythes for any Land, which they should have by purchase, as long as they held it in their own hands. And they all held, as it was discharged from the payment of Tythes in the hands of the Priory at the time of the Dissolution; So the Plaintiff now, having but some part of Land by Letters Patents from the King, shall be discharged by the Statutes of 31 H. 8. and 32 H. 8 from the Payment of Tythes for ever after against the Grantee of the Parsonage, and all others, in regard it was discharged at the time of the dissolution. And Popham said, The difference would be, Where the Discharge were by reason of the Persons, who were to pay Tythes, as the Order of Cistercians, &c. Then then Patentee should pay Tythes: But if the Land were discharged from the Payment of Tythes by reason of an Unity, It shall then be discharged by the Statute in the Hands of the Patentee; for that Priviledg runs with the Possession. Wherefore it was adjudged for the Plaintiff.

Ante. 479.

Moor. 910.

Ant. 475.

Dier. 277. b.

Moor. 913.

Archers Case.

A Ccount *versus* Archer, as Baliff of his Mannor of D. The Defendant gaged his Law, and had day to make it, and at the day, he being ready to make this Law, it was ruled, That Ley-gager lay not in this Case; for it is a matter Triable per Pais, whereof they may take Conusance. Whereupon a Repleader was Awarded.

(2)

Moor 468.

Post 790.

Co. Lit. 295. a.

Hoe *versus* Felix Marshall, Hill. 36 Eliz. rot.

S Cire facias Upon a Bail in this Court by I. S. which was; That, if I. S. were condemned here at the Plaintiffs sute, that he

Gould. 166.

Moor 469.

Co. 5. 70. b.

Ante 131.

Co. 5. 20. 1.
2 Cr. 171.

Dier. 217. b.

should pay the Condemnation, or render his Body to Prison; Otherwise, the Defendant would pay it for him; Et concessit, quod tunc levetur de Terris, & Tenementis Bonis, & Catallis of the Defendant. And in Barr hereof the Dett. pleaded a Release of all Debts, Duties, Actions and Demands made after the Reconusance, and before the Judgment. And thereupon the Plaintiff demurred. Athoe argued for the Plaintiff, and Jeremy for the Defendant. And Gawdy, and Popham held it not to be any Bar; For it is neither a Debt, Duty or Demand at the time of the Release made, nor cause of Action, nor any thing before the Contingent performed: For he is not bound in any Sum certain; But it is a Possibility to be a Reconusance after Judgment; and Default made, and then it becomes certain by the Judgment. And therefore a Release before that time shall not discharge it. And Gawdy said if a Man Covenants to do a thing before Mich. and before Mich. the Covenantor releaseth to the Covenantor all Actions; This is not any release of the Covenant: But if it be afterwards broken, he may maintain his Action; as Hall, and Kirbies Case in Dyer is. But, if he Release the Covenant it self, it is otherwise: as 35 H. 8. Reads Case is. Popham; There is a difference, where it is a Duty Defeasible by Act subsequent, and where it grows by an Act subsequent. In the first Case it may be released; For it was in Esse before the Act done: But in the other Case it is not in Esse, and therefore cannot be released. If one Covenant to infeoff me before Mich. a Release of all Actions before Mich. is no Barr to an Action of Covenant brought after Mich. For there was not any cause of Action at the time of the Release made: But if an Obligation be made for the performance of that Covenant, a Release of all Actions is a discharge of that Obligation: For it was a Duty Defeasible: If I also grant unto you; That, if B. do such an Act, I will pay unto you 20 l. if you release unto me all Actions; and afterwards B. performs the Act, The 20. is due, and an Action lies for it: For it was not in Esse at the time of the Release. And in 15 Eliz. it was adjudged, where a Lease was made to Baron and Feme for their lives, the Remainder to the survivor for 20 years, it is uncertain in whom it shall vest, and is not yet in Esse, and therefore the Baron can either Release Grant, or surrender it: But if he should make a Feoffment. that peradventure might destroy the Possibility. And in the principal Case, in regard it is not any Recognizance, nor any thing untill a Contingency, which was not, happend at the time of the Release, it cannot therefore be released by the word Demands (which is the most general Word for it) not being then in demand. And Popham said; that the Opinion of the greater part of the Justices of Serjeants-Inn, where he was, was accordingly. Wherefore, &c. Fenner & Clinch e contra: For it is a Reconusance from the time of the Bayl entred: Although it be not certain, nor suable, before the Judgment. But the Judgment being given, and the Defendant not rendering his body, nor paying the Debt, it is a Recognizance ab initio for so much Debt against the Baylor; And this Release is a good Barr now, when a Scire facias is sued. For Clinch said, if a Baylor be seised of Land at the time of the Bayl entred, and after Aliens that Land, and afterwards Judgment is given, and default made, &c. That

That Land, which he had Aliened, is subject to this Execution. And Fenner said, Although this Release at first was not a discharge thereof, Yet now being reduced to an Action, It is a good Barr; As in Littletons Case, where one hath a Judgment to recover 20l. and releaseth to the Defendant all Actions, It is not any Discharge of the Execution. But, if after this Release a year and day passeth, so as he be put to a Scire fac. It is then a good Barr. Wherefore, &c. And afterwards Clinch (ut audivi) mutavit opinionem, and agreed with Popham and Gawdy. Whereupon (Repugnante Fenner) Judgment was given for the Plaintiff. 5 Co. 70. b.

Post 731.

The Earl of Lincoln *versus* Fysher.

Hill. 37 Eliz. rot. 1715.

DEbt for an Amercement in a Leet; and Counts, That he had a Leet within his Mannor of Fokingham of all Resiants within the Mannor; And that at such a Court holden there before one J. Gustard his Steward there, the said Steward speaking to the Defendant, That he was a Sutor there, and telling him, That he ought to be sworn to enquire, &c. The Defendant contemptuously answered him, In saying so thou lyest. And for this Contempt the Steward imposed a Fine of 20 s. upon him, For which this Action was brought. The Defendant pleaded Nihil Debet, and found against him, and after Verdict it was moved by Yelverton Serjeant, That this was not any such Contempt, for which there ought to be any fine imposed; For it is no more in effect, Then Thou speakest untruly, which one may say to a Steward without offence. But all the Court held it to be an apparent Contempt, and Abuse unto him, being a Judge, and in his Authority; And, That he himself might assess a Fine for such Contempt, and that for such Fines assessed by a Steward Debt lies, without any Prescription alledged to assess such Fines, or to have such an Action. Wherefore it was adjudged for the Plaintiff.

(4)

Ow. 113.
Moor 470.

Co. 8. 38. b.

Cham *versus* Matthew,

Pasch. 39 Eliz. rot. 383.

TRespass: Upon the Case, The parties pleaded to Issue. The Plaintiff for his Expedition of Tryal surmised, That he was servant to the Sheriff of Cornwall, where the Action was brought and Triable, and prayed a Ven. fac. to the Coroners; and the Defendant non dedixit; Whereupon Process was Awarded to the Coroners: And after Trial, and Verdict for the Plaintiff, Glanville moved, That this Process was misawarded, and a Dis-tryal: For Process ought not to be awarded to the Coroners; But where the challenge is principal. And here to say, That he was servant to the Sheriff is no principal Challenge; As 21 Ed. 4. 67. is; But only to the Favour. Wherefore, &c. But the Court held, Forasmuch, as if the Sheriff had returned this Pannel, it had been a good cause to quash the Array for Favour, That the Plaintiff, to avoid that Delay, might well

(5)

Moor 470.

2 Cr. 21. 547.
2 Cr. 547.
Co. Lit. 156. a.

Post. 586.

shew

shew it, and have process to the Coroners, and so much the rather, this being a Judicial Writ, and not Original; As Plow. 74 Wimbiſhes Case is. And the Clerks said, there were many Presidents accordingly. Wherefore it was adjudged for the Plaintiff.

Thoroughgood *versus* Scroggs.

Mich. 38, and 39 Eliz. rot. 390.

(6)

Error of a Judgment in the Common Bench in Trespass upon the Statute of 8 H. 6. of Forceable Entry. The Error Assigned was; Because a Capias was directed to the Sheriff of Bedford, returnable Craftino Animarum; And it was returned by one Dive, who then was not Sheriff, but one Luke. And it was held to be a manifest Error; But because the Defendant appeared afterwards, and pleaded, it was not now material; And, that his Apparance had made it good; A second Error Assigned was, that the Jury found damages 20 L. and 2 s. Costs; And the Costs were increased by the Court to 20 s. And the Damages, and Costs being trebled, he had Judgment to recover 63 l. whereas the Costs assessed by the Court ought not to be trebled, but only those Costs, which the Jury Assessed. Sed non allocatur. For all the Presidents are otherwise. Wherefore Rule was given to Affirm Judgment.

Co. 10. 11. 6. b.

Pay *versus* Brown, and Guybon.

(7)

Trespass upon a special Verdict, The Case was found to be such; Nicholas Hare, being Lord of the Mannor of Stow, demised that Land, being Copyhold Land of Inheritance, to A. upon Condition, That he should pay to Brown 20 s. annually, during his Minority; and an 100 l. at his full Age. A. fails of the payment of the 20 s. and surrenders to the use of Pay, and his Heirs; The Lord admits him, and afterward Brown attains to his full Age, and the 100 l. is not paid unto him; Whereupon the Lord enters for the Condition broken, and grants it by Copy to Brown. And whether his Entry was Lawful; Or, that the acceptance had dispensed with the Condition: was the Question. Fenner held, that he well might enter: For he, to whose Use the Surrender is made, comes in by him, who surrendered; and not by the Lord; For the Lord is but as an Instrument to convey the Land. Wherefore, &c. the Condition is not gone. But Gawdy doubted thereof; Ceteris Justiciariis absentibus, Adjournatur.

ant. 553.

Ante 361.

Pollard, and his Wife *versus* Armshaw.

(8)

Action for these Words Thou art a Whore, and J. S. hath the use of thy Body; The Cart is too good for thee. After Verdict, it was moved, that the Action lay not for these Words, and so held all the Court. But, if one saith to a Woman, which keepeth an Inn, or a Tabling-House, Thou keepest an house of Bawdry

Ant. 289.

dry. It is Actionable; For thereby her House is slandered. Wherefore it was adjudged for the Defendant.

Harrisons Case.

Action for these words; Thou hast forsworn thy self at London, and there it appeareth upon Record, Upon Demurrer, it was ruled, That it well lay, (9)

Hammon *versus* Gryffith.

Information Upon a Penal Statute for the Queen, and himself. Before any Plea Pleaded, the Informer died. And Coke Attorney General, moved the Court, whether he might proceed upon it for the Queen. And the Court held, that he might: And if the Informer will be Non-suited, or Release, the Queen may prosecute. And so it was ruled in this Court betwixt Stretton and Taylor, where the Queens Attorney would enter a Non vult prosequi; Yet the Informer might proceed for his Part. And so where the Queen will pardon, &c. For it is but for her own Part only. Wherefore it was ruled accordingly. (10)

3 Inst. 194.
Co. 11. 66. 2.
Ante 138.

Makarell *versus* Bachelor.

Debt upon divers Contracts: All for Apparel; some for Fustian Sutes; some for Velvet and Sattin Sutes, laced with gold Lace, amounting to 44 l. whereof he was satisfied 4 l. The Defendant pleaded Infancy. The Plaintiff replied, That he was one of the Gentlemen of the Chamber to the Earl of Essex, and so it was for his necessary Apparel. And it was thereupon demurred; and the Court held, that they were to adjudge what was necessary Apparel, and such sutes of Sattin, and Velvet be not necessary for an Infant; although he be a Gentleman, &c. It was then prayed, That he might have Judgment for those, which were necessary Apparel. But the Court held, in regard he had acknowledged satisfaction for 4 l. parcel, &c. and they did not know wherefore it was payed, therefore he could not have Judgment for any part: Otherwise, he should have Judgment for those Contracts, which were allowed of, &c. Wherefore, &c. (11)

2 Cr. 561.
Ant. 129.
Co. Lit. 59. 6.

John Fusses Case.

AN Enditement was against him by the name of John Fuss of Aldrington, alias dictus John Fuss of Aldrington Yeoman, Quod Felonice, & Burglariter fregit domum, &c. And because there wanted the Addition of Yeoman in the first name, which was not till after the alias dictus, it was ruled to be ill; As also, for that he did not say Noctanter, the Enditement of Burglary was not good. But Gawdy said, it was good for the Felony. But for the first cause he was discharged. And it was said, That there were divers Presidents in this Court accordingly. (12)

Ante 198.

Palmer *versus* Humphrey, Hill. 39. rot. 599.

- (13) **E**jectione firmæ. It was found by an especial Verdict, That the Sheriff, upon an Elegit, Impanelled a Jury who found, that Humphrey, the Defendant, was possessed of a Lease for one hundred years, which began at Mich. 2. and 3. Philip, and Mary, ubi revera (as it was found, it began at Mich. 3, and 4 Philip, and Mary) cujus quidam H. Statum, Interelle, & Terminum in Tenementis prædictis Juratores prædicti appretiarunt at 80 l. And the Sheriff sold it to the Lessor of the Plaintiff for 80 l. And, whether the Sale was good, nor not? was the Question. Popham said, I have considered of the Record, and conceive, that the Sale is void; for there is a difference betwixt a Sale upon a Fieri facias, and upon an Elegit: for the Elegit is Quod per Sacramentum duodecim proborum hominum, per rationabile premium, & extent. They Apprise the Goods & Chattels of the Debtor, and extend his Land. And therefore, without an Inquisition, he cannot sell them:) which was agreed by all the Justices, and so is Dyer, fol. 100, &c. And then, if the Inquest find one thing, & he sells another (as the Case is) it is not warranted by the Inquest, and therefore void: But, if the Inquest had found that he was possessed of such Land, for term of divers years adhuc ventur, which they appraised at so much, without shewing the certain beginning or determination thereof, it had been well enough; for they shall not be compelled to find a Certainty, not having means to be informed thereof. And therefore about twelve years since it was agreed in this Court, in *Sr. George Sydenhams Case versus Rolls*, where an Inquest upon a Fieri fac. found, That the Defendant, against whom, &c. was possessed of such a Term bearing Date, &c. (whereas it truth it did not bear the same Date) And the Sheriff sold the same Term, That the Sale was not good. And then the Court directed the Sheriff, that upon a new Fieri fac. it should be found, that he was possessed of a Lease for years generally, yet continuing, and that he sold it &c. And it would be well enough. So here, &c. And of that opinion were the other Justices; but the Parties compounded the Matter. And Hanger the Lessor gave two hundred Marks more to have Assurance of the Term: And so it was determined, 21 H. 6. 11, 18 Ed. 2. Tit. Execution, Dy. 116, & 193, 4. Co. 74.

Button *versus* Long.

- (14) **P**rohibition. And surmiseeth in Discharge of Tithes, That J. S. Prior of Brade-stoke was seised of the Rectory, whereto, and of the Lands, out of which the Tithes were demanded, in Fee, simul, & semel, from time, whereof, &c. and at the time of the Dissolution; Et ratione inde, the said Land is discharged &c. The Defendant traverseth the Unity at the time of the Dissolution; And thereupon the Plaintiff demurred. Fenner, & Clench (cæteris Justiciariis absentibus) held the Travers to be good; for, although there was an Unity of Possession from time, whereof

Co. 2. 48. 2.

whereof, &c. Yet if it were not at the time of the Dissolution; it shall be charged. But if the Discharge had been pleaded generally by Prescription, and not by reason of Unity; then the Prescription ought to have been answered, and not the Unity. And in Trin. 34 Eliz. betwixt Calmady and Wyther, it was so ruled in the Common Bench. Wherefore it was adjourned.

Buckler *versus* Hardy. Ante, fol. 450 Mich. 37. & 38 Eliz. rot. 1159.

Testione firmæ. Upon a Special Verdict, The Case was such. Andrew Buckler being tenant for life, the remainder to Christopher Buckler in tail, remainder to the right Heirs of the said Andrew, letts the Land to J. S. for four years, and afterwards granted the Reversion to one Row, Habendum from Midsummer next for the life of the said A. B. After Midsummer J. S. the Lessee, attorned to Row, and after that granted all his term unto him, who entred, and granted the said Land to Hardy the Defendant, to have, and to hold to him, for his life, but no Livery was made, Hardy entred, and after the four years expired, Hardy continued his possession, Andrew Buckler levied a fine unto him Sur Conuſance de droit come ceo, &c. Christopher Buckler the tenant in tail, enters, for a Forfeiture, and lets it to the Plaintiff for years, upon whom the defendant re-entred. Et si, &c. The first Question was, When this Reversion was granted by A. B. to R. Habendum after Midsummer; and the attornment to that Grant is after Midsummer: whether it be a good or void Grant? And all the Justices agreed, That the Grant was void, being limited to begin at a day to come. For, if it should be good, the Lessor should have a particular Estate reserved in himself in the mean time; which cannot be: So, if the Attornment had been made thereto presently, yet it had been clearly ill. And, although the attornment was not till after Midsummer, yet it cannot help the Grant, which was void at the beginning: for Quod ab initio non valet, in tractu temporis convalescere non prestat. As, if a man makes a Lease for years, and, before the Lessee's Entry, he grants the Reversion, and afterwards the Lessee enters, and attourns, yet it is void: because he had not at that time a Reversion to grant. So in Trevillians Case, One devised his Land before the Statute of Wills, and afterwards the Statute was made, and the Devisor died, yet this Will is void. But, if a man grants a Reversion, Habendum after the death of the tenant for life, it is a good: for it is but a Limitation when he shall have the possession. But, if it were Habendum after the death of a Stranger, it should be otherwise. And Popham said, It had been ruled, where a Feoffment was made Habendum after Michaelmas, and the Attorney made Livery after Michaelmas, yet it was void. Secondly, admitting the Reversion passed not to Row, when he afterwards purchased the Term, and granted the Land to Hardy for his life (no Livery being made) Whether the Land passed by that Grant? And Gawdy, Fenner, and Popham held, That the term passed; for 10 Eliz. Dyer 277. is, where a Term for years devised the land to one for his life, that the term passed: So here. But Popham said, If there had been in the Deed a Letter of Attorney to make Livery, then peradventure it would have been otherwise: for thereby the purpose of the Grantor had appeared to pass a Freehold,

(15)

Moor. 423
Ante 255.

Moor 424.

Ant. 450.

= Cr. 563.
Post. 874.

Moor 424.

hold, and not the term only. But here is no more than the Grant of his term during his life. Thirdly, Admitting he had the term, or not, by this Grant: Whether, after the term expired, he continuing the possession, shall be said to be tenant at sufferance? and, if he hath not the term, whether by his entry he be a disseisor? and then, when A. B. levied a fine unto him Sur Conuſance de droit come ceo, &c. It is a forfeiture every way, for the Conuſor and the Conuſee are both estopped to say, that he had not any estate before the fine, by the gift of the Conuſor. Wherefore it is a manifest forfeiture. And so the entry of Chr. B. tenant in tail is Congeable. Wherefore it was adjudged for the Plaintiff. Mich. 37 & 38 Placito 18. C. B. 2 Co. 55.

Gregory *versus* Booker.

(16)
Ant. 581.
Ant. 574.
Ant. 581.
Post. 894.
Co. Lit. 158.a.

TRESPASS. The parties being at Issue, the Plaintiff for his expedition surmised, that he was servant to the Sheriff; which being confessed by the Defendant, the process was awarded to the Coroners. And, after Verdict, it was moved in arrest of Judgment, that the Tales de Circumstantibus was awarded, and returned by the Sheriff, which was held by the whole Court to be good Cause for staying the Judgment; for it is as a mistrial, not aided by any of the Statutes. For the process being once awarded to the Coroners, the Sheriff afterwards is not the Officer, to return the Jury, no more, then any other man; and process ought always to be returned by him who is an Officer by Law to return it: otherwise it is merely void. But, afterwards, upon view of the Record, it appeared, that the Tales was returned by the Coroners, and their Names annexed thereto: Wherefore it was without further Question. But the Court said, If their Names had not been annexed to the Tales de Circumstantibus, yet it had been well enough; for they be annexed to the first Panel: And it shall be intended, that the right Officer returned it. And the usual course is, That to such Tales there is not any Officers Name subscribed, and yet is good enough; for it is not within the Statute of York; which appoints, That the Name of the Sheriff should be subscribed. But it was moved, That the Record of the Postea is, That the Tales were returned by the Sheriff. But the Court held, That it was amendable. And it was done accordingly, and the Plaintiff had Judgment.

Pawlet *versus* Christmas.

(17)
Ante. 194.
Co. 5. 37. a.

Error of a Judgment in the Common Bench, The Error assigned was; because there were but twenty three of the Jurors Names returned by the Sheriff upon the Panel, where there ought to have been twenty four. And the Trial was by ten of them, and a Tales de Circumstantibus: But, because this Default was in the Return of the Names of the Jurors upon the Writ of Habeas Corpora, and not upon the Ven. fac. in which Writ were twenty four Names, it was ordered to be amended. Coke; It hath been adjudged here, That when upon a Ven. fac. twenty three were only returned, and a Trial had by twelve of them, It was

Memorandum, That upon the sixth of November this Term the Lord Keeper of the Great Seal, the Lord Treasurer, the Lord Privy Seal, Earl of *Arundel* Earl Marthal, the Earl of *Pembroke* Lord Chamberlain, the Lord *Cottington* Chancellor of the Exchequer, and all the Justices of both Benches, and Barons of the Exchequer, were assembled in the Exchequer Chamber to nominate three persons; of every County throughout *England*, to be presented to the King that he might prick one of them to be Sheriff of every County, which is usually done according to the Statute, upon the third of November being *Craftino animarum*. But because it was the first day of the Parliament, and the Lords were to attend upon the King, it was resolved, by the advise and resolution of the major part of the Justices, with whom conference was had in this cause, that it might be well put off to another day: And the Lord Keeper, notwithstanding the Statute, deferred it until this day. 11.

Sloper versus Child.

Error. The Error assigned was, That in the Writ of Venire facias awarded to the Sheriff of Somersetshire, the word Vicecomiti was omitted; yet the Sheriff of Somersetshire returned the Panel, and his name was indorsed. And after Habeas Corpora Juratorum, the Jury appearing, the Verdict and Judgment was for the Plaintiff, and this Error being assigned, it was held a clear Error: But because upon the Roll, the Writ was awarded Vicecom. Somerset. and the omittance of the Sheriff is the fault of the Clerk; therefore all the Justices agreed, that it ought to be amended, and that the Judgment should be affirmed, unless, &c. 12.
1 Ro. 205.

Sir Henry Williams Case.

Sir Henry Williams prayed a Prohibition to the Council of the Marches of Wales, because he was sued there for a Legacy above the value of 50 l. viz. 60 l. and it was answered at the Bar, That their instructions were to hold plea of Legacies of any sum; but the Court doubted thereof; whether such instructions should be good to warrant their proceedings, because Causes testamentary and Legacies are suable in the Spiritual Court, and not elsewhere, notwithstanding their instruction: For they cannot warrant that which is not according to Law: And the Statute of 34 Hen. 8. warrants that Court. 13.
Ante 318. 558.
531.
R. 528.

Calmadies Case.

Calmady prayed a Prohibition to the Court of Requests, for that in an Action of *Trover* for divers goods, after Verdict and Judgment in this Court, and affirmed in a Writ of Error, the Defendant surmised matter of equity, and that he was surprised in the Trial and had not his Witnesses there, having had two Verdicts before against this Trial. The question being upon sale by the 14.

ffff 2

Commis.

3 Inst. 123.
2 Cr. 335.

3 Cr. 647.
4 Inst. 97.

Commissioners upon the Statute of Bankrupts: Whereupon a Prohibition was granted, and the Court resolved, that so they would always do when ever any exhibited Bills were after Verdict and Judgment. Trin. 14 Eliz. rot. 1157. Flood versus Stepney in the Common Bench, where duress was pleaded unto a Bond; and afterwards an Attachment issued out of the Court of Requests against the Defendant, and it was held to be a good Plea, and there resolved, That the Court of Requests cannot grant an Attachment of contempt: And in 37 Eliz. it was agreed per totam Curiam to be against Law, That the Court of Requests should commit any: And in 40 Eliz. in this Court, Austen versus Breerton, in an Action and Judgment for the Plaintiff, the Defendant sued in the Court of Requests to be relieved. This Court upon examination did bail the party, and Sir Thomas Gawdy was contented before the Queen for it; yet notwithstanding it was held good enough, and Breerton was enforced to satisfy the said Judgment.

Anonymus.

15. **P**rohibition was prayed, for that one J. S. (who was a Curate and Sequestrator of the Rectory of D. in London, by reason that Mr. Walker, for contumacy and other causes, was suspended from exercising his function there) sued four of the Parishioners in the Spiritual Court for Tythes of their houses, and not before the Major, according to the Decree and the Statute of 37 Hen. 8. for they ought clearly to sue before the Major of London, and not in the Ecclesiastical Court; And therefore divers Prohibitions have been granted; but whether in this case it was grantable, the said J. S. being neither Parson nor Vicar, was the doubt. And it was moved at the Bar, That for houses, tythes ought not to be paid, unless there be a special Custome, as in Cok. lib. 11. fol. 16. Doctor Grants Case, is clearly resolved; and the Statute is introductive of a new Law, and thereby is appointed how it shall be ruled, and before what Judges, and what remedy shall be for the party grieved, unless their order be obeyed; and then he may not sue in another place, nor before other Judges then the said Statute appoints: And if Prohibition should not be admitted for suing, it should be a defrauding of the Statute, and would make it of none effect; wherefore the Court doubted, and would further advise, and gave day to hear counsel on both sides.

Sir Matthew Mints Case.

16. **U**Pon the 14. of November 1640. Sir Matthew Mints alias Ments, Knight of the Bath (who was convicted of Manslaughter of one Weeks, who was his Servant, by beating or carrying of him, whereby he was so bruised, that he instantly died) and had his Clergy; and his burning in the hand, was respited:

spited : And now he pleaded his Pardon, whereby the burning in the hand for the Manslaughter, and all other felonies committed by him, & alia malefacta, before the eighth of July last, were pardoned ; And there was an especial clause, That he should not find Sureties for his good behaviour ; and the Pardon bore date 31 Octob. last : And although there were divers misdemeanors committed by him after the said eighth day of July, for which he deserved to be bound to the good behaviour ; Yet he had his Pardon allowed, and was discharged from finding Sureties, &c.

Aspye versus

Prohibition was prayed to be awarded to the Council of the Marches of Wales, where it was by Bill suggested, That a Copyholder in fee surrendered into the hands of such a Tenant such a Tenement, held of the said Manor by the veirge, to the use of the Plaintiff ; And that Pembroke the Steward of the Manor refused to admit him, and there prayed that he might be compelled to admit him, whereunto the Defendant pleaded that the custome of the Manor is to surrender into the hands of two Tenants, and that the said Surrender ought to be done by the Veirge : And this Surrender was only by a Knife, sitting at the Table, and into the hands of one Tenant only ; And that he who made this Surrender was dead ; and his Heir alledging that this Surrender was void, desired to be admitted, and was admitted : And that notwithstanding this answer, they proceeded to try the Custome, which is triable only at the Common Law, whereupon a Prohibition was granted.

17.

Sherman versus Lylly. Hill. 15 Car. rot. 1198.

Debt upon an Obligation of 200 l. conditioned, That whereas Lylly had married such a woman, being a widow, If the Defendant should permit his said wife to make a Will of her husbands goods, to the value of 100 l. to be paid within one year after her decease, that then, &c. The Defendant pleaded, That he permitted his said wife to make a will ; And thereupon the Plaintiff demurred, and Rolls Serjeant said, That he ought to have pleaded, That he paid accordingly ; for otherwise he doth not answer to the Condition, but only to one part thereof. And of that opinion was all the Court ; for To be paid is all one with And to pay, otherwise it is an idle thing to permit her to make a Will, if he doth not pay ; And therefore they all held, That the Plea was ill ; wherefore it was adjudged for the Plaintiff.

18.
2 Ro. 247. 8.

Ante 220.

Burwell versus Harwell. Hill. 15 Car. rot. 197.

Replevin. The question upon demurrer was, First, Whether the Grantee of a Rent-charge, by the Conusor of a Statute, after

19.
Jones 456.

3 Cr. 152.

Dyer 1.b.

Co. Lit. 315.b.
Yelv. 12.
Moor 662.

Co. 4. 67. b.

after the Statute acknowledged, and after the time of the extent of the Statute, aberring that the Debt, Damages, and Costs are satisfied, may distrain for the rent and arrearages without suing a Scire facias? And after argument at the Bar on both sides, Berkeley Justice delivered his opinion, That the distress was lawful, without a Scire facias; For he did not meddle with the possession, but distrained for his rent: And he put a difference where a man makes a gift in tail, reserving a Rent; and where a Donor grants a Rent out of a Reversion, in the one case the Rent may be locked and barred by recovery against Tenant in tail; but in the other case it cannot be destroyed by recovery, but the Rent shall remain, at least as a Rent-seck, &c. And Brampton said, peradventure he might enter and distrain: For where a man hath *Profits a prender*, as Common for twenty Beasts, or twenty loads of *Estover* every year, if he might not have them until Scire facias, he should be at a great mischief. And I was of the same opinion, That he might distrain, if he at his peril will take notice, that the Extent is determined, and the Debt, Damages and Costs levied: And he cannot have a Scire facias because he hath no title by Record whereupon to ground a Scire facias. The second Question upon the demurrer was, Whether one who claims by the Conusor by Fine or other Record, may maintain a distress without a Scire facias ad computandum, as 38 Ed. 3. 12. 25 Ed. 3. 1. & 37. And in Michaelmas Term following it was argued again by Shaftoe for the Avowant, That the distress was lawful, and that he might well maintain it, without a Scire facias ad computandum. And Rolls Serjeant for the Plaintiff much insisted, That for as much as the Conusor comes in by matter of Record, that without matter of Record he cannot be ousted by one who claims under the Conusor: And therefore the Grantor cannot distrain without first suing a Scire Facias. Berkeley answered, That true it is, none who claims Estate in Land under the Conusor, after the Statute acknowledged, can enter or avoid the Extent, without a Scire facias or Venire facias ad computandum; wherein, if it appears that he hath taken the profits of the Land after the time of the Extent satisfied, he shall be allowed for them, and shall answer for the profits so tortiously taken. But Grantor of a Rent, after the Extent satisfied, may well distrain, so may Grantor of a Common; for they claim no interest in the Land, but profits out thereof; wherefore he cannot have a Scire facias or a Venire facias ad computandum; for he ought not to account with them, and therefore may distrain or put in his Cattel to take the profits, otherwise he should be without remedy, for which, &c. And I was of the same opinion; And that the Rule holds not always good, that where one comes in by matter of Record, he ought not to be ousted without a Scire facias or matter of Record: For he whose Lands are extended upon an Elegit upon a Recognisance, after the Debts be satisfied, may enter without Scire facias; but the Conusor of a Statute (because he is to have Costs

For Parsons would purchase other Houses within their Parishes, and be always resident upon them, and suffer their Parsonage-Houses to decay, and Sterilitate their Glebe-Land, and Meliorate their own possessions in prejudice of their Successors. And as Gawdy said, The Statute which saith, That he shall be resident upon the Benefice, shall be intended, where there can be a Residency: for he cannot be resident upon the Cithes, nor upon the Glebe-Land, where there is not any House: But only his habitation is within his Parsonage-House. Clinch, and Fenner e contra. For they held, that, if he be resident within his Benefice, (which extends to the whole Parish) it is sufficient: but if he be resident upon any other House adjoining to his Parish, but not within his Parish, although he every Sunday and Holyday serve the Cure; yet it is not sufficient; as it was adjudged here in Brown and Hudsons Case, 33 Eliz. And they said, That the intent of the Statute for his Residency is, that he should Pascere gregem cibo, exemplo, & verbo, all which he may do, when he is resident in any part of the Parish, And the Statute is in the Disjunctive, viz. In, at, or upon his Benefice. Et in disjunctivis sufficit unum esse verum. And it is clear, that all the Parish is his Benefice; so he is resident in his Benefice. But peradventure he is not resident upon his Benefice, unless he inhabits within the Parsonage House (But Note, the Statute is in the Copulative, In, at, & upon his Benefice) The Statute also cannot intend Residency upon the Parsonage-House; for there be divers Parsonages, which have not any Parsonage-House. But it may be aliened by the former Parson, with the consent of his Patron and Ordinary, or lett out, so as his Successor cannot have it; and therefore his Residency may be in any other House within the Parish. Wherefore, &c. And Fenner said, that the Lord Anderson was clear of his Opinion; That it is a sufficient Residence, if he inhabits within any part of the Parish. Et adjournatur, 6 Co. 21.

Co. 6. 21. b.

Co. 6. 21. b.

Heddy *versus* Wheel-house, Ante Pasch. 39 Pl. 15.

THe Case was now moved again, and, after Argument at the Barr, Popham, Gawdy, and Fenner delivered their Opinion; That by the said Grant of a Fair cum omnibus libertatibus, &c. Toll is not due, nor demandable; for Toll is not incident to a Fair, as common experience proves, for the greatest part of the Fairs in England have not any Toll. But by express words in the Kings Grant, the Grantee may have Toll, so he may have Poizage, or Pontage. For the Subjects thereby have a greater benefit for their money they pay for it, viz. in the one case true Weights, and in the other case of passage over Water, which otherwise was not well fordable. But Popham said, the Case may be, That by the Kings Grant, with such words as here, Toll may pass: As where one hath a Fair by Grant or Prescription, whereto Toll hath usually been paid, which afterwards is forfeited to the King and the King then grants it cum omnibus libertatibus ad hujusmodi Feriam spectantibus: By this Grant, the Grantee shall have Toll; for Toll was formerly belonging thereto. And therefore the Kings Grant did not grant a new Fair, but the ancient one; for it was not extinct by the Kings possession: And therefore there is a difference, That such Liberties,

(29)

Ant 558. 9.
2 Inst. 220.
Moor. 474.

which

Co. 9. 25. b.

which a common person hath by Prescription, or Grant, and which, if the common person had not, The King himself should have throughout England, as Ways, Estray, Wreck, &c. There, if the common person hath them by Grant, or Prescription, and they come to the King by Forfeiture, or otherwise: They are extinguished in the Crown, and the Queen will have such Liberties by her Prerogative, and they cannot afterwards be granted, but by a new Creation. But such Liberties, which a common person hath by Grant, or Prescription, which the King (if such Prescription had not been) could not have by his Prerogative, as Warren, Park, Fayr, Market with Toll, &c. if these come to the Crown, &c. they remain in esse, and are not extinct: for, if the King should not have them by this means, they would be lost. Wherefore, absente Clinch, it was adjudged for the Plaintiff.

The Earl of Shrewsbury *versus* Sr. Walter Lewson.

(30)

Ant. 551.

Scire fac. in Chancery, as Administrator to George E. of Shrewsb, upon a Reconnaissance of 4000 l. conditioned for the performance of Covenants. The parties being at issue, it was sent hither to be tried, and it was found for the plaintiff; and now moved in arrest of judgment, because it is not mentioned in the Writ, Quod profert Literas Administrationis, &c. But, because it was in a Writ founded upon the Record, and the course is not to mention it in Writs, and so be all the presidents in the Chancery, It was therefore ruled to be well enough. Vid. 37 H. 6.

Grondy *versus* Ischam. Hill, 38 Eliz. rot, 828.

(31)

Ant. 50.

Error to reverse an Outlawry, The Error assigned was, because the Capias was esse Edmundo Anderson; so as T. was wanting: for the Teste is the Warrant of the Writ, and so it is of Judicial Writs, and therefore the Outlawry was reversed.

Waterhouse *versus* Woodstreet, in Camera Scaccarii.

(32)

Co 8. 134. a
1 Cr. 373.
Post 887.

Error in the Exchequer-Chamber of a Judgment in the Queens Bench for 100 l. against an Executor, who pleaded Riens enter Main, and found, that he had 50 l. and Judgment. Quod recuperet Debitum prædictum; Et quod habeat executionem de bonis Testatoris, &c. The Error assigned is, because the Judgment was for the Entire, where it ought to have been but for the 50 l. But it was said, That the Judgment should be for the Entire; and, that he might have Scire fac. upon the Judgment, when more assets came to the Executors, and so is 46 Ed. 3. 9. and so are the presidents there, viz. Pasch. 31 Eliz. rot. 131, inter Haydon & Melford, Hill, 36 Eliz. rot. 388, and Trin. 38 Eliz. rot. 269. But the Justices demanded more ancient presidents, and would advise.

Termino Mich. 39 & 40 Eliz. Reg in Communi Banco.

Gorges versus Stanfield.

WAS in cutting down three hundred Oaks. The Defendant, as to two hundred, pleaded, That the Houses Lett unto him were ruinous, &c. and he cut down to repair those Houses: And, as to the Residue, he cut them down, and keeps them to Imploy about Reparations, tempore opportuno, &c. upon this Plea the Plaintiff demurred in Law. And by all the Court, sans Argument, It was held to be no Plea: For, if it should, every Farmer might cut down all the Trees growing upon the Land, when there were not any necessity of Reparations. Wherefore it was adjudged for the Plaintiff. (33)

Leuknor versus Huntly.

DEbt upon an Obligation. The Defendant pleaded, That one Jaques brought Debt in London against the Plaintiff, and according to the Custom there, attached this Debt now demanded, in the Defendants hands, and pleads the Recovery, and Judgment there, &c. The Plaintiff replies that before the Attachment, the said Jaques brought debt in the Queens Bench against the now Plaintiff for the same cause; and, hanging that sute, this Attachment was made, &c. And it was thereupon demurred. And Glanville, for the Defendant moved, that the Plaintiff should be barred: for although one cannot attach a Debt in London; for that a sute is here depending in the Queens Bench (as it formerly hath been ruled in this Court) yet one who hath conceived an Action here, may affirm a Plaint in London for the same debt, and may make an Attachment of the Parties debt according to the Custom. For there the debt in question is not touched by the Attachment. And the Plaintiff might now have pleaded this Attachment in Bar, for so much of his debt in the Action brought in the Queens Bench. And the opinion of the whole Court was, that the plea in Bar was good: And Judgment was commanded to be entred accordingly. Postea, Mich. 40 & 41. Placito 36. (34) Post. 712. 3. Ante. 157.

Rotheram versus Green.

TRespals. The Defendant Pleads, That W. Green, his Father, was seised in Fee of a Tenement in L. and that he, and all his Ancestors, and all those, &c. in the said Tenement, from time, whereof, &c. have used to have common in the place, where, &c. for all their Beasts levant and couchant upon the said Tenement; and that it descended unto him, &c. And Issue was taken upon the Prescription, and a special Verdict found, viz. That E. G. Grandfather to the Defendant, was seised of the Tenement; And that he and all his Ancestors, and all whole, &c. from time, whereof, &c. had used Common, &c. (according to the Prescription) And he, being so seised, released to Sir G g g Thomas (35)

Thomas Rotheram, the Plaintiffs Ancestor, all his Right, and his Common in part of the Land, where he had the Common, and died, and the Tenement descended to W.G. and from him to the Defendant. Et si, &c. Drew prayed Judgment for the Plaintiff. For, by Release of the Common in part of the Land, the whole Common is gone, and extinct; for otherwise the Tenant of the residue of the Land should be charged with all the Common, which is not reasonable. And thereupon it is, That if a Lord releaseth his Signiory in one Acre, All is gone: As 21 Ed. 3. Scire fac. 112. is, Spurling e contra; Because the Common is appurtenant, and it is for the Manurance of the Land, and stands with common Right. Anderson; This is not a Common of common Right; for it is for Swine and Sheep, and it is not like to 17 Eliz. Dyer, where the Lord improved part of the Common, leaving sufficient to the Commoner, and infeoffed a Commoner of that part improved: For there the Common is not extinct; because the Land improved was discharged of Common before the Feoffment. But this is like to Ramptons Case; which was adjudged in this Court; Where one having Common in a great Field, wherein many men had Land, he purchased on Acre from one of them, it was adjudged, That all this Common was extinct, &c. So here, The Common also is intire through the whole Land: Wherefore a release in part shall discharge the whole. The Prescription also is general, to have Common in all the place, where, &c. And the Jury have found a Release in part of the Land, and therefore the Prescription is found against the Defendant. Beaumont and Owen agreed with him in both points: But Walmsley held, that the Common was not gone for the Residue; because this Release went in benefit of the Tenant, and it was as an Improvement by him: But, as touching the Prescription, he agreed, that it was found against the Defendant, for the reason abovesaid. Wherefore they all agreed against the Defendant. And it was adjudged accordingly.

Co. 4. 38. 2.

Tisdale *versus* Bedington.(36)
1 R. 2. c. 4.

Action upon the Statute of Maintenance, For maintaining a Sute in the Spiritual Court. Warberton moved, That this Action lay not: For the Statute of 1 R. 2. cap. 4. whereupon this Action is founded, is to be intended only of maintaining Sutes in the Courts of Common Law: And upon view of the Statute the whole Court was of that Opinion, and willed him to demurr. And Drew remembred a Case in the Court, Pasch. 37 Eliz. between Constantine and Barns, whereupon it was Ruled, that no Action lay for maintaining a Sute in the Spiritual Court.

Edwards *versus* Peel.

(37)

Quid Juris clamat upon grant of a Reversion by Fine by I. S. and the Tenant pleads, That I. S. had nothing in Reversion at the time of the Fine levied. Glanville moved to the Court, That the Truth of his Case was, That the Land was the Land of the Tenant for Life, Remainder to I. S. in Fee, who by Fine granted it by the Name of a Reversion. Walmsley; It

It is clear then, that the Reversion passed by that Fine, and you may shew that special matter in your Count, and that will help you. Quod fuit concessum per omnes Justiciarios.

Somerfet versus Markham.

Prohibition, To stay a Sute in the Admiralty Court. It was agreed per Curiam, That if one sued in the Spiritual Court for a matter, whereof they have Jurisdiction, and therein a Plea is pleaded, which is triable at the Common Law; yet if they will allow the Plea, they shall have Jurisdiction thereof, and try it. Otherwise a Prohibition lieth. It was also held; that if one answers to a sute in the Spiritual Court, and suffers Sentence to pass against him, he never shall have a Prohibition: And if he brings an Appeal, the Defendant in the Appeal shall not have a Prohibition. And this was the principal Case here, and Ruled accordingly. (38)

Post. 666.

Ant. 88.

Wykes versus Tyllerd.

Replevin. The Defendant made Conusance, as Bayliff to one Rylden, for Rent reserved upon a Bargain and Sale of Land by Indenture enrolled. The Plaintiff thereupon Demurred. Glanville prayed Judgment for the Avowant: for he said, he knew not any cause of Demurrer, unless it were, whether there might be a Reservation upon a Bargain and sale, which is a common Case, and held, That there may: Walmsley; But I will maintain it by reason: For nothing passed by the Indenture, but the use; how may then a Rent be reserved thereupon? Anderson It is clear, that at the Common Law such a Reservation had been void; but now the Bargainor shall have the Rent by the Saving in the Statute of Uses, Where any are seised, to the intent that any may have a Rent. And so it was holden in Danbys Case, And I have seen a Judgment in the very point, That the Reservation was good; & so all the Court agreed in this Case. Wherefore, without further argument at the Bar, or Bench, it was adjudged for the Avowant. (39)

Co. Lit. 144. 2.
2 Rol. 448.

Stratfield versus Dover, Trin. 39 Eliz. rot. 1914.

Trespas. Upon Demurrer the Case was, Tenant in Tail of a Gift from the Queen is disseised. The Disseisor Levies a Fine with Proclamations, the five years pass; The Tenant in Tail dies: Whether the Issue shall be bound or not? was the Question. Anderson held, that the Issue should be bound: For he is not helped by the Statute of 34 H. 8. Although it hath been conceived, that where a Fine is levied by a Tenant in Tail, his Issue may be aided by this Statute, which the other Justices agreed unto. Walmsley; This Case is to be well advised upon; for he conceived, it was to be remedied by the equity of the Statute: It would otherwise be a common Dischief, That Donee in Tail of the King would suffer a Disseisin, and the Disseisor should levy a Fine; and thereby barr the Issue. Wherefore, &c. Pasch. 40, Placito 20. (40)

Co. Lit. 373. 2.
Moor 467.
1 Cr. 430.
Post. 612.
1 Cr. 430.

Co. 8. 78. 2.

Rede *versu* Burley,

Ante Hill. 39 Placito 25 C. B.

(41)
Ante 549.

Co. Lit. 47. 2.

Ant. 560.

REplevin. A Clothier put certain Wool to a Spinner to Spin, and afterwards comes with an Horse to bring back the Varn: And because there were not any Beam, or Weights in the Spinners House to weigh it, the Clothier and Spinner, by the leave of one of the Neighbours, who had a Beam & Weights in his House, brought his Horse thither, and entred therein to weigh the said Varn, and whilst they were there, the Lord of the House distrained that Horse and Varn for his Services. And whether the taking hereof by distress be lawful, or not? was the Question upon Demurrer. Anderson, Beaumont and Owen held, That they be not distrainable: For the Trade of a Clothier is pro bono publico, who ought to be allowed all necessary means, and without doubt Cloth put to a Weaver to be woven, nor Varn in an House to be Spun, be not distrainable (Quod Walmesley agreed) And weighing is as necessary, as the former. Therefore the Varn brought thither for that purpose, and the Horse, which brought it, are privileged, and are not distrainable. And although (as it hath been said) If the weighing had been in a publick House for that purpose, they had not been there distrainable; for it is a place privileged for these purposes, as a Farrior, or Taylors Shop; but being now brought to a private House for that purpose, It is not so: He said, That the cause of the bringing privileged them; as an Horse, which carrieth Corn to a Market, and is set up for a time in a private House, is not distrainable, as Beaumont said; because his purpose of bringing the Horse was pro bono publico. Owen also held, that they were not distrainable for another reason; for that they alway were in the Possession of him who brought them: As it is of an Horse, whereupon one rides. Therefore, &c. Walmesley e contra; because it is not averred, that it was a common Beam, or place for weighing; for there is a difference between a common place, and a private House. Sed Adjournatur: And afterwards it was adjudged, that the distress was not lawful.

Termino

Termino Hillarii
 Quadregesimo ELIZABETHÆ,
 in Banco Reginæ

Hobs versus Tedcastle, Hill 38 Eliz. rot. 876.



Audita Querela. The Case upon Demurrer was such; Tedcaster sued a Bill of Debt against Holloway in this Court, who put in Bail Hobs (the Plaintiff) & another, which is entred in this manner, That they acknowledged, that if the Defendant was condemned in that Sure, that he should pay the Condemnation, or render his body to Prison; otherwise they would pay the Condemnation

(1)
 Jones 29.
 1 Rol. 336.
 Post. 186.
 Moor 432.
 Stile 324.

for him. Afterwards Holloway the Defendant was condemned, & died before the Condemnation satisfied, or his body rendered, &c. Whereupon a Scire fac. was awarded against the Bill, & after two Nihils returned, Execution was awarded, and the Plaintiff taken in Execution: Whereupon he brought this Audita Querela, surmising the death of the said Holloway the Defendant, And the Court demanded of Kemp their course in this Case of the time of awarding Execution against the Bail, who said, that always after Judgment they awarded a Capias against the Defendant, and upon a Non est inventus returned, They awarded a Scire fac. against the Bail. But there was not any Capias awarded here against the Defendant. And all the Court held it to be very reasonable, not to sit Execution against the Bail, untill there was default in the Principal. And the Reconfluence of the Bail, that the Principall should render himself, &c. is to be intended upon Process awarded against him, &c. And here there was not any Process awarded against him in his Life time, and therefore the Bail is discharged; and so it was adjudged for the Plaintiff.

Post. 733.
 2 Cr. 98.

2 Cr. 47. 8.

Charter versus Peeter.

Fieri Facias was awarded upon a Judgment given in this Court, by force whereof the Sheriff took the Defendants Goods in Execution; and before Sale, the Record was removed by a Writ of Error into the Erchequer Chamber, and a Superseas awarded. And the Sheriff returned upon the Fieri fac. a Seizure of the Goods, and that they remained in his Hands pro desectu Emptorum: And he also returned, That a Superseas was awarded,

(2)
 Post. 602.

ed, &c. And hereupon it was prayed for the Defendant, That he might have Restitution of his Goods. But all the Court held, Although this Record be removed, and notwithstanding the Superseas awarded, in regard it came not unto the Sheriff, until he had begun to make Execution, as appears by his return; That a Venditioni exponas shall be awarded to perfect it: and although the Plea-roll be removed, yet it shall be awarded upon the return of the Fieri fac, which remains filed in the Office. And so it was likewise done in the Case betwixt Sir. Miles Corbet, and Rookwood Trin. 39 Eliz. rot. 406. in this Court; although the Record was there removed by a Writ of Error. Vide primo Maria, Dyer 99.

Rastal versus Turner. 39 Eliz. rot. 413.

(3)
1 Rol. 508. 9.
Post. 880.

Ejectione firmæ: Upon a special Verdict the Case was: L. Cundy Tenant for Life, Reversion in Fee of a Copyhold to William Cundy her Son; The Tenant for Life sells it in Fee. And for assurance it was devised, That he should make waste to commit a Forfeiture, and that the Lord should enter for the forfeiture, and should grant it to the Vendee in fee; She committed waste in burning an Out-house, which was presented, and the Lord seised it for the waste, and granted it to the Vendee upon condition that he should rebuild the House, and that he should pay such a summe to the Vendor. The Tenant for Life died, The Heir in Reversion (being admitted) entred upon the Vendee; And whether his entry were Congeable? was the Question. Gawdy held, that it was; For the collusion betwixt the Tenant for Life, and the Vendee, to take away the Inheritance is apparent, unto which Fraud the Lord was consenting, as is manifest by his Demise by Copy to the Vendee, upon the condition supra, &c. Therefore he shall not have advantage of this forfeiture, especially against him in Reversion, being a Stranger. And he conceived, that no forfeiture of a Tenant for Life shall by Law prejudice him in Reversion, or Remainder; As, where Tenant for Life of an Office commits a forfeiture, it shall not prejudice him in Reversion; as 39 H. 6. is. So here, although it were a forfeiture during her time, whereof the Lord might have taken advantage, yet it shall not prejudice or bind another. Wherefore the other Justices being absent in Parliament, because he conceived it to be a clear case, he commanded Judgment to be entred accordingly.

Post. 880.
Co. 9. 107. 2.

Paramore versus Pain, Mich. 39, & 40 Eliz. rot. 547.

(4)

DEbt. for 40 l. The Defendant pleads, That the Plaintiff was indebted unto him in 40 l. and he therefore sued a Plaint in London, and there this Debt in Demand was attached in his Hands. And he pleaded the foreign Attachment in certain, and the Judgment thereupon, &c. The Plaintiff replies, That he was not indebted to the Defendant in 40 l. nor in any other Sum. And it was thereupon demurred by Tanfield. For the Debt is not now Craverfable, because it is recovered in London; Et non disfracionatur within the year, and day, as it might be by the Custom. But Coke moved, that the Replication was good: For, whether he were indebted, or not, is very well Iſſuable;
For,

For, if he were not indebted, they in London could not attach the Plaintiff's debt by a Foreign Attachment for nothing. And so was the Opinion of the whole Court. And Fenner said, that in the Common Bench, 22 & 23 Eliz. It was so Ruled in one Brays Case. Wherefore it was here adjudged for the Plaintiff.

Pigot *versus* Hearn, Mich. 39 & 40 Eliz. rot. 299.

Action of Trover of certain Corn. The Matter in Law, whereupon the demurrer was grounded, was, The Lord of the Mannor of Pr. within the Parish of Ovingham in the County of Northumberland prescribed, that he and all his Ancestors, and all those, whole, &c. had used from time, whereof, &c. to pay to the Parson of O. (the now Plaintiff) and all his Predecessors 6 l. for all manner of Tythes growing within the said Parish. And that by reason thereof, he, and all they, whole, &c. Lords of the said Mannor had used from time, whereof, &c. to have Deciman Garbam, five Decimum cumulum Garbarum, seu granorum of all his Tenants within the said Mannor. And whether these were good Prescriptions, or not, was the Question. Popham, Gawdy and Fenner held, That they were good, and as to the first they conceived, That a Modus Decimandi by the Lord for himself, & all the Tenants of his Mannor, to Bar the Parson from demanding Tythes in Specie, is good: for it might have a lawful beginning, viz. That before it was a Mannor, all the Lands were in the Lords hands, and 6 l. was paid for the Tythes thereof. Then, when he conveys parcel thereof to others, it shall be discharged, as it was in the Lords hand; As in the Case of Doctor Cotton, Mich. 39 & 40. Placito 19. And as to the second Prescription, that it was good to have the tenth Shock, &c. For he hath it as a Profit apprender, as Parcel, or a thing appurtenant to his Mannor, and not as Tythes; for a Layman cannot have Tythes by Prescription, because he is not capable of them, in regard they be Spiritual. But he may have the tenth Shock, as a temporal Profit apprender; As 44 Ed. 3. 5. And it well may be parcel of a Mannor: Otherwise of Tythes, which cannot be said to be parcel, or appendant to a Mannor; As it was adjudged in Winch's Case, 34 El. and so is the Book of 10 Ed. 3. 5. And therefore, if the Lord had prescribed to have had Decimas garbarum, it had been ill: But when he prescribes to have decimam garbam, &c. it is otherwise; for so there is a difference betwixt the pleading for Tythes, which are Spiritual, and of a Tenth, which is temporal. They also agreed, that if the Queen was Lady of a Mannor, She might prescribe to have Tythes: For she is capable of them, although they be Spiritual; As 22 Aff. 75. For she is mixta persona, & Capax Spiritualis jurisdictionis; As 23 Ed. 3. Ayd de Roy. Wherefore, absente Clinch, They adjudged it for the Defendant, 2 Co. 45. a.

(5)
Co. 2. 45. a.
Post. 763.

Post. 785.
Hob. 42.

Ante. 587.

Ante. 293.

Ante 511.
Co. 2. 44. 2

Matures *versus* Westwood.

Covenant: Upon Demurrer, The Case was; A Lessee for twenty years, grants it by Indenture to W. for ten years, wherein he Covenants at the end of the Term to leave it sufficiently repaired, And the Possession to the Lessor, his Executors, or Assigns. Afterwards A. assigned the Reversion to the Plaintiff.

(6)
Post 617.

Post. 650.

Ante 78.

tiff: and because the Defendant, at the end of the ten years, did not deliver up unto him the Tenement sufficiently repaired, he brought this Action. And it was first moved, Whether this Action lay by the Statute of 32 H. 8. for an Assignee of a Reversion for years: and therein the whole Court held, that it did. Secondly, This Covenant is Collateral, viz. for the delivering of a Possession: & it was not broken until after the Term determined, and therefore the Assignee cannot have any advantage thereof: for he was not Farmer when it was broken, but only Tenant at sufferance: and of that opinion was Fenner; But all the other three Justices e contra. For there cannot be a more apt Covenant to run with the Land, then to leave it sufficiently repaired; And that is broken instantly with the determination of the Estate. Wherefore they resolved for the Plaintiff. But then an Exception was taken to the declaration, viz. That he did not aver, that he had the Reversion at the time of the Grant: but it is alledged, that A. Lett to the Defendant for years, and afterwards granted the reversion to the Plaintiff, to which Grant the Defendant attuned; and it was holden to be an apparent fault, Vide 7 H. 7. 3. Wherefore, for this cause, it was adjudged for the Defendant, Vide postea, M. 40. & 41. pl. 2.

Bennet versus the Bishop of Norwich.

(7)
Co. Lit. 270. b
Moor. 467.

Co. Lit. 270 b.

Error of a Judgment in a Quare Impedit. The Case was such: the next avoidance of a Church was granted to A. and B. Afterwards A. released to B. the Plaintiff, and after that the Church became void: and whether B. should Present only, or have for the disturbance the Quare Impedit in his own Name only: was the question. And it was held by all the Court, that he should; for the next avoidance is a thing in Interest, and is grantable to a Stranger, wherefore it might be released by the one to the other: but if the Church was void at the time of the Release made, it were otherwise: for then it is a thing in action, which cannot be conveyed over. Wherefore the Judgment was affirmed.

Bowyer versus Garland.

(8)
Co Litt. 295. a
2 Rol. 107.

Debt against an Administrator upon an Arbitrament made betwixt the Plaintiff, and the Intestate, in writing. And the Defendant demurred thereupon; and, without Argument, it was adjudged for the Defendant: because the Intestate might have waged his Law. But otherwise it were, if it had been in debt upon Arrerages of accompts before Auditors.

Action versus Barham.

(9)
Post. 620.

Error of a Judgment in Sandwich. The Error assigned, because that in Trespafs of taking his Ox in D. the Issue was, Whether the place, where, &c. was holden of him, as of his Manor of S. by Heriot &c. And the Ven. fac. was awarded de Vicineti de D. and S. whereas it ought to have been from S. only; and for this cause, it was held to be Error: Although it were alledged, that the awarding the Ven. fac. from the Vicin. of D. was but Surplusage, and not Error, where the Vill. whence the Issue ariseth,

seth is also named. But it was thereto answered, That this shall not help it; for it is not awarded according to Law. And it may be there be many more returned from D. then from S. which the Law will not allow of. Wherefore it was held to be Erronious: But Judgment was not then given; Sed Adjournatur, Mich. 40 & 41 Placito 10.

Wilsons Case.

Wilson was Endited of Forgery, upon the Statute of 5 Eliz. before A. and B. Justiciariis ad pacem, nec non ad diversas Felonias, &c. audiendum & Terminandum, assignatis, Et per Gawdy, Fenner, & Clinch, (10) Co. 9. 118. b. Ant. 87. It was held, that they had not any power to take this Enditment. For the Statute which appoints, that the offences shall be enquired before Justices of Assise, or Justices of Oyer and Terminer, intend those who have general Commissions, and not those who have but a special Commission only, as the Justices of Peace. But Popham doubted thereof.

Armiger versus Holland.

Upon Demurrer. The Case was such, Meys, Parson of North-creak, in the County of Norff. (It being a Benefice above the value of 8 l. per annum) takes a second Benefice, and was there to Admitted, Instituted and Inducted. Afterwards he was Elected Bishop of Carlisle, and before his Creation, and Installation, The Queen by her Letters Patents reciting, that he was Parson of North-creak, granted unto him, that he might hold it in Commendam, Non obstante, &c. Afterward he was Sacred, and Installed; and then Holland was Presented, Admitted, Instituted, and Inducted to the Church of North-creak. Afterward the Bishop of Carlisle Lett the said Parsonage to Armiger the Plaintiff. And which of them had the right, was the Question? Wherein three points were made. First, whether by the Order of the Common Law, The first Benefice be void without Depriuation by the taking of a second Benefice? Secondly, Whether the Statute 21 H. 8. be a general Law, whereof the Court ought to take Consuance, although it be not pleaded? Thirdly, admitting it were not void by taking the second Benefice; Whether it were not void by his being Created a Bishop, viz. Whether the Dispensation granted by the Queen to hold in Commendam be good, or not, by reason of the Statute 25 H. 8. which gives Authority to the Arch-bishop of Canteb. to grant it? As to the first point, All the Justices resolved, that by the acceptance and induction into the second Benefice, the first was void by the Order of the Common Law, without any Sentence of Depriuation, and for that purpose, 5 Ed. 3. 9. 9 Ed. 3. 26. 10 Ed. 3. 1. 24 E. 3. 30. 11 H. 4. 37. 14 H. 7. 28. 12 H. 8. 6. 14 H. 8. 17. As to the second they held, That the Statute of 21 H. 8. is a general Law, and therefore needed not to be pleaded, nor any part thereof. And therefore by the taking of a second Benefice, and by the Induction to it, the first is clearly void; and so it appears to the Court without pleading the Statute, Vid. Dy. 27. As to the third, they all agreed. That the Qu. by her Prerogative, without the Arch-bishop, may grant to a Bishop, to hold a Church in Commendam, Notwithstanding the Statute of 25 H. 8. But for the two first points, they awarded a Consultation, 4 Co. 75. (11) Ant. 542. Ant. H. 39. pl. 9. Post. 690. Hob. 146. Ant. 571 542.

Charter *versus* Peter.

(12)
Ant. 597.
Cont. Post. 621

Error was brought in the Erchequer Chamber of a Judgment in the Queens Bench for these Words Thou art an enemy to the State. The Error assigned, that the words were not Actionable; and adjudged that they were: For the words cannot have any good Construction, but are very slanderous. Wherefore the Judgment was affirmed.

Keen *versus* Cope, Hill. 39 Eliz. rot. 941.

(13)

Ejedione firmæ. A special Verdict was found, that Tho. Jennings was Tenant in Tail, Remainder to John Jennings. Tho. Jennings, the first Tenant in Tail made a Lease to the Defendant, and two others, for their Lives, according to the Statute of 32 H. 8. with Warranty, and died without Issue: and that John Jennings in the Remainder was his Brother and Heir, who entred, and Lett to the Plaintiff for years, upon whom the Defendant entred, and ejected him, &c. The sole Question was, whether this Warranty shall Barr him in Remainder to enter, or not? For the Lease not being a discontinuance (being warranted by the Statute) determined by his dying without Issue, and it cannot bind him in remainder: For he cannot have the Rent reserved; and then the Estate is determined, and the Warranty with the Estate, and it shall not barr him in the remainder. Wherefore it was adjudged for the Plaintiff. Note The Lessor did not warrant it for him, and his Heirs; But pro Redditu prædicto he warrants it against him, and his Heirs: And for this cause also it was held, that it was a Warranty for his Life, and was determined by his death.

Pigot *versus* Gascoyn & Furthee.

(14)
Post. 719.

Debt, as Administrator to Anthony Longvile, durante Minore ætate of W. Longvile, the Executor, upon an Obligation, and avers, That W. Longvile was within the age of twenty one years. The Defendant pleaded an ill Bar, and it was thereupon demurred. But, because the Court was resolved upon Conference with divers Civilians openly in Court, that the power of an Administrator, durante Minore ætate, doth cease at the Executors age of seventeen years; and that Administration committed after that age of the Executor, is meerly void; and notwithstanding this averment here, the Executor might be above the age of seventeen years, and within the age of twenty one years: It was therefore adjudged, Quod Querens nihil caperet, &c. 5 Co. 29.

Stanley *versus* Boswel.

(15)
Rol. 53. 55.

Action for these words spoken of the Plaintiff, being an Attorney, Thou art a Cozening Knave, & gettest thy living by Extortion and

& didst cozen one *Pigeon* in a Bill of Costs, of 10 l. The Defendant pleaded Not-guilty, and stood against him, and after Verdict, it was moved, that an Action lay not for these words. And all the Court agreed, that the first words, Thou art a Cozening Knave, an Action lies not, for they be too general, and no body knows what is intended by them. And for the words, Thou gettest thy living by Extortion, no Action lies, for so he may do, and be no Extortioner: As in the Case of Stanhop, Thou gettest thy living by swearing, & forswearing, &c. Co. 4. 11. b. But for the last words, because they touched him in his Profession (For to make a false Bill is against his Oath) and is a great falsity, and abuse to the Court, they all held the Action to be maintainable, and gave Rule, that Judgment should be entered accordingly, &c.

Mariot versus Smith.

Ejectione firmæ. Upon a Special Verdict, it was found, That one L. was seised of the Land, and made thereof a Charter of Feoffment to the Lessor, and his Heirs, dated the tenth of September; and he, by another Deed, Reciting that L. had made unto him a Charter of Feoffment of that Land, dated the Eleventh of September, gave thereby Authority to A. to receive Livery, and Seisin for him Secundum formam, & effectum Chartæ prædictæ; A. receives Livery upon the Feoffment accordingly. And it was found, that there was not any other Warrant of Attorney. And Whether this were a good Feoffment, or not? was the Question. Drew moved, that it was: For all is certain, viz. the Name of the Feoffor and Feoffee, and the certainty of the Land, and nothing mistaken, but the date, which being sufficiently certain before, it is not material, although it be mistaken; As in 2 Ed. 4. fol. ultimo, and Dy. 376 Cottons Case. But all the Justices resolved to the contrary: For the Warrant to receive Livery is by the Letter of Attorney, which authorizes him to receive it Secundum formam Chartæ, dated the Eleventh of September, whereas there is not any such; and so he had not any Warrant to receive it: Wherefore the Livery made is void; and the date of the Deed was the principal note to know it. And if it varies in the Date, there is not any such Deed; and where a Statute is pleaded, and misrecited in the date, as in Plow. 84. Stranges Case, there is not any such Statute. And it is not like to Cottons Case; for there, although the House was mis-named, in whose Tenure, &c. yet it was certain enough before, and passed by the Charter of Feoffment; and the Letter of Attorney referred thereto. And so they all held, if the Warrant had been to make Livery, it had been ill: But it was then moved, that in regard that the Feoffor himself made the Livery to the Attorney; it shall be a good Livery unto him, although it shall not be to the Feoffee. But Anderson and Walmley denied it. For there was not any intent to Infeoff the Attorney, but the Feoffee: Wherefore it is utterly void, and it was adjudged for the Defendant.

(17)

Arch-Deacon *versus* Jennor.

(18)

Co. Lit. 204.

THe Case was; One made a Lease for years; The Lessor Covenanted, that the Lessee should have House-bote, Haybote, and Plow-bote, without committing any Waste upon pain of Forfeiture of the Lease, Whether this were a Condition? was the Question. Anderson: The Covenant is no more then what the Law appoints, and therefore vain: And so all, what is Subsequent, is vain. Quod Beamond agreed. Walmley; It is a Covenant on the Part of the Lessor; and therefore it cannot be a Condition.

Termino

Termino Paschæ,
Anno Quadragesimo ELIZABETHÆ,
in Banco Reginae.

Holland *versus* four others.

Holland brought an Appeal of Murder against four of Sir George Fearmors men by Original Writ; And at the day of the Writ returned, they appeared at the Barr, and then he would have declared against them being at the Barr, as in custodia Mareschalli; and by the Rule of the Court he could not. For the appearance of the Defendants do not make them in custodia Mareschalli; unless there be a Record made, Quod committitur Mareschallo; Or that they find Bail: Otherwise not. Wherefore in regard the Plaintiff would not Declare against them upon the Writ, the Plaintiff was therefore Demanded, and called upon the Writ, and was Non-suited, and the Defendants discharged. Note. He would not Declare against them upon the Writ, because there was a Fault therein, viz. want of an Addition of one of the Defendants in the first name. And if he had declared, and the Writ had then abated, It would have been Peremptory unto him. For Tanfield for the Defendant said, That a Non-suit before Appearance is Peremptory. Vide 22 Ed. 3. 7. 22 Ass. Pl. 97. (1) 1 Rol. 581. Post. 695.

The Earl of Worcester *versus* Paddon.

TRespals. After Verdict it was moved in Arrest of Judgment, That the Ven. fac. was made returnable three dayes after the Term, and after a Distringas was awarded, and the Jury taken thereupon, which was ill, because the first Ven. fac. was ill. Gawdy; If there were no Ven. fac. it were holpen by the Statute of Jeofayls. But an ill Ven. fac. upon the Record is not holpen. Popham; The like Case was of late in this Court, and Ruled to be ill. Wherefore, for this Cause, the Judgment was arrested. Vid. 1 Eliz. Dy. 168. 107. 265. (2) 2 Cr. 442.

Hutchins *versus* Martin.

Upon Evidence to a Jury, It was moved, where Lessee for years accepts of a second Lease to begin at Mich. following; Whether it be not an immediate Surrender of the first Lease? And the Court held, That it was, and that the Lessor might enter in the interim, and take the profits. And Coke, Attorney General, said, That it was lately so adjudged in the Common Bench. Childs (3) 2 Rol. 496. Ant. 522. Co. 5. 11. b.

Childs Case.

(4)
Ant. 101.

Child was Endicted upon the Statute of 5 Ed. 6. for striking in a Church-yard: George Croke took Exceptions thereto, because it was apud generalem Sessionem pacis tenet. apud Blanford; and it is not said in Comitatu prædicto. And although the County was in the Margin, and so by Intendment it might refer thereto, yet, because Endictment shall not be taken by Intendment, he was for this Cause discharged, 11 H. 7. 10.

Darrel versus Middleton.

(5)

Ejectione firmæ of a Lease made the twentieth of August, from Mich. then last past Ante Datum hujus Indenturæ, and he neither shews the Indenture, nor the Date thereof. After Verdict, This matter was alledged in Arrest of Judgment: That there did not any Certainty appear by the Declaration, when the Lease should commence. For there is not any Date of the Indenture expressed. Wherefore, &c. But all the Court held it to be well enough. For when he declares of a Lease made of the twentieth of August, for twenty years, from Mich. then last past: If he had stayed there, it had been clearly good. Then the Addition ante Datum Indenturæ shall be void, and the beginning of the Lease appears certain enough. Wherefore it was adjudged for the Plaintiff.

Collins versus Harding, Pasch. 39 Eliz. 100333.

(6)
Co. 138. 57.

Hob. 177.

Debt upon a Lease for years; And Declares, That one Par-grew being seised in Fee of two Acres; the one Free-hold, the other Copy-hold Land, and having the Lords Licence to make a Lease of the Copy-hold Land by Indenture, Lett the two Acres by Indenture to J. S. for twenty one years, rendering 20 s Rent, and afterwards, Maii 32 Eliz. granted the Reversion of the Free-hold Land to the Plaintiff in Fee; To whom the Lessee attourned: And upon the same day surrendered the Reversion of the Copy-hold Land into the hands of two of the Tenants of the Manor, to the use of the Plaintiff in Fee, and at the next Court this Surrender was presented, and the Plaintiff admitted accordingly. And afterward the first of August 33 Eliz. Jo. Sc. the Lessee granted all his Estate to the Defendant. And for the Rent of three years Arrear at Mich. 37 Eliz. the Plaintiff brought this Action. The Defendant pleads a Release from the Plaintiff made to J. S. the first Lessee upon the fourteenth of Novemb. 33 Eliz. (which was after the Assignment) of all Actions, and Demands, until the date of the Deed, which J. S. (as the Defendant alledgeth) died possessed, and made him his Executor; intending thereby, that by this Release made to J. S. being the principal party, the Action of Debt was gone for ever. And it was thereupon demurred. And it was agreed by all the Court, that the Bar was ill: And, that there was no cause to barr this Action: the Release being of all Demands, until the date of the Deed, and this Rent was not arrear till afterwards. It was then moved, that the Declaration was not sufficient to maintain this Action,

Action; for when he divided his reversion, (viz. by granting the reversion of the Freehold, which then immediately passed by the Attourment, whereas the Copy-hold passed not until the Surrender presented, and the admittance in Court) The Rent was thereby utterly Extinct. Or at leastwise, the Plaintiff ought to have had several Actions, because he now hath the reversion by several Conveyances. And of that opinion was Gawdy. And Popham said, That he was of the same Opinion, if this Rent should be said to be Issuing out of both Acres. But he held, that this Rent shall be Issuing only out of the Free-land; because that is the most worthy, and whereof the Common Law takes Consequence. As if Rent be granted out of Land Guildable, and out of Land in ancient Demesne. The Action shall be brought for it at the Common Law. And if a Lease be made of Land and Goods, rendering Rent; it is issuing only out of the Land. But we will well advise thereof. And the other Justices spake not thereto, Sed adjournatur. Post, Mich. 41. Pl. 15. Co. Lit. 148. 2. Post. 623. Ante 258. 6. Post. 622. 3.

Wade *versus* Bullard.

Action on the Case for these Words, Thou hast Forged an Obligation, and I will prove it. The Defendant Justifies, because he had forged such an Obligation in the name of Wendy. The Issue de son Tort Demesne, &c. and found for the Plaintiff; and now moved, that an Action lay not for these Words. For he doth not shew, that this Obligation was sealed and delivered. But the Court held it to be well enough, for it cannot be otherwise intended, for, without those Circumstances, it is not an Obligation, but a Writing only. But they held, that for saying, Thou hast made a false Bond, an Action lieth not: For that may be upon false Instructions. Secondly, it was alledged, that this Issue was not good: for there being a special Forgery alledged, it ought to be specially Traversed, But the Court held the Issue to be well enough. And, if it were not good, it is aided by the Statute 32 H. 8. Wherefore it was adjudged for the Plaintiff. (7) 1 Rol. 65. Co. 2. 67. 2.

Leigh *versus* Wood, Mich. 39, & 40 Eliz. rot. 374

Prohibition to stay a suit for Tithes; wherein he surmiseeth: that he set forth his Tythes. And afterwards, for some reasonable causes (not shewing what in certain) he had detained part of them. And that the Parson had sued him for them in Court Christian: and it was thereupon demurred: And Fenner and Clinch held it to be good Cause for a Prohibition. For, by setting out of the Tythes, they are become Lay Chattels. For which he may have his remedy at the Common Law by Trespass, or Detinue, and therefore there is not any cause of Sute in the Court Christian. Gawdy, and Popham e contra. For against the Party himself, who set forth his Tithes, a Sute is well maintainable in the Spiritual Court, if he detains them, although the Parson (if he would) might have his remedy at the Common Law. But if a Stranger takes them after they be set forth, his remedy is only at the Common Law. And the Statute of 32 H. 8. proves it. For the words thereof be, If any do not set out, or do detain, or with-hold his Tythes (which is to be intended after they be set out) (8) 2 Rol. 286. 2 Inst. 613. Post. 844.

out) He shall be sued in the Court-Christian, &c. For otherwise Dilchies would ensue to the Parson, in that he would secretly let his Cythes forth, so as the Parson should not know thereof, and would afterwards carry them away. Et adjournatur.

Beadle *versus* Sherman.

Pasch. 39. Eliz. rot. 699. vel Hill. 40 Eliz. rot. 699.

(9)
Co. 13 47.
Post. 613.

2 Cr. 70.
2 Inst. 612.
2 Inst. 650.
Post. 621.

1 Inst. 650.

1 Cr. 419.

DEbt upon the Statute 2 Ed. 6. for not setting forth of Cythes, wherein he declares, that he was Parson of Lytlington, in the County of Cambridge, and that the Defendant being a Parishioner there, and having Corn there growing, &c. The Cythes whereof amounting to the value of 50 l. He had not set them forth: Wherefore he demanded the treble value, viz. 150 l. After Verdict for the Plaintiff, upon a Nihil debet pleaded, it was moved in arrest of Judgment, that the Suit for this treble value ought not to be brought at the Common Law, but in the Spiritual Court, as it ought to be for the Cythes before they be set forth. But Tanfield for the Plaintiff moved, that it might be well brought at the Common Law; and so it was ruled in the Exchequer, upon great advice, in the time of Manwood, betwixt one Wood & Halton; for there the Information was brought by the Queen only upon this Statute, and the treble value was demanded, and adjudged that it lay not, for the Statute gives it to the Party grieved, and not to the Queen. And then it was brought by Wood, being the Party grieved, and he had Judgment to Recover; And a President in this Court Hill. 34 Eliz. rot. 682. betwixt Wentworth and Crisp was cited, where such an Action was brought, and the Plaintiff had Judgment to recover; and all the Justices were of the same opinion in this Case; but, because it was a new Case, they would advise until next Term. Another exception was taken; because it appears, that the Plaintiff had this Parsonage in right of his Wife for years, and so ought to have joyned his wife with him in this Action. Sed non allocatur. Residuum postea, Trin. 40 Placito 1.

Cowper *versus* Langworth, Hill. 40 Eliz. rot. 479.

(10)
1 Rol. 601.
1 Rol. 601.
Post. 817.
Co. 6. 45.

DEbt upon a Recognisance acknowledged in Chancery. The Defendant pleaded, that the Plaintiff had sued a Scire fac. upon it in Chancery, and had Judgment there, and had sued an Elegit, and demanded Judgment, &c. and it was thereupon demurred. The Question was, Whether after this Execution awarded by the Elegit, the Plaintiff might waive it, and have a new Action of debt? And all the Justices held that he might; and that the Judgment in the Scire fac. upon the Reconisance being in force, yet he might have a new Action of Debt. So, if one recovers in debt upon an Obligation, yet, that remaining in force, he may have a new Action. For Popham said, the difference is, where one recovers in Trespas, or other Action, wherein he recovers nothing certain, but damages only; if he hath Judgment in such an Action, there, when that Judgment is in force, he cannot have a new Action; but where the thing which is demanded is certain, as debt, &c. it is otherwise. Wherefore it was adjudged for the Plaintiff.

George

George Skarning *versus* Elias Shartwell.

DEbt. The Judgment was, Quod prædictus Georgius capiatur; whereas it should have been prædictus Elias. And this was assigned for Error. And it was prayed, that it might be amended: for it is but the Default of the Clerk. And by Fener, and Clench (cæteris Justiciariis absentibus) it was held, That it was not amendable; because it is part of the Judgment, and the Act of the Court. (11)
1 Rol. 201.
Ante 170.
1 Rol. 201.

Shaw *versus* Tompson.

Action upon the Case for these words; Thou art a forsworn knave, and I will prove thee to be forsworn in the Spiritual Court. After Verdict for the Plaintiff, it was moved, that an Action lay not for these words, no more then for saying, Thou wert forsworn in White-Church-Court; which words have been here resolved not to be actionable. But all the Court held, that the Action well lay: For the Ecclesiastical-Court is a Judicial-Court, and well known. Wherefore it was adjudged for the Plaintiff. (12)
1 Rol. 40.
Ante 135.
Ante 185.

Corbet *versus* Hill.

Action for these words; The Plaintiff was perjured in his Answer in the Star-chamber, innuendo a Bill there exhibited by the Plaintiff against the Defendant. After Verdict it was moved, that an Action lay not: For it is well known, that a Plaintiff cannot be perjured in his Bill exhibited; for he is never sworn thereto. But all the Court held, that the Action was maintainable for the first words, and they be sufficient without the Innuendo, which being repugnant is void, and not to be regarded. Wherefore it was adjudged for the Plaintiff. (13)
1 Rol. 40. 83.

Anonymus.

Action for these words; The Plaintiff hath forsworn himself; Innuendo before the Justices of the Assise of &c. And the whole Court held, that the words were not Actionable; for the precedent words be not sufficient of themselves: And the Innuendo shall never help it. Wherefore it was adjudged for the Defendant. (14)
Ant. 297.

Austyn *versus* Lucas.

IT was held by all the Justices, That for Broom, Furs, or any other fewel expended in a Parishioners house, there be not any Tithes due, or payable. A prescription also to pay the tenth Cheese, made from May-day until the first of August in recompense of all Tithemilk for the whole year, is good. For that comes of labour, and is not due of it self and therefore is a good discharge: but to pay the Tenth quart of Milk, is not good; for that is but for what is due. But Popham said, to pay the tenth quart of Milk at the Parsonage house, or at any other place, is good enough. (15)
Rol. 644. 651.
2 Inst. 652.
2 Cr. 113.
1 Rol. 651.
Ant. 363.

Hunt *versus* King. Pasch. 39 Eliz. rot. 361.

(16)

Error of a Judgment in Formedon in the Common Bench. The Case: That W. King the Grandfather, Tenant in Tail, Infeoffed Rich. King, the Father, in Fee, and afterwards Will. King disseised him, and Levied a Fine with Proclamations, to Hitchcock, and before the Proclamations passed, Rich. King, entred, and, after that the Proclamations passed, Hitchcock, the Conusee, enters, and W. K. and R. K. died, John King, the Son of Rich. King brought the Formedon, where this a Fine with a Que Estate was pleaded in Barr, &c. The Demandant thereupon pleaded this Entry by his Father, which was Traversed, and found for the Demandant, and Judgment given for him, and thereupon, Error brought. And the Error assigned in the matter in Law; That this Fine should barr the Intail: For although it was a Fine levied by him, who was Tenant in tail, and had the right of the Intail in him at the time of the Fine Levied; and although the Fine, as to the Possession, was defeated by the Entry of the Father, who was disseised, yet, when the Proclamations run out, and are not stopped, nor avoided, this Fine is a good barr within the Statute of 32 H. 8. to bind the right of the Intail, which was in him, who Levied the Fine; and, that this is not to be compared to Fines at the Common Law, nor to other Fines of other persons: for it sufficeth here, that the Fine was levied by one, who had the right of the intail, or that he was one, to whom the Land was intailed, although that none of the parties hath the interest in the Freehold, or in the reversion, or remainder of the Land; as it was adjudged in Zouch, and Bagfields Case; that a Fine levied by Tenant in tail, who is disseised, to a stranger, who had nothing in the Land, was good to barr the intail. And it is not any plea for the issue in tail, Quod partes ad finem nihil habuerunt, &c. Popham also cited the Lord Sturtons Case to be adjudged in 16 Eliz. where Sturton being Tenant for life, remainder in tail to the Lord Surton, remainder in Fee to a Stranger, the Lord Sturton disseised the Tenant for life, and Levies a Fine, the Tenant for life enters before the Proclamations passed; so as he defeated the Fine, and after the Proclamations were passed, although neither the Free hold, or inheritance in Fee were bound by this Fine, yet it was adjudged, that the intail was bound by it: So it shall be in all Cases, where the Fine is levied by one, to whom the Land is intailed, or who may claim as Heir in Tail. And therefore he is to be barred, as Heir in Tail, to have a Formedon. And, although it appears, that he had right to have the Land, as Heir of the Fee, and might well enter; and, although the Tenant might well have Demurred upon this Entry pleaded, and had not done it, but had taken issue upon it, and it was found against him, yet in regard it appears, that the Demandant had no Right to this Land by this nature of Action. And this appears to the Court, they shall adjudge against him. Wherefore they Reversed the Judgment. Note; Warberton Serjeant cited one Grants Case, to be lately adjudged in the Common Bench, where

Co. 3. 90. 2.

Co. 10. 50. 2.
Ante 122.

where one devised Land to his Feme for life, Remainder to his Son in tail, when he should have attained to the age of Twenty five years. He, before his age of Twenty five years, Levies a Fine (when he had nothing in the Remainder, as it was agreed, that he had not; for the remainder did not vest in him until that age) and afterwards died at his age of Twenty five years. The Feme afterwards died, it was adjudged, that this Fine should barr his Issue, although at the time of the Fine he was not Tenant in Tail; but was a person to whom the Land was intailed; and therefore the fine was a barr to his Issues.

Wade and his Wife *versus* Smith.

Error to reverse a Judgment, and Outlawry against them in Debt. And, because it was to reverse an Outlawry, it was held, that they could not assign Error; but in person: and, because the Baron could not bring in his Feme, it was held, that he could not assign Error; for he cannot assign it without his Feme. And so it was ruled by the Court. And the course of the Court is, that it cannot be otherwise assigned. (17)

Ant. 370.

Termino Paschæ, Anno 40 Eliz. in Com. Banc.

Davies Case.

Action sur Trover of Goods. The Defendant justifies, as Servant to the Sheriff of Middlesex, because the Plaintiff had stolen those Goods, and carried them to D. within the County of Middlesex; at which place the Defendant seized them, *ut bona waviata*; and, without argument, it was adjudged for the Plaintiff: For he ought to alledge a Felony committed; and, that the Goods were waved by the Felon; But it is not alledged, that the Felon waved them. Wherefore it was adjudged *ut supra*. (18)

Anonymus.

A Writ of Warrantia Cartæ was brought of two Messuages, and Twenty acres of Land, wherein he counts, that the Defendant infeoffed him of the said Messuages, and Twenty acres *per nomen unius Tofti, & 2 virgat, Terræ*. And Exception was taken hereto; because, that, which comes under the name of *per Nomen*, doth not warrant the Count: For the two Messuages cannot pass by any word contained under the *per nomen*. Sed non allocatur: For it may be there was only one Toft there at the time of the purchase of the two Messuages, and they might since that time, have been builded. Wherefore it was adjudged for the Plaintiff. (19)

Ant. 234.

Stratfield *versus* Dover.(20)
Ant. 595.

THe Case was now moved again by Williams, that the pleading was ill: For the Defendant made Conuſance, as Bayliſſ of Ed. Verney; for that King Ed. 4. gave the Land to the Anceſtors of Ed. V. in Tail, and conveyed it by deſcent to Ed. V. The Plaintiff ſaith, That Fr. Howſe, before the taking, was ſeiſed in Fee; and in 25 Eliz. Levied a Fine with Proclamation, and five years paſſed; and, that this Fine was to the uſe of Fr. H. himſelf, and his Heirs, who let to the Plaintiff for years, &c. And for this cauſe it was in ſufficient: For he never Trauerſeth the gift in Tail, nor the ſeiſin in Tail, in Ed. V. nor in his Anceſtors, nor confeſs, nor avoid it. Wherefore, without regard to the Matter in Law, it was adjudged for the Defendant. Mich. 39 & 40. C. B. Placito 40. ant.

Termino

Termino Trinitatis.

Quadragesimo ELIZABETHÆ,

in Banco Reginae

Beadles *versus* Sherman. Ante, Pasch, 40. Plac. 9.

THe Case was now moved again, to have the Resolution of the Court: and they all Resolved, that the Action well lay upon the Statute. It was then moved, That those Tithes were personal Chattels, which appertained to the Baron only, and he hath joyned his Feme with him in this Action; and therefore it was ill. Sed non allocatur: For, the Feme, being Termor, the Baron is possessed of them in her Right, and the Action is given to the Proprietor, or Farmor, &c. wherefore the Action is well brought in both their names. And it was adjudged for the Plaintiff. Note; That a Writ of Error was brought upon this Judgment. And the Error was Assigned in the point of Law. And the Judgment was affirmed. (1) Post. 621. Co. 13. 48.

Fox *versus* Wright.

DEbt upon a Bill ensealed of 200 l. which was in this manner (2) That the Defendant, in consideration of a Bill of 50 l. 2 Rol. 25. wherein the Plaintiff was bound to Will. Flud, for the payment of 42 l. for the Defendant, obligavit se in 200 l. ad indempnem conservandum the Plaintiff from all Actions by reason thereof, solvendum to the Plaintiff cum requisitus esset; and alledgeth, in fact, that he had not saved him harmless, pro eo quod, that the said Will. Flud had sued him upon that Bill, and recovered 90 l. Damages, and had taken him in Execution thereupon, unde Actio Accrevit, &c. The Defendant pleaded Non est factum. And upon the evidence it appeared, that this Obligation was written in a Book, and in the same leaf the Defendant put his hand and seal thereto. And at the Nisi Prius in London, before Popham, it was moved, whether it were a good Deed, or not? And he held, that it was: But willed the Jury to find it especially. But they generally found it to be Factum suum; For they said, it was an usual course in London. And being afterwards moved in Court, Clench and Popham agreed, that it was a good Deed, But Fenner doubted. Yet now, by the Verdict of the Jury, it is put out of Question. Secondly, it was moved, that the Plaintiff could not have advantage of this Bond; because it is not alledges 2 Cr. 288. ledged, that he gave notice of this Sute to the Defendant. Sed non allocatur. But it was adjudged for the Plaintiff, although not any Reason given thereof.

Hewer

Hewer *versus* Bartholomew. Trin. 39. Eliz. rot. 830

(3)

A Ccompt, supposing that he received 100 l. by the hands of John Coventry. The Defendant pleaded Nunques son receiver by the hands of John Coventry to render accompt, &c. And thereupon they were at Issue. The Jury found, That Barth. paid that 100 l. to Hewer the Plaintiff in redemption of a Mortgage; and he commanded his Servant to put it in his Closet: who did so. And afterwards B. demanded of the Plaintiff certain evidences, and Bonds; which he refused to deliver. Then the Defendant required, that he might have his Money again, which he then had paid. And the Plaintiff thereupon commanded his Servant, John Coventry that he should fetch back the said 100 l. ad redeliberandum to the foresaid I. B. the said 100 l. by him paid; And, that the said John Coventry did fetch again, the same Money, and poured it forth upon the Table eidem I. B. ea intentione, ut idem I. B. suas centum libras prædict, quas idem I. B. to the said Plaintiff had paid, Reciperet in præsentia of the Plaintiff: and the Plaintiff then, and there did will the Defendant ad recipiendum the foresaid 100 l. per ipsum Defendentem præfato Querenti, ut præfertur, solut, quas 100 l. idem Defendens ad tunc, & ibidem recepit, & asportavit. Et si super tota materia, &c. And all the Court resolved, That this payment was a good discharge of the Mortgage; and although he afterwards required it again, as his own Money, yet it shall not avoid that, which was absolutely paid: But the Mortgage remains absolutely discharged; and the Monies were the Plaintiffs own Monies. And although he delivered them to the Defendant as his own, not knowing the Law therein, supposing it to be no payment; yet in regard he did not give it otherwise, nor upon other consideration, the Defendant received them as the Plaintiffs Money, and is accomptable for them. Secondly, Popham, and Gawdy held, that this was not any receipt by the hands of I. C. but by the hands of the Plaintiff himself: for when he willed the Defendant to receive it, it was his own delivery; and when he commanded his Servant to fetch it ad deliberandum to the Defendant, and he brought it down and poured it forth ea intentione, that the Defendant should receive it; that is not any authority to the Servant to deliver it; nor did he by that Act deliver it. But Popham said, if he had commanded his Servant to bring the said Money, and deliver it to the Defendant, and he had done it in the presence of his Master, and the Master had required the other to receive it, that peradventure might have been a receipt by the hands of the Servant. Fenner held the contrary in this point: for he conceived it to be a delivery by the Servant; because he fetched it down, and poured it forth to the other to receive it. And Clench doubted, Et adjournatur. But afterwards the Plaintiff discontinued his Sute, and brought a new action, supposing the receipt by his own hands.

Gerry *versus* Holford.

Ejectione firmæ. A special Verdict found, that there were two (4)
 Co-partners of an House: The one entred generally, and
 made a Lease for life, by the name of All that his House, &c. The
 question was, whether all, or the Moety only of the House
 passed? Popham, and Fenner held, That the intire house passed:
 For, when he saith, All that my House, &c. that intended the
 whole House; and by his Libery made he gained the entire, and
 gave the entire, although by his general Entry it is not in-
 tended, that he entred into more, then to what he had right,
 But Gawdy e contra; For, as his Entry prima facie doth not gain
 more, then he had right to demand; no more shall this Lease. And
 Foster, at the Barr, cited, that it was adjudged in this Court, Ante 115.
 in Reignolds Case, according to the opinion of Popham,

Gervis *versus* Peade.

Tenant pur vie made a Lease for Twenty one years by Inden- (5)
 ture: And Covenanted that he had not done any Act to pre- Ante 157.
 judice the said Lease; but, that he should enjoy it against all
 persons. The Tenant for life dies, and the Lessor enters.
 The Lessee brings Covenant against the Executor. And it was
 adjudged, that it lay not: For, the last words, But that he shall Ante 44:
 enjoy it against all persons, refer to the first words, viz. for any Act
 done by him, &c. And so the Covenant is not broken.

Termino

Termino Michaelis,
 Quadregesimo, & Quadregesimo primo
 ELIZABETHÆ, in Banco Reginae.

Graves *versus* Short, Hills 40 Eliz. rot. 847.

(1)

2 Rol. 715.
 1 Rol. 783.4.

2 Rol. 715.

ERror of a Judgment in the Com. Bench in a Formedon. The Errors assigned were: The first in fait; that the parties being at issue, whether a Feoffment were made, &c. and the Jurors at the Nisi prius, being gone together to confer, &c. Wil. Malevory, one of the Jurors, shewed to the residue of the Jurors an Escrow in Writing, pro petentibus quod non fuit dat. in Evidence per partes predictas, per Quod they found the Verdict for the Demandant. And, upon this Error assigned it was demurred in Law. And, after argument at the barr, The Court resolved, that it was not any Error, nor could be alledged for Error: For it doth not appear, that it was Evidence given to the Juror by any of the parties, or by any other in behalf of the Plaintiff; but it shall be intended, that he shewed it of himself; and, that it was a piece of evidence, which he had about him before, and shewed it to inform himself and his fellows; and, as he might declare it as a witness, that he knew it to be true; so he might shew any thing, which he knew: And therefore it is not like to 11 H. 4, 33. & 35 H. 6. Title Examination. They also held, that if this were cause to avoid a Verdict, if it had been so found by Examination, as they conceive it was not, yet in regard it was not examined, nor made parcel of the Record, it cannot be assigned for Error. For Popham said, the trial hereof rests only in the Examination, and it shall not be per pais: as Non-age shall be by Inspection to avoid a Fine; so this matter should to avoid the Verdict. For, if so, then every Verdict upon such a Surmise, might be drawn in question; and peradventure, after the parties be dead, & all the Jurors dead, so as they cannot be examined; which would be a great inconvenience. And therefore they held, that such a Cause of staying the Judgment ought to be always, if it be upon Verdict at the Nisi prius; upon the Postea returned; and, if it be upon Verdict in Banco, it ought to be made parcel of the Record; otherwise the party shall not take advantage of staying the Judgment, or of assigning it for Error. Another Error was assigned ore tenus, That the Record is, Ad quem diem, scilicet Octab. Trinitatis 39 præceptum est, quod habeat corpora Juratorum coram Justiciariis in Banco in Crastino Animarum, nisi Justiciarii in partes illas venerint octavo Julii proxime præterito, where it ought to have

Ante 411.

5. Bac. ab. 291. 2. Co. Lit. 227. b.
 1. Salk. 405. Ant. 411.
 1. Sid. 133.

have been proxime sequente. Sed non allocatur: For it was said that all the presidents are so in the Common Bench to make their Entries as of the time past: But otherwise it is in this Court. Wherefore the Judgment was affirmed, Afterwards, at another day, it was moved to have Costs allowed, and Damages for the delay of Execution, upon the Statute of 3 H. 7. cap. 10. Whereupon it was doubted, because it was in a Formedon, in which (being the principal Action) no costs were allowable. But notwithstanding, upon consideration of the Statute, for that the Statute is general, That if a Writ of Error was brought before execution, and in delay of the execution, and the Judgment be afterwards affirmed, that the Demandant or Plaintiff shall have Costs, & Damages; And it mentions not any Action: They all resolved, that Costs and Damages shall be given for delay of Execution, although in the first Action no Damages were recoverable. Wherefore it was adjudged accordingly.

Post. 659.

1 Cr. 145.

R. 704.

1 Cr. 145.

Matures versus Westwood. Trin. 40. Eliz. rot. 1023.

Covenant. The Plaintiff Declares, that Mary Brice was possessed of a term for Twenty years of an House in London, and Lett it by Indenture for four years, wherein the Defendant covenanted to repair it, and to leave it at the end of the term sufficiently repaired; and that M. B. the Lessor assigned over her reversion to the Plaintiff, and that the Defendant thereto attourned, and that afterwards upon such a day the term expired, and that the house was not well repaired, (viz. &c. and shews wherein) and for this he brought the Action. The Defendant pleads, that before this Grant of the reversion, viz. such a day, he assigned his term to one Westbury, who was possessed at the end of the term. And it was thereupon Demurred. The point intended was, Whether the assignee of a Reversion shall have an Action of Covenant against the first Lessee, after the assignment of his Term. (And it was admitted on both sides, and by the Court; That, although he were but an assignee of a reversion for years, yet he was a sufficient assignee to have action of Covenant;) and to the principal matter none of the Justices spake, besides Gawdy, who said, That the matter in Law is with the Plaintiff, that the Action well lies, but, for a defect in the barr, and not upon the matter in Law, Judgment was given for the Plaintiff; viz. because the Defendant pleaded, that he granted his Lease, &c. and doth not shew the place? So it is not issuable to be tried, which they all agreed to be a manifest fault. Another exception was also taken; because it is alledged in the Declaration, that M. B. granted the reversion to the Plaintiff, and the Defendant being Tenant, attorned. And the Defendant pleaded a grant of his Estate over before the attornment. And he doth not traverse, that he had nothing at the time of the attornment; and that the Court also conceived to be amiss: But, for the first exception, principally, it was adjudged for the Plaintiff.

(2)

Ant. 600.

Post. 670.

Anthony Theobald versus Brook.(3)
1 Rol. 51.

Ante 6.

1 Rol. 51.

Action for these Words, which the Defendant spake to one Gurney; Bring me to the Constables house; for I am robbed this night: And bring me to Bonaventure Theobalds house to arrest him; for old Theobalds (innuendo the Plaintiff) setteth his sons to rob me (innuendo dictum Bonaventure, & quendam Johannem, filium ipsius Anthonii) from time to time. The Defendant pleaded Not-guilty, and found against him: And, after Verdict, it was moved in Arrest of Judgment, that the Words were not Actionable; Because it is not alledged, that any of Anthonies sons robbed him; and it is but an intent of setting to rob, and no act done. The words also are insensible. But, notwithstanding, it was held by the Court that the Words were very slanderous; and, that the Action was maintainable: And so it had been adjudged in this Court, That one such lay in wait to murder me; or, That he sent his servant to murder me, &c. Wherefore it was adjudged for the Plaintiff, Note, Error was hereof brought; because it is not precisely affirmed of the Plaintiff: But it is said Old Theobalds, and he doth not name the Plaintiff, and an Innuendo will not serve; whereupon it was reversed.

Walmsley versus Havand.(4)
1 Rol. 333.

Post. 738.

2 Cr. 109.

2 Cr. 109.
1 Rol. 334.

Assumpsit. The Plaintiff recovered, and afterwards took forth a Capias against the principal party, which was returned, Non est inventus. He then took forth a Scire facias against the Bail, and they were returned Nihil. And, before the Scire facias awarded, the Sureties brought in the Principal. And he prayed, that he might render himself to prison in discharge of his Sureties. And, whether he came in timely enough? was the Question. And afterwards he was awarded to be committed to the Marshalsey in Execution; and the Sureties were discharged. And it was said by the Court, that there have been divers Presidents of that kind in this Court. And, although he had rendered himself after the second Scire facias awarded, before Judgment thereupon, he had been received. Wherefore, &c.

Berry versus Lane. Hill. 39 Eliz. rot. 246.

(5)

Ant. 433.

Error of a Judgment in the Common Bench in Debt for 101. the first Error assigned was, that the Ven. fac. was in this manner, Venire faciat coram Justiciariis nostris a die Paschæ in 15. dies 12 libros & legales homines, &c. And he shews not in the Writ where it was returnable (viz. apud Westm.) as it ought to be; But, because the Roll is Ven. fac. hic, &c. That is a good Warrant for the writ; and it, being a judicial writ, shall therein be amended. And so also in libros for liberos, it was held by the Court to be amendable. Secondly, because the writ Vicecomiti Londini, Et quod habeat, whereas it should be Habeatis; and that was ordered also to be amended: which was done accordingly, and the Judgment affirmed.

Walford versus Hundred de Beners.(6)
Post. 638

Error of a Judgment in an Action upon the Statute of Hue and Cry; Wherein Walford supposeth, That Andrews, his
Servant

Servant, was robbed, and Walford brought the Action. The Defendant imparled; Et idem dies datus est prædicto Andrews; where- as it should be eidem Walford; and afterwards the Defendant pleaded, and after that waved the plea, and confessed the Action. And Error thereof brought, and assigned; for that there was here a discontinuance, because die datus est Andr. and so to a stranger, and not to the Plaintiff. But it was moved, That it was the misprision of the Clerk to give a continuance against a wrong person, and might well be amended; As 22 Ed. 4. 3. But the Court held; if a Continuance is to be given to two, and it is given but to one only, that is a misprision of the Clerk, and shall be amended; as 22 Ed. 4. 3. is: But, where no Continuance is given to the party at all, but to a stranger, as here, it is the Act of the Court, and not amendable. And so was the opinion of the whole Court, Gawdy excepted. It was moved also, that the appearance of the party after, and his pleading, hath aided that discontinuance. Sed non allocatur. Wherefore the Judgment was reversed.

Sydenham versus Robins.

Action upon the Case for stopping a way; and declares, where- as he was seised in Fee of an house in Dulverton, and, that he, and all those, whole, &c. had had a way over a Close of the Defendants, called Culver-house-close in Brushford, from his house to another Close called Exon: Which he had in Brushford; that the Defendant had stopped his way by erecting of an Hedge cross the way, and the said Close, &c. The Defendant pleaded Not-guilty, and found guilty; and, after Verdict, it was moved, that this was a Mistrial: because the Ven. fac. was from Brushford, whereas it ought to have been from both Vill; for the way ought to be proved: But the Court held, That, in regard Not guilty was pleaded, and so the stopping is properly in issue, the Venue shall be only from the Vill, where the stopping is: but, if the issue had been upon the Prescription, it had been otherwise. Wherefore it was adjudged for the Plaintiff. (7)
2 Rol. 614.

Levet versus Hawes

Assumpsit, and declares, in consideration, That the Plaintiff agreed with the Defendant; that J. L. Son, and Heir of the Plaintiff, should espouse Constance the Defendants kinswoman, and in consideration, that the Plaintiff agreed to assure to the said Constance Lands of 10 l. per annum for her Joynture, That the Defendant assumed to the Plaintiff to give to J. L. the Son in marriage with the said Constance 200 l. and alledgeth in fact, That the Marriage took effect; and, that the Plaintiff had assured such Lands for the Joynture; and that the Defendant had not payed to his Son the 200 l. Whereupon the Father brought the Action. And upon Non assumpsit Issue, and found for the Plaintiff, it was moved in arrest of Judgment, That the Action ought not to have been brought by the Father: (8) 1 Vul. 318.
Post. 652.
Ante 63.

For the Son only is to have advantage thereof: But it was said on the other side, that the promise is only made with the Father, and all the considerations arise on his part, and the Son is a stranger thereto, and therefore the Son cannot maintain the Action, but the Father. But the Court doubted thereof. Et adjournatur. Hill. 41. Plac. 11.

Poe versus Doctor Mondford. Trin. 40. Eliz. rot.

(9)

Action for words. Whereas the Plaintiff was, and is a Physician, that the Defendant intending to defame him, and to prejudice him in his Art, False & molitiose spake of him these Words, Mr. Poe (*innuendo* the Plaintiff) hath killed Mr. Pasfield of the Old Jury with Physick (*quendam Johannem Pasfield* late inhabiting within the Old Jury; and now deceased, *innuendo*) which Physick was a Pill, and the Vomit was found in his mouth: and Doctor Atkins and Doctor Paddy (*quosdam Henricum Atkins, & Johannem Paddy*, Doctors in physick, *innuendo*) were there, and found it so, and it is true: *ubi revera* neither the said Doctor Atkins nor Doctor Paddy, nor any other ever found any such thing to be committed by him; Et *ubi revera* he never administered any Physick unto him in Pills, or otherwise, &c. The Defendant pleaded a concord in barr, which Plea was ill pleaded (as it was agreed on both sides) whereupon the Plaintiff demurred. And now Coke, Attorney General moved, That an Action lay not for these words. For it is not any slander to a Physician to say of him, That he killed one with Physick: For he might do it involuntarily, in not knowing the disease, and no discredit unto him. Popham, and Fenner held, that the Action lay not: For it cannot be any discredit to a Physician to say, that he killed one with Physick: For it is an usual and common expression, and it may be without any default in him, for they may mistake the diseases in their own bodies, much more in others, and apply wrong medicines, which may be the cause of the Patients death, and yet no discredit unto them. But if it had been, that he scilicet, & voluntarie, ministered Physick to one to kill him, that toucheth him in his profession, and the words had been actionable: but not here. And, although it be said, that he never administered any Physick unto him, that is not material: Wherefore they, without any argument on the Plaintiffs side (*Clench repugnante, & Gawdy absente*) adjudged it for the Defendant.

Action versus Barham, Ante, Hill. 40. Plac. 9.

(10)
2 Rol. 605.
Post. 855.
2 Cr. 405.

Error of a Judgment in the Common Bench in Trespass for the taking of an Ore in Mynshal. The Defendant justifies: because Land in Dodington was holden of him, as of his Mannor of Chelsey by an Heriot Custom. The issue being upon the tenure, a Ven. fac. was awarded from Mynshal, Dodington, and the Mannor of Chelsey, and found for the Plaintiff, and Judgment thereupon accordingly, and Error assigned: because the Venire facias is awarded to more Vills, than it ought to be: For, by this means, the Sheriff may return more from the places, where there cannot be any notice, and the parties thereby prejudiced;

diced; and therefore it is an equal mischief, where the Ven. fac. is to more Vill. then it ought to be, as where it is to fewer. And Walter for the Plaintiff cited a Judgment in the Erchequer, in an Information of an Intrusion against of Lands in D. and S. For the Lands in D. they were at Issue: For the Lands in S. it was demurred; and a Venire facias was awarded from D. and S. and after Verdict, it was moved in arrest of Judgment, and for this cause it was stayed. Popham and all the Court held; That, if a Venire facias was awarded from more Vill. than it ought to be, that it is ill, and erroneous, for the mischief which thereby might happen to the party; for, peradventure, the Sheriff would return but one, or two from the place, where best notice might be given, and all the rest from places, where it needed not, and who by Intendment cannot have as good notice as the others. But they all held, That the Venue was well awarded in this Case: for Mynshal, which is the place where the taking was, is as much necessary as the other: For, although the Issue is upon the Tenure, yet the Damages are also to be inquired of: and they of the Vill, where the taking was, might have the best notice thereof. Wherefore the Venire facias awarded from that place also is was enough. Wherefore the Judgment was affirmed.

2 Rol. 602.

Johns *versus* Carne.

DEbt upon the Statute of 2 Ed. 6. for not setting forth his Cithes. The Defendant pleaded Not-guilty, and found against him: and now moved in arrest of Judgment, First: That this action of Debt lies not; because a certain penalty is not given by the Statute; but the treble value, which is uncertain. Sed non allocatur. Vide ante, in Bedle and Shermans Case. fol. 608. Secondly, because the Defendant pleads Not-Guilty, which is not any issue in an Action of debt; but he ought to have pleaded Non debet. Sed non allocatur. For this action, being founded upon the Statute, upon a wrong done, this issue is good enough. Thirdly, because he brought this Action for himself, and the Queen; and the Queen cannot have any benefit thereof; nor is it given to the Queen by the Statute, but to the parties grieved only. And it was held by the Court to be a material exception, and thereupon the Court Commanded the Judgment to be stayed.

(11)

Ante 613.

Post. 766.

2 Inst. 651.

Ante 257.

Ant. 608.

Owen Wells *versus* Hemmerson.

Action for these Words: Thou art a Rebel, and no true Subject. After Verdict, it was moved in arrest of Judgment, that an Action lay not for these words, and the whole Court was of that opinion: for he may be said to be a Rebel upon a Proclamation of rebellion against him in an English Court. And it was afterwards adjudged accordingly.

(12)

Ant. 602.

Post. 638. 878.

Cross versus Andrews. Hill. 40. Eliz. rot. 1032.

(13)
1 Rol. 2.

1 Rol. 2.

Co. 4. 123. b.
Ante 398.

Action upon the Case against an Inn-keeper of Stratton-Audley in the County of Oxon. And declares upon the common custom of the Realm, That an Innkeeper should keep the Goods of his Guests safely, &c. The Defendant pleaded: That, when the Plaintiff lodged with him, he was sick, and of Non sane memory, by occasion of his sickness, whereof he then languished; and it was thereupon demurred; and adjudged without argument for the Plaintiff. For the Defendant if he will keep an Inn, ought at his peril, to keep safely his Guests Goods, and although he be sick, his servants then ought carefully to look to them. And to say he is of Non sane memory, it lieth not in him to disable himself, no more then in Debt upon an Obligation. Wherefore it was adjudged for the Plaintiff.

Clerk versus Clerk.

(14)

Ante 433.
Ante 258.

Post. 854.
Co. 9. 78. a.

Ante 258.

Ejectione firmæ. The Defendant pleaded Not-guilty, and found for the Plaintiff. And it was moved in arrest of Judgment, that the Venire facias was ad faciend. Jurat. in Placito transgressionis, whereas it should have been in Placito transgressionis, & Ejectione firmæ, and therefore a Mis-trial, and not ayded by any of the Statutes. But it was moved e contra, That it was but a Misawarding of process, which is ayded by the Statutes. The Writ also, being judicial, may be well amended, for it is but the default of the Clerk, the Roll, (which is the Warrant thereof) being good. But the Court (Gawdy absente) held, That it is not amendable; For non constat, but that there may be an Action of Trespals depending, and that this Venire facias is awarded thereupon. And although it were said, That an Ejectione firmæ is but a plea of Trespals in its nature, yet the Actions are several, and therefore the Venire facias ought to be accordingly, and this misawarding of process is not ayded by any of the Statutes: But if there had not been any Venire facias, it had been holpen by the Statute of 32 H. 8. and 18. Eliz. Wherefore a Venire facias de novo was awarded.

Collins versus Harding. Ante, Pasch. 40. Plac. 6.

(15)
1 Rol. 234. 5.
2 Rol. 408. 426.
Hob. 177.
2 Rol. 426.

Ante 607.

The Case being again moved: Gawdy, Fenner, and Clench held, That, the Lease being made by the Lords Licence with one entire reservation, it is a good Lease, and a good Rent, which issueth out of the entire Land, Copy-hold, and Free. For the Rent is for Land, and the profits thereof) for which he may well contract, and in recompense whereof the Rent is to be paid, and therefore it issueth out of both. And it is not like to a Lease of Land, and Goods: for all of it is there issuing out of the Land only, and nothing out of the Goods. And when the Reversion was granted at one time, and an Attornment thereto, and a Surrender is made to his use at the same time, which is presented, and an admittance made accordingly, although at another time, yet it shall have relation to the time of the Grant, and Surrender made: As where an Obligation is made by two,
an

and the one seals at one time, and the other at another time, yet it is one entire Deed, and shall relate to the time of the first delivery, and the party shall declare accordingly. So here, it is now in the hands of the Grantee, as one intire reversion, and he shall declare accordingly, and although they be several reversions, yet he shall declare upon the truth of the matter; and upon the whole Case the Action is well brought. As a man may have one Action of Debt upon several Obligations: So, upon several Grants of reversions, he shall declare according to his Case. Wherefore, &c. Popham held, that the Rent was issuing out of the Freehold only, which is the more worthy, and most regarded in Law; and although a Lease for years of a Copyhold is regarded, as a Lease at the Common Law, wherefore an Ejectione firmæ lies at the Common Law; as all the Justices of England (besides 3.) resolved: yet this being coupled with Free-land, it shall not be regarded to have Rent issuing thereout: But it shall be, as where Rent is reserved upon a Lease of Land, and Goods. But in regard he declared upon all the matter, the Court, shall adjudge upon the whole matter, that he had good cause to recover; as in Case, where a Lease is made of Land, and Goods, rendering Rent, and he brings Debt thereupon, and declares according to the Case, he may well recover: So here. Wherefore it was adjudged for the Plaintiff.

Hob. 172.

2 Rol. 426.

Ante 607.

Ante 535.

Ant. 607.

Hodges *versus* Smith

DEbt upon an Obligation of 200 l. The Defendant pleaded, that after the Obligation made, the Plaintiff, by his Indenture shewn in Court, covenanted, and granted unto him, that if he payed 100 l. at such a day, that the Obligation should be void; and alledges in fact, that he paid it at the day, &c. And the Plaintiff hereupon demurred; For it was moved on his part, that, it being made after the Indenture, cannot be pleaded in Barr thereof: but he ought to take his advantage thereof by way of Covenant, and it shall not enure, as a Defeasance, or Release. But all the Court held the contrary, that he may well plead it in barr, and shall not be put to his Wit of Covenant by circuits of Action. And therefore they all held, that the Plaintiff should be barred.

(16)

Fysh *versus* Thorowgood.

Action for Words. Whereas such a Commission issued out of the Erchequer to the Plaintiff, and one J. S. and by force thereof they took divers Examinations of Witnesses, and returned them into the Erchequer; that the Defendant said, that the Plaintiff had returned, as the Depositions of Witnesses, into the Erchequer the Examination of divers, who were never sworn. The Defendant pleaded in Barr, that a Commission issued to examine, &c. And, &c. And, that the Plaintiff returned into the Erchequer the Examination of one J. S. who was never sworn, and therefore, &c. And it was hereupon demurred, and ruled by all the Court, that the Justification, and Barr were not good: For although one, who was not examined, was returned into the Erchequer, yet that does not prove the Words, That the Plaintiff returned, &c. Because the

(17)

the justification is of one witness only returned, and the words are in the plural number; it was then moved, that the words themselves were not actionable; for they be not any slander, which will bear an Action. But all the Court resolved to the contrary: For, being averred, that he was a Commissioner, and that he returned Depositions, taken before him and his companion, into the Exchequer, it is a great fault in him to certify one, as sworn and examined upon his Oath, who was never examined; and it is fineable. Wherefore it is a great slander unto him to report it of him, &c. And it was adjudged for the Plaintiff.

(5)

Barton versus Aldeworth.

Action upon the Case. Whereas he pursued a Latitat against J. S. intending to declare in Debt, upon an Obligation of 100 l. wherein he was bound unto him, and delivered that Writ to the Defendant, being Sheriff of Bristol, to execute it, and advertised him of his cause of Action, and of his intent to declare in Debt, &c. And that the Defendant, being Sheriff, arrested him by vertue of the said Writ, that the Defendant had let him at large, absque aliqua securitate inventa for his appearance, and at the day returned Cepi corpus; and that the said J. S. did not appear at the day, but hid himself; and that upon an Habeas corpus awarded, he returned paratum habeo, which was false, whereby the Plaintiff was delayed in his Sute, whereupon he brought this Action: The Defendant pleaded, that the said J. S. being arrested, put him in sureties for his appearance J. N. and J. D. who are persons of sufficient Estate within the County, who were obliged unto him in 40 l. for the appearance of J. S. at the day in the Writ mentioned, and pleaded the Statute of 23 H. 6. by reason whereof he let him at large, and traverseth absque hoc that he let him at large absente aliqua securitate inventa prout, &c. And it was thereupon demurred: for it was moved in the Plaintiffs behalf, that the Sheriff at his peril is to take heed, that he take good and sufficient Sureties for his appearance, and to save himself harmless concerning it: For, although the Statute appoints him to let to Bail, yet it appoints him not what Security he shall take. But he ought to take sufficient to preserve himself indemnified. But all the Court held the Plea and Travers to be good; for the Statute appoints him to let at large upon Bail, and therefore he is compellable to take Bail, and it is left to his discretion what Bail he will take. Then when he answers, that he took Bail of him, viz. J. N. and J. D. having sufficient Estates within that County, that shall excuse him against the party; and it is not reasonable, he should be chargeable in an Action upon the Case for doing that, which the Law appoints. And Popham said, if he takes one Surety, it is sufficient for he is not compellable to take two Sureties: and, although that he had not the body at the day, and afterward at the day of the Habeas Corpus returned, returned quod paratum habeo, when he was at large, that is a contempt to the Court, and fineable, but it is nothing as to the party, nor can he take any advantage thereof. Wherefore it was adjudged for the Defendant.

Post. 672. 808.

Co. 10. 101. a.

Post. 624. 852.

Post. 873.

Bennyon

Bennion *versus* Watson, & Elwicke, late Sheriffs of the City of York. Trin. 39 Eliz. rot. 1084.

Action upon the Case: Whereas John Bell was indebted unto him in three several Obligations in 1411. and he pursued a Latitat directed to the Sheriff of the City of York, which he sued, &c. with an intention, that the said John Bell being arrested, and appearing according to the course of the Court of Queens Bench he might have exhibited his Bill of Debt upon those three Obligations against him, and have declared against him in Custodia Marefchalli secundum consuetudinem Curiae, to recover his Debt; and alledges in fact, that the Defendants by force of this Writ arrested him apud York, and afterwards, to defraud him from taking the advantage of his Writ, and to recover his Debt by that means, before the return of the Writ, apud Cropwell-Bishop in Comitatu Nottingham. they let the said John Bell at large, and to escape without taking any reasonable Sureties for his appearance, per quod he is not only delayed of his Sute, but utterly deprived to have any remedy for his debt against the said John Bell, to his damage of 200 l. The Defendant pleaded Not guilty. And after the Ven. fac. returned, and before the Trial, one of the Defendants died. And afterwards, upon surmise to the Court, that one of the Defendants was dead, the Distringas, and the Record of Nisi prius was betwixt the Plaintiff, and the one Defendant only; and it was found for the Plaintiff to his damage of 200 l. And after Verdict, it was moved in Arrest of Judgment, First, That the Bill was abated by the death of one of the Defendants; For, it being a joynt action, wherein they are chargeable as Sheriffs, and not several, the Bills shall abate by the death of the one of the Defendants. Sed non allocatur; for it was held by the whole Court, That this being but in nature of a Trespass, and meerly personal, and in regard he cannot have another action but against the Survivor, it shall not abate no more then in Trespass, or Replevin. Secondly, because the Trial was only by a Venue of Cropwell, whereas it ought to have been from York also; for there was the principal part of the act, viz. the delivery of the Writ, and the Arrest. And upon Not guilty pleaded, all is in Issue. Sed non allocatur; For the Tort, whereupon the Action is founded, is upon the Escape only, which was committed in the County of Nottingham. And although the Arrest is to be proved, otherwise there cannot be an Escape, yet the Escape being the sole cause of the Action, the Trial shall be by a Venue from that place only, where the Escape was. And Fenner said, that in regard York was a City, and a County, which could not joyn with any other; therefore, also, the Trial shall be only from the County, where the Action is brought. Thirdly, it was moved, Whether this Action lay upon this Escape, and for the non-appearance of the party: For, it was said, that that was an offence to the Court, for which they should be fined; and they ought not to be twice punished. But the Court held, that the action did lie; because here is an apparent negligence in the Sheriff, to let him at large, without any Bail; and thereby the party prejudiced in his Sute, as he hath declared. And the Defendant is found guilty thereof, and therefore it is reasonable, that the party

(19)

2 Rol. 602.

Post. 652.

Ante 272.1.

2 Rol. 602.

Ant. 624.

Post. 652.

Ante 124.

Party should have his Action: And it is not like to the Case, where the Sheriff let him at large upon Sureties; for there he did his devoir, and that whereto he was compellable, and no wrong; but it is not so here. Wherefore it was adjudged for the Plaintiff, and Error brought, but it was discontinued.

Markham versus Gonallton. Trin. 40 Eliz. rot. 212.

(20)
2 Rol. 29. 30.

Action upon the Case. Whereas the Plaintiff, and Sir Francis Willoughby, 18 May. 38 Eliz. were bound in a Reconuſance of 600 l. to William Tracy Esquire, at the request of the said Sir Francis Willoughby, and for his Debt, with a Condition for the Payment of 315 l. upon the nineteenth day of Novemb. following; And, whereas Sir F. W. 20 May, 38 Eliz. agreed with the Plaintiff, That he, and G. Fox, would be obliged to the Plaintiff, by an Obligation of 1000 l. with a Condition for the payment of the said 315 l. upon the said nineteenth day of Nov. & to save him harmless from the said Reconuſance, and from all damages, and losses, by reason thereof; and whereas upon the said 20 May, 38 Eliz. the Defendant at the request of the said Sir F. W. writ Formam prædicti Scripti Obligatorii, and of the Condition, leaving a space in the said Condition for divers English words to be put therein: viz. in quinta linea inter hæc verba an & Tracy: and another space in the same line, &c. (and so mentions divers) And afterwards upon the same 20 Maii, An. 38 Eliz. the said Geffry Fox sealed Scriptum Oblitorium prædictum, with the said spaces therein, and delivered it to the Defendant (having the said spaces therein not filled up) to the use of the Plaintiff, as his deed; That the Defendant fraudulently, and maliciously intending to deceive the Plaintiff, and to avoid the said Bond quoad the Plaintiff, postea the same day and year, without the assent, or notice of the Plaintiff, filled up the said spaces, viz. in the first space, interlining the word William, and in the second space, betwixt the words, an & Tracy, interposed these words of Raglay, and so of others; and that the said 315 l. was not payed at the day; and, that afterwards William Tracy sued a Scire fac. upon this Reconuſance, and had Judgment upon two Nihils returned, and had Execution thereupon; and alledgeth in fact, That by reason of this interposition of these words, the Obligation had lost his force; and he is deprived of his remedy to recover his Debt to his damage, &c. The Defendant pleads, That he was Servant to Sir F. Willoughby, and by his command writ this Obligation, leaving the spaces therein for the inscribing of the said words, after the enſealing, and delivery thereof, by the said G. Fox, and that he writ it accordingly; and that after the enſealing and delivery thereof by G. F. to the Plaintiffs use, and before the Plaintiff had any notice of that Obligation, he, by the command of Sir F. W. his Maſter, did fill up the said spaces by the assent of the said G. F. and that afterwards Sir F. W. sealed and delivered it to the Plaintiffs use. Whereto the Plaintiff agreed, and traverseth, That he also, fraudulenter, & maliciously filled up the said spaces, modo & forma, &c. And it was thereupon demurred; first, it was held by all the Court, That the Addition of a Condition to an Obligation, which was single, although it be for the advantage of the Obligor, shall avoid the Deed, being done by the Obligee, or any Stranger: For he is put to have his remedy against the stranger, by an Action upon the

Co. 10. 27. 2.

the Case. Vid. 14 H. 8. 27. 36 H. 6. 5. 26. H. 8. fol. ultimo. So of a Rature of a Condition, 41 Ed. 3. 10. 28 H. 8. 27. 30 Ed. 3. 8. This interposition also of the Words, in the Condition of the Obligation, being words material (as it was agreed by all the Court, that they were) avoids the Deed: For it is parcel of the Deed, and by those words the Condition is altered: For, whereas before it did not appear, to which of the Tracies the Reconuſance was entred, it is now made certain; and it may be, that it was now to another man, then in truth it was. But although it were not so, yet it is altered, for, whereas it before rested upon an Averment, yet it is now altered: And, if before it was void for want of those words, as they conceived it was, It is now made good by inserting of them, which alters the Deed, and therefore it is ill. And although this alteration is for the benefit of the Obligor, yet it is not material, for the Deed ought always to remain, as it was at the beginning. And therefore Fenner said, that it was adjudged in the Common Bench, that where Fecknam, Dean of Pauls, made a Lease for years, rendering 27 l. (as was the intention) But the Indenture of the Lease was 26. l. But the Counterpart was 27 l. the Lessee afterwards, according to the Intention, and to make it agree with the Counterpart made it 27 l. and so it was for the benefit of the Lessor, yet it was ruled, That for this cause the Lease was void: So here. Vide 28 H. 8. 17. and 9 Eliz. Dyer, 261. It was also resolved, That although it was filled up by the appointment of his Vaster, that shall not excuse him from the ill fact. And, although it were done before notice of the Delivery of the Obligation to the Plaintiffs use; yet it was holden, That it was not material: For, presently, by the delivery to the Plaintiffs use, it vested in him without notice (and the Obligor had no further to meddle therewith) For, being for his benefit, it vested in him before the agreement, and is not Countermandable; As 33 H. 8. 29. is. And, although that the interposition of those words was by the assent of the Obligor, after the Obligation was sealed; yet it is not to any purpose: But, if it had been appointed by the Obligor before the sealing and delivery thereof, that it should be afterwards filled up; Popham said, It might then peradventure have been good enough, and it should not have made the Deed to be void. But, being after, it shall avoid the Deed. Wherefore it was adjudged for the Plaintiff. Note, That Markham had before brought Debt in the Common Bench, upon this Obligation against G. F. who pleaded the filling up of the Spaces, after the Bond sealed, and delivered; and so not his Deed: And it was held clearly to be a good cause of avoiding the Bond. Wherefore he there took Issue, that they were not filled up, after the sealing, and delivery, which being proved at the Nisi prius, he was non-sued. Wherefore, for his remedy, he brought this Action; and it was adjudged accordingly for the Plaintiff, and a Writ awarded to inquire of damages.

Sawyer *versus* Wilkinson. Trin. 40 Eliz.

T Respals, For the taking an Dr-hide 10 June 38 Eliz. apud St. Peters in Cornhil. The Defendant justifies: For that the Mayor and Comminalty of London were seised in fee of an House called Leaden-hall, being the place, where, &c. And because the said Dr-hide, at the time aforesaid, was there damage felant, He,

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as

1 Rol. 29.

Ant. 54.

M. 547. Cui.

Co. 11. 27. a.
Post. 800.

(21)

as Bayliff to the said Mayor and Comminalty, & by their command, took it there Dammage fasant, &c. *Quæ est eadem transgressio.* The Plaintiff saith, that London is an ancient City, and that a Common Market is kept there every Friday, within Leaden-Hall aforesaid, for Hides, and other things; that the said 10. June 28 Eliz. was Friday, and Market day there; and that he bought the Hide in the Market there of one W. B. and delivered it to William Hunt to carry away; and the said W. H. put it upon his shoulders, ready to carry it away: and he having it in a Basket upon his shoulders, and going therewith from Leaden-Hall, the Defendant took it, &c. which he is ready to aver; &c. And hereupon the Defendant demurred; first, for that the Defendant justifies dammage fasant, and the Plaintiff shews this matter to take from him his Authority for the Caption, and he varies from the manner of the Caption, and doth not conclude his Plea, *Quæ est eadem, &c.* Secondly, because the Defendant justifies for a taking, which is intended upon Land dammage fasant: And the Plaintiff speaks of another, and doth not travers. *Sed non allocatur;* for the Plaintiff shewing the special cause of the Hides being there; and that for this cause, the Defendant had colour to take it, but, by reason of the Matter in Law, which he shewed, his taking was not justifiable, it seemeth, that the Replication was good, and he needed not a Travers: and the conclusion of the Plea, *Quæ est eadem transgressio,* is not requisite, because he agreed in the place, and time of the Caption; but shews cause why it is not distrainable. And they all agreed, That this Dr-hide brought into the Market, and sold, cannot be distrained dammage fasant. But Popham held, That the Plaintiff ought to have traversed; for he doth not agree in the manner of the Caption. But Gawdy and Fenner è contrâ; because it is his matter in Law: and therefore it sufficeth to plead it without any travers. Wherefore it was adjudged for the Plaintiff.

Baron *versus* Sleigh. Hil. 40 Eliz.

(22)

Action upon the Case, Whereas the Plaintiff was Bail in the Queens Bench for one A. S. at the Sute of William Rich in Debt for 19 l. and whereas the said A. S. was sued in debt by the Defendant for 200 l. in which Action one Jo. Starton, and Hercules Anthony were Bail for him: That the Defendant after a Recovery in Debt against the said A. S. of the said 200 l. took forth a Capias against the said A. S. which was returned *Non est inventus*: And, that the Defendant afterwards, at Westm. &c. by fraud, and Cobin to charge the Plaintiff with the said Debt of 200 l. recovered ut supra, informed the Court in deceit of the Court, That the Plaintiff was Bail for A. S. at his Sute (whereas he was not, but was Bail only for him at the Sute of Rich, which was well known to the said Defendant) He thereupon injuste impe-travit a Writ of Scire fac. upon this Bail against the Plaintiff, which being returned *Nihil*, he by the like fraud, and deceit procured a second Scire fac. against the Plaintiff, which was also returned *Nihil*. Whereupon it was adjudged, that the said sleigh the Defendant should have execution against the Plaintiff. That the Defendant, *premissorum non ignarus*, by the like fraud, & deceit to arrest the Plaintiff, in deceit of the Court, procured a Capias ad satisfac. against the Plaintiff. Whereupon the Plaintiff

tiff was arrested, &c. to his damage, &c. The Defendant pleaded Not guilty, and found against him, and it was moved in arrest of Judgment, that this Action lies not. For it is to procure Process Judicial to be awarded, which is the Act of the Court, and the misawarding thereof, although it be upon information of the party, as it is the surmise of the party, no Action lies for it: For it is but erroneous, and the default of the Court to award it upon such information. And in proof thereof, 21 Ed. 4. 23. was cited, where a Writ of Habeas Corpus was awarded to remove a Cause out of London, for that the party had an Action depending here, whereas in truth he had not any: Although this were upon the Information of the Atturney to the party, and the other delayed in his Sute thereby, yet it is not actionable; but, if it were awarded upon surmise, that he was Servant to one of the Clerks, where he was not, there an Action would lie; for that the Court could not know, but meerly upon the parties Information. So here, before the Process had been awarded, the Court might have seen, whether he were the same person, who was Bail. Wherefore, &c. But Fenner and Clinch held, that the Action was maintainable, in regard it was shewn, that he procured it by fraud and Covin, to deceive him, and although he knew that he was not the same party: so there is an apparent Tort in him, and it is alledged, that he was the cause of awarding the Process against him: As where one procures a false Sute to be brought in anothers name, or where one casts a protection without cause, or the like; wherefore without argument absentibus Popham, and Gawdy, they adjudged it for the Plaintiff. 17 Ed. 3. 51. 20 H. 6. 31 & 24. 27. Aff. Plaintiff 75.

2 Cr. 667
Co. 7. 12.
Post. 714.
Post. 794.
Post. 714.

Blake versus Stanley.

Action for words, Thou art a Coyner of false Money, and I have money to shew which thou coynedst. After Verdict it was moved, That the words were not actionable; for he doth not say, that he coyned Honey currant in England, otherwise it is not Treason, but Disprision. Sed non allocatur, and adjudged for the Plaintiff, absentibus Popham and Gawdy.

(23)

Stebbing versus Gosnal. Trin. 40 Eliz. 108. vel. 376. Suff.

Action upon the Case, by a Copy-holder against his Lord, supposing that he was a Copy-holder in Fee, and that within the Mannor is such a Custome, That every Copy-holder shall have the Loppings of the Pollingers; and because the Defendant had cut down two Oaks being Pollingers, whereby he lost the benefit of the Loppings, he brought this Action; The Defendant Protestando, that there is not any such Custom, for Plea saith, that he cut down two Oaks, being Pollinger-Timber Trees, and left the Loppings there for the Plaintiff. And thereupon the Plaintiff demurred. Godfrey for the Plaintiff moved, that it was not any plea; for a Copy-holder hath not only interest in the present Loppings, but in a future profit by the Loppings, and therefore the Lord ought not to cut them down to his prejudice. And he cited a Case to be adjudged in this Court, betwixt Garnon and Keble, that this point was adjudged upon demurrer, that an Action upon the Case was maintainable. And of that Opinion were Popham and Fenner: For a Copy-holder of Inheritance

(24)
1 Rd. 108.

tance hath interest in the Loppings and Boughs, as well as the Lord in the Timber: And if the Lord cut down all the Timber-trees, then the Copiholder shall lose all the profit, which for the future might come unto him, and never afterwards should have any more Loppings; and it is a reasonable custom to have the Loppings of the Pollingers, which anciently have been continued. Wherefore, &c. But Clinch doubted, because that then the Lord, who had interest in the timber, should never by this means have any profit thereof, and thereby lose his Inheritance: wherefore it is reason, that he might take the timber, and leave the Loppings to the Copiholder: Otherwise they should never be cut down, and the timber would decay, which would be a prejudice to the Common-wealth. But notwithstanding, Popham, and Fenner (absente Gawdy) gave rule, That if other cause were not shewn, Judgment should be entred for the Plaintiff.

Smith versus Belay.

(25)
2 Rol. 794.

2 Cr. 168.
2 Cr. 168.

Co. 1. 134. b.
2 Rol. 794.

AVowry for a Rent-charge: Upon Demurrer the Case was, that Edward Ardes the Grandfather made a Feoffment to the use of Katherine his Wife for life, Remainder to Richard his Son for life, and after to his eldest Issue, which should be at the time of his death, Remainder in fee to J. S. Richard had Issue John his Eldest Son, Edward the Grandfather dies, Katherine lets it for years to Richard, Richard and J. S. made a Feoffment, and levied a Fine with Warranty, and Proclamation to Belay. Katherine dies, within five years after Richard dies. John being his eldest Issue, at the time of his death, enters as in his Remainder. And whether the Remainder were destroyed by these Acts, or, that he now might enter? was the sole Question. Tanfield moved, that this being a contingent Remainder, and being destroyed by the Feoffment, and Fine, before it hapned and fell, that it never should now take effect: For, if there be any disturbance before, that this future use comes into Esse, it is destroyed for ever: And in this Case upon the same Title, betwixt Terringham and Ardes, this Court was clear in opinion, that this future Use was destroyed, but that was upon Evidence to a Jury. And in Chidleys Case this Point was resolved by all the Justices accordingly: And of this opinion was the whole Court. But because there were none on the other side, they would advise.

Ireland versus Coulter. Pasch. 40 Eliz. rot. 393, or 339.

(36)
1 Rol. 922.
Co. 5. 30. a.

DEbt against him as Executor to one Hunt, The Defendant pleads, that Hunt the Testator was bound in a Statute of 100 l. and besides, that he had not any Assets: And hereupon they were at Issue, and a special Verdict found, that the Defendant was Executor de son tort demesne; and that the Testator was indebted unto him, and that he retained divers goods to satisfy that Debt due unto himself, and over and above, then to satisfy the Recognisance he had not in his hands, &c. Et si, &c. It was argued by Tanfield & Goldsmith for the Plaintiff, and by Coke for the Defendant, The sole point was, whether an Executor de son tort may retain Goods to satisfy himself? And Coke moved, That he well might. And the Plaintiff, by this Action against him,

him hath allowed him to be rightful Executor: Wherefore the finding, that he was Executor per Tort is not material. And he, being allowed to be Executor, may do all things, as an Executor, viz. pay debts, or any other lawful acts. And as he may do it to a stranger, so he may pay himself. Gawdy, and Fenner were of his Opinion: For as he shall be charged by reason of his possession: Like reason it is he should be allowed all lawful acts; and this is here a lawful act: As where a Disseisor pays rent, they shall be recouped in damages. So if one enters as Guardian, who is not Guardian, he shall have allowance for all reasonable acts, as a lawful Guardian should. And it might be; That in this Case he did not know himself, but that he was rightful Executor, as if the Testator had first made a Testament, and thereby made him Executor, and afterwards he made another Testament, and thereby made another Executor; and the first was proved, all lawful acts done by him are good; and, although the other Testament be afterwards found and proved, that shall not defeat the lawful acts. Popham and Clinch e contra; For an Executor de son Tort shall never have any benefit by his Malefiance. And it is not like to the Case, where a Disseisor pays rent: For that is not any wrong, or prejudice to a stranger, or to any other to pay that which is due: but here this is prejudicial to a stranger; for every one will be Executor after the death of a Testator, and by that means be their own Carvers, and pay themselves before any other Debtors, whereby great inconveniencies would ensue. Neither is this like to the Case, where one enters as Guardian, who is not Guardian; for there the Infant may have Trespass against him, or he may charge him as Guardian. And if he charge him as Guardian, it is reason he should then have allowance as Guardian. Where one likewise is made Executor by a former Testament, and afterwards another Testament is made, and therein another made Executor, and the last Testament not being known, the first is proved, and the Executor pays debts unto himself; and then the second Testament is discovered and proved: Yet peradventure the payment of the first Executors debts shall be allowed him, against all strangers at the least: For he had color to do it, as Executor by the first Testament, and he is to be allowed for all Judicial acts, which he did, &c. But it is not so here, where he takes upon him to be Executor de son Tort & Teste Demesne. And a president was cited, Pasch. 32 Eliz. in Communi Banco; That an Executor de son Tort might not retain to satisfy himself. Wherefore, &c. Afterwards upon another day it was moved again; and the Court said, They were resolved, that an Executor de son tort Demesne cannot retain goods to satisfy himself his own Debt. And Popham said, That divers of the Justices at Serjeants Inn (to whom he had propounded the Case) were of that opinion, And, that they resolved to enter Judgment for the Plaintiff: But it was then surmised to the Court, that the Defendant was dead, and thereupon a stay of Judgment was prayed: But the Court would not stay it upon such surmise. But upon the Plaintiffs prayer Judgment was entered. 5 Co. 20.

1 Rol. 922.
Co. 5. jo. b.

Phillida Shackborough *versus* Biggins.

(27)

Ant. 465.

Appeal of Murder for the death of her Husband. The Defendant pleaded Not guilty, and was found Not guilty of the Murder, but guilty of the Manslaughter. The Defendant prayed to be discharged, because the general Pardon had discharged him, that he should not be put to have his Clergy, & this punishment is not for the party Plaintiff: But it was ruled; That it was at the parties Suite, and that she might well pray it, and so she did. Note, that Musgraves Case was here cited, and the Record viewed, and no Judgment herein. Trin. 41. Pla. 14. postea.

Brownlow *versus* Farr. Trin. 39 Eliz. rot. 626. Linc.

(28)

Trespas for the taking of two Loads of Wheat set out for the ninth part of the Grain in Hepworth. Upon Not guilty pleaded, it was demurred upon the evidence, and the Case was, That King Ed. 6. was seised in Fee of the ninth Sheaf of the Corn and Grain in Epworth, *alias* Hepworth as parcel of the possessions of the Abby of St. Leonards, in Comit. Eborum: and by Letters Patents under the Great Seal in 7 Ed. 6. granted to Estofe and Downman, and to their Heirs, Totam illam medietatem nonæ garbæ bladorum & granorum vocat. The ninth Sheaf, de, & in Epworth in Comit. Eborum modo vel nuper in tenura, sive occupatione Willielm. Ward, ac nuper Monasterio St. Leonard in Comit. Eborum dissolut. spectant. And under this Patent the Plaintiff claimed the entire ninth Sheaf: For in truth all was in the tenure of Ward by a Lease made 36 H. 8. under Rent: But Epworth was not in the County of York, but in the County of Lincoln. And, whether upon the Patent, the entire ninth Sheaf passed, or not: was the question, by reason of the Statute of Misrecital made 7 E. 6. And it was argued by Roper for the Plaintiff, that all passed, for, the quantity being mistaken, it is expressly aided by the Letter of the Statute; and if not, yet by the intent of the Statute. But Henry Yelverton *contra*. But as to the Misrecital of the County, where Epworth lay, it was agreed on both sides not to be material. For that is holpen by the Statute, and so held the Justices Popham and Clinch, cæteris Justiciariis absentibus: but as to the principal Matter, Popham said, That the Patent could not convey more than the Moveny, if it could convey that: For, when the King was deceived in his Grant it was not the intention of the Makers of the Statute to help that Grant: as if the King grants the Moveny of two acres, it is not reason, that the Patent should be construed, that he should have two acres: And that is the difference, as to the quantity where the certainty is plain; as where the King grants two acres, called the Mannor of D. whereas the Mannor contains an hundred acres, it is a good grant of the whole Mannor, and of all the acres: But if he had granted all his Mannor of D. containing ten acres, whereas it contained twenty acres, Nothing had passed by the Common Law, but it is aided by the Statute: There is also a difference as to the quality, and nature of the thing. As where King Hen. 8. granted to Sir Thomas Moor, Totam Turbariam suam in D. where a former Patentee, having such a Grant, had before converted part thereof into arable Land, and part into Pasture, That Sir Thomas Moor should have but that only, which was then Turbary. And

and the Statute doth not remedie such a Grant. For Turbary is a profit pertainable, which may be in one place, and not in another, after conversion; but if it were a great Moor, and after such conversion of part into Arable, or Pasture, the King had granted totam Moram suam, it had been otherwise; for that is provided for by the said Statute; and if he had granted all his Estovers in such a Wood, whereas he had not any Estovers, but a Coppice in the said Wood, he was not remedied by this Statute; and, if a common person had granted an acre called the two Acres, one acre only had passed. A fortiori in the Kings Case. Wherefore it was adjudged for the Plaintiff with the assent of Clinch, cæteris Justiciariis absentibus.

Barisdale versus Smith.

T Respals by a Vicar, for taking of two loads of Hay, and carrying it away. The Defendant pleads, that the place, where, &c. is within the parish of Maidstone, whereof he is Parson Imparsoned; and it was let out for Tithes; and that he used to have Decimas garbarum, & sceni. The Plaintiff replies, and shews a Composition in the time of R. Hen. 3. and that the Vicarage was then endowed, which was; that the Vicar should have Minutas decimas, & totam decimam garbarum in Watworth (which was an Hamlet within the said Parish, and the place, where, &c. and was parcel of that Hamlet) and, that at all times, whereof, &c. he, and his predecessors (Vicars there) had used to have the Tithes of Hay there. Wherefore, &c. And it was hereupon demurred. Tanfield, By this prescription, he cannot have Hay. For Garba is always Corn, and therefore this prescription cannot stand with the composition. Coke e contra: for as the usage hath been, so it shall be expounded. For it was adjudged in the Exchequer, where a Patent was made by King John to one, and his successors; and because Bracton saith, that anciently successor was taken for Heires, and that always since it had used to descend Jure hereditario, it was adjudged, that the Heir should have it by that Charter. Wherefore, &c. And all the Court here resolved accordingly, in regard it was an ancient Charter, and constantly had been used to extend to Hay, the word Garba might well extend thereto, although at this day it is commonly used in another sense. Wherefore it was adjudged for the Plaintiff.

(26)

2 Rol. 335.

Co. Litt. 8. b.

Broom versus Hore.

Debt for Rent: The Case was, That Sir Christopher Broom Lett Land to Hore, rendering Rent, who Lett to Wriglesworth the fourth part of an acre, and afterwards Sir Christopher Broom granted the reversion to George Broom now Plaintiff: and he brought debt against Hore for the entire Rent. Tanfield moved, that the Action lay not; for when the Lessee granted his Estate in part, and the Lessor granted all the reversion of the Entire, the pivity thereby for that part, which was granted over, was utterly destroyed, and no action as to that part lies against the first Lessee; as in the Case of Humble and Glover was adjudged in this Court; and the Action being gone in part, is gone for the whole. Stephens e contra: because the entire Estate re-

(30)

Co. 3. 24. a.

Ante 323.

Co. 3. 23. b.

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mained in part of the Land, and so the entire privity, and action remains for the whole against the first Lessee, and so is 24 H.8. Rydens Case, and 2 Asl. 52. and all the Court was of that opinion. It was afterwards moved by Tanfield, that here was a suspension of the entire Rent. For it is alledged and confessed, that the Plaintiff entred into that part, Lett to Wr. and then that is a suspension of the entire Rent; But the Court said, That this Entry, were it lawful, or tortious, being by the command of W. vested all in W. and he was but servant to W. and nothing thereby vested in the Plaintiff, and therefore here is not any possession in him. Wherefore it was adjudged for the Plaintiff. 3 Co. 24.

Malyns *versus* Sir John Hawkins.

Hill. 38 Eliz. rot. 676.

(31)

1 Rol. 310.

2 Rol. 706.

2 Cr. 29.

Ant. 41.

140. 209.

2 Cr. 29.

1 Cr. 328.

Audita Querela. to avoid an Execution of 500 l. upon a Judgment in this Court, and surmisseth: That the said 500 l. was paid to Sir Jo. Hawkins after the Judgment in discharge of the Judgment, and the Audita Querela was awarded out of the Chancery, directed to the Justices of this Court, &c. Whereupon a Scire fac. was awarded. And the Sheriff returned, That Sir Joh. Hawkins was dead. Whereupon it was surmised to the Court, that Dame Hawkins was his Executrix, and a Scire facias was awarded against her, which was grounded upon this Audita Querela, and she appeared upon it, and pleaded, That the foresaid 500 l. was not paid in discharge of the Judgment, and thereupon they were at issue: and it was found Quod illæ 500 l. fuerunt solutæ by Sir Horacio Palevizino to Sir Joh. Hawkins, to have the Judgment assigned over unto him. Et si &c. And thereupon the opinion of the whole Court was, That when the Jury found, Quod illæ 500 l. solutæ fuerunt, that sufficeth for the Plaintiffs issue. And what was found more is but surplusage; and that an Audita Querela well lies upon this matter in fait to discharge the Execution; for if it be true, that the 500 l. were paid for the Judgment: it is not reason he should be stayed in Execution for it. And, although it be found, that a stranger paid it, yet when it is found, Quod illæ 500 l. solutæ fuerunt, it is then to be intended the same sum, for which the Judgment was obtained, and thereupon the Judgment was discharged, and Rule given, that Judgement should be entred accordingly. But afterwards Tanfield at another day moved, That, this Audita Querela being an Original out of the Chancery; the party being returned mortuus. there being but one party named therein, it is totally abated: and the Scire fac. thereupon awarded is void, and without warrant. Wherefore, &c. Doderigde e contra. For this Audita Querela is not in nature of any Writ: but it is as a Commission for the Justices to call the parties, and to hear the Complaint, and to do right, and there is not any party certain thereto. So, although the Testator be dead, the Executor may well be called by a Scire fac. and being made a party, may be examined; and this Sute is in case of the party who is in prison, and therefore shall be favored in Law, and not quashed, if any one be made party to the examination. And to that purpose Vid.

3 H. 7.

3 H 7. 1. 2. R. 3. 1. 11 R. 2 brev. 638. where a Writ of Audita Querela was brought against two, and one of them dies; It was ruled, That for this Cause the Writ would remain, and not abate. So 35 H. 6. 23. If two be Plaintiffs, and the one be non-suited, or release, it shall not prejudice his Companion, because it is sued for the ease of both. And 13 Ed. 3 tit. Audit. Quer. 26. this Writ was brought to avoid a Statute for the Non age of the Conusor, &c. where the Conusee was returned Mortuus: Yet the Conusor was discharged, and there was not any doubt, that the Writ should abate. By this means also another mischief might ensue, that the Party always might remain in prison: For it may be, whereas one is returned Mortuus at one time, so another at another time might be returned Mortuus, and so infinite. A Scire fac. also is in nature of an Audita Querela, when one is in Execution for it shall comprehend all the matter. Wherefore, &c. Tanfield e contra. I agree with the Books, That in an Audita Querela against two, if the one dies, as long as there be any Party alive, who can be Party to the Examination, the Writ shall not abate, nor a new Audita Querela be brought: But there is not any Book, that where there is but one Party, and he dies, that saith the Writ shall stand. But the Book of 13 Ed. 3. is grounded upon another reason, for that better expounds 18 Ed. 3. 10. which is the same Case; where an Infant brought an Audita Querela for his Infancy, and his age was inspected: although the Party were returned Mortuus, yet no new Audita Querela should be awarded. For his Non-age being adjudged, none can contradict it, nor have any plea thereto. And therefore it would be in vain to make any new Party thereto; wherefore the Party was discharged. And whereas it hath been said, That a Scire fac. might be brought in nature of an Audita Querela, and there needs not any new Audita Querela: True it is; but then it is meerly grounded upon a Record here, which comprehends all the matter: but it is not so here; for this is grounded upon the original Writ, which being abated, the Scire fac. awarded thereupon is ill. Wherefore, &c. Gaudy held, That this was but a Commission, which shall not abate by death, and is like to a Mitimus upon a Fine, 14 H 7. and there is not any Party here, but a Commandment, quod vocatis partibus Justice be done, Wherefore, &c. But all the other Justices against it: For it is an Original awarded out of the Chancery. And if the Parties be dead, the Writ shall abate, and the Commission is determined. And they agreed to the Cases, where there are two Parties Defendants and the one dies, that there the Writ shall not abate; and so to the Case of an Infant for the reason abovesaid. Whereupon it was adjudged, That the Writ should abate, and that a new Audita Querela should be pursued. And so it was, and the Party thereupon bayled.

The Lord Barkley *versus* the Countess of Warwick.

ERror of a Judgment in the Common Bench, in a Writ of Partition. Upon the first Judgment quod partitio fiat, before the return thereof, and the second Judgment quod partitio stabilis sit according to the course of this Writ; a Writ of Error was brought, and the Error assigned: and it was alledged, That there was not any perfect Judgment yet given: until the second

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Judg-

(32)

1 Rol. 750.

Co. Litt. 168. a.
Co. 11. 40. b.

Post. 914.

Co. 11. 38. b.

Post. 643.

Judgment, and therefore the Writ lay not: but in divers Cases, where there be two Judgments, where the first is the principal, There Error may lie before the second; As where an Assize, or an Ejectione firmæ is brought, where the Land is the principal, if Judgment be given for it, although damages are to be recovered, yet before a Writ of Enquiry for them, Error lies, because the damages but accessory. But in Trespals, or in an Action upon the Case, where the damages are the principal; although that the Judgment be Quod recuperet, yet until damages be enquired, and Judgment thereupon, no Error lies: as it was agreed in Russel and Prats Case, so in 21 Ed. 3. in the Case of Account, until the second Judgment, no Writ of Error lies: for the Plaintiff might be non-suited before the second Judgment given; as 1 H. 7. 2. is. And so it was adjudged in 11 Eliz. betwixt Harding and Vine. So 7 R. 2. in Formedon, where the Tenant was ousted of Aid, Error lies not until the Judgment of the Principal: And so held all the Court here, That the second Judgment in this Case is the Principal, and before that death shall abate the Writ. And they agreed the differences in the Cases, where the damages are but accessory, &c. But because it was a new Case, they would advise, Et adjournatur. *Note.* Brownlow the Prothonotary told me, That it had been adjudged in the Common Bench, That the death after the first Judgment shall not abate it, For where the Plaintiff died after the first Writ, the Heir had a *Scire fac.* upon that Judgment, & it held to be maintainable; and, if so, the first Judgment is the Principal.

Buskin, *alias* Living *versus* Edmunds. Ante, Mich. 38. Pl. 7.

(33)
Ant. 415. 535.

Ant. 328.

DEbt in London upon a Lease for years, supposed to be made in London of Cythes in H. in the County of Kent, by the Assignee of a Reversion against the Assignee of a Term. After Verdict upon a Nihil debet pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment: for that this Action was brought in London. For it is not grounded upon any privity of Contract; for both the Parties are strangers to it: but by reason of the occupying the Land, and the Estate of either of them therein. And although peradventure the Action at the first might well have been brought in London by the Lessor, for the Contract made there, yet it cannot be so here. Wherefore, &c. Altham and Brock moved for the Defendant, that the Action lies not: Sed non allocatur. For the Privity of the Contract is conveyed with the Estate. But for want of Privity, Debt lies not against the first Lessee, because he was not privy in Estate. But the Contract is always triable where it was made (viz. in London) and therefore the Action there is well maintainable. And it was adjudged for the Plaintiff.

Scambler *versus* Waters.

(34)
2 Rol. 153.
1 Rol. 731.
Co Litt. 3. b.
1 Cr. 50.
1 Cr. 16.
Co. 10. 61. b.

Action upon the Case, for disturbing him to execute the Office of Steward of the Courts, and to take the Profits, &c. and shews all his Title in the Declaration. Upon Not guilty pleaded, a Special Verdict was found; That from time whereof, &c. There was a Steward of the Courts of the Bishops of Norwich, who used to have 10 l. Fee by the year, as also an Under-steward, who

who had 4*l.* fee per annum, &c. And that the Duke of Norfolk was High-Steward, and died, and that the Bishop of Norwich granted the Office of under-Stewardship to Nicholas Hare, and two of his Sons for their lives; That Nicholas Hare and one of his Sons died; and that the youngest Son, being within age, granted it to Waters the Defendant. And that Scambler Bishop of Norwich granted both those Offices to the Plaintiff, with the Fees; and that the Defendant disturbed him. And it was moved by Daniel Serjeant, and by Tanfield, That this Verdict is found for the Plaintiff. For being found, that it was the Custome, that he might make an Under-Steward, and he granted the Office to three; that cannot be well maintained by the Custome. It is also against reason, that the Bishop having the Grant of the High Stewardship, that he should appoint the Under-Stewardship; for it is the Office and duty of the High Steward. An Infant also cannot be an Officer; for he cannot be a Judge in a Court, as a Steward is in the Leet, a multo fortiori he cannot assign over the Office: for an Infant cannot be Bayliff, nor Attorney for this cause; for he is not to be conceived to be of discretion to execute it. Much less can he execute the Office of a Judge. Wherefore, &c. Popham and Fenner held, That an Infant cannot be a Steward, for he cannot by Intendment execute it, much less may he assign it over. And Popham said, That it was usual for Bishops to appoint great Persons to be Stewards, and to appoint their under-Stewards also. But it would be hard to maintain it, unless they be ancient, and distinct Offices. Et adjournatur. Co. Littl.

1 Cr. 50.

1 Cr. 49. 259.

1 Cr. 279. 556.

Co. Litt. 3. b.

2 Rol. 153.

1 Cr. 556.

Ards versus Watkin. Trin. 40 Eliz.

UPon Demurrer the Case was: Lessee for thirty years of a parcel of Land called Shortwood, lets it for twenty eight years, rendering 34*l.* Rent per annum, and after deviseeth 28*l.* parcel of that Rent to his three Sons, severally to every of them a third part; and the one of them brings Debt for his part of the Rent: And whether this Action lay, or not? was the Question. And it was argued by Rydgley for the Plaintiff, and by Nichols for the Defendant. And Gawdy and Fenner held, That the Action well lay: for there is no doubt, but that Rent may be devised, and be divided from the Reversion. For it is not merely a thing in action, but quasi an Inheritance, as 26 H. 8. Dy. Knolls Case is, and 24 H. 8. Ryldens Case. If Lessee grants over all his term in part of the Land, yet it is chargeable in an Action with the entire Rent: For he by his act cannot apportion it. And by the grant of part the Lessee is not compellable to Atorn: For then he should be lyable to two Actions, or two Distresses. But the Devise is quasi an Act of Law, which shall enure without Atornment, and shall make a sufficient Privy, and so it may be well apportioned by this means; Wherefore, &c. But Popham and Clinch e contra. For as the Lessee by his own Act shall not divide the Lessors Contract, nor apportion his Action: So likewise the Law favors the Lessee, that the act of the Lessor shall not charge him with divers Actions, or double Distresses, but upon his voluntary Atornment: and the Contract being entire cannot be apportioned. But Popham agreed, That the Rent was well

(35)

1 Rol. 234.

Post. 651.

Ant. 634.

well devisable, and by that means severable from the Reversion. And although a thing in action cannot be transferred over, nor be devised, yet a Contract, which ariseth from an Interest in Land, or which is an interest, may be well transferred over. Wherefore, &c. Adjournatur. Residum postea, Hill. 41, Pl. 8.

Harvey *versus* Wrot. Hill 35 Eliz. rot. 381.

(36)
Ant. 567.

Error of a Judgment in Dower. For that the Judgment was against him by Default before any appearance, whereas he was an Infant: and it was thereupon demurred; and the Court held it to be no Error. For if Infants would never appear, there would never be any Recovery in Dower. And Popham said, That the greater part of the Justices in Serjeants Inn were of his opinion. Gawdy was absent, Et adjournatur. It was afterwards moved again, and in Hill. 41 Eliz. Rule was given to affirm the Judgment. But it was afterward reversed for the defect of Warrant of Attorney.

Holiday *versus* Hicks, Pasch. 40 Eliz. rot. 336.

(37)
Post. 661. 746

Action upon the Case for Trover, and Conversion of 25 l. The Defendant pleaded Not Guilty. And the Jury found a Special Verdict, that the Defendant being Servant and Factor to the Plaintiff, sold twenty Quarters of his Masters Corn for 25 l. and receiving it, converted it to his own use. Stephens moved for the Defendant, That this Verdict is found for him. For this 25 l. was never in his Masters possession, nor his money, and this Action lay not, but rather an Accompt. This also is money out of any bag. Wherefore, &c. But Fenner held, That it was found for the Plaintiff: For the possession of the Servant is the Masters possession, and it is, as if he always had it in possession. And it hath been adjudged, That, the Servant being robbed, the Master may well bring the action. And that was the Lord Riches Case. Clinch doubted, Et adjournatur. Resid. postea, Term, Pasch. Pl. 9.

Ant. 618.

Redston *versus* Eliot.

(38)
1 R. 59.
Ant. 621.

Action for these Words, Thou art a Rebel and all that keep thee company, are Rebels, and thou art not the Queens friend: After Verdict it was moved, That the Action lay not for these words. For as to the first words, Thou art a Rebel, it was adjudged here in Wells Case, That an Action lies not. And 16 Eliz. in the Common Bench, between Bustard and Petts, it was adjudged, That for saying, Thou art not the Queens friend, no action lay: wherefore they being coupled together, the action lies not. But Fenner and Clinch held, That the words were actionable: for although to say Thou art a Rebel, will not bear an action of it self, yet being conjoynd with the other words, All that keep thee company, they are thereby much aggravated, and shews his intent. But cæteris Justiciariis absentibus, adjournatur.

Tyrrel *versus* Bash.

T Respals vi & armis, For taking his Goods. The Case was, That a Sheriff took Goods by a Fireci fac. and, before Execution done by sale, the Defendant took them again, and he brings Trespals, and, whether it lies, because he had not any property? Vid. 11. H. 4. 23. and 7 Ed. 6. Stringfellow's Case. Fenner being only in Court, said, That he had conferred thereof with the Lord Anderson, and Periam, and they held clearly, That the Action well lay. Wherefore he commanded Judgment to be entred for the Plaintiff.

(39) 2 Vent. 95.

Reston *versus* Pomfreit,

Trin 40. Eliz. rot. 1125.

A ction for these words, Mrs. Ann Reston (The Plaintiff innuendo) hath had a Child, it is true, for she was conveyed to B. and there she laid her great belly. It is as true, that she hath had a Child, as that you sit there; for she was sent away with Child, and if she had not a Child, she hath made it away: and alledge, That, by reason of these words, she lost her Marriage. The Defendant demurred. And thereupon adjudged for the Plaintiff.

(40)

Co. 4. 16. b.

Hemsley *versus* Price. Hill, 40 Eliz. rot. 103.

E jectiōe firmæ of a Lease of Gabriel Armstrong. Upon a special Verdict the Case was, that Henry Stapleton, being seised in Fee of the Mannor of Rempstone, and of the Advowson of Rempstone in Fee, the Mannor holden in Socage, the Advowson by Knight service in Capite, devised all his Lands to Eliz. his wife for her life, remainder to Faith his Daughter in Tail, remainder to the eldest Son of William his brother in tail, remainder to his Cousen William Stapleton in tail, with divers remainders over: remainder to the right Heirs of Henry the Devisor; Henry dies, Eliz. enters, and Lets all the said Lands to Jackson: who occupied the Entire for three years; Faith dies without issue; Eliz. dies, John Stapleton Son and Heir of William Stapleton enters; and that Gertrude Yeo was Cousen and Heir to Faith, and that she levied a fine to Gab. Armstrong of the Mannor of R. which Gab. Armstrong by Deed enrolled in Chancery, bargained, and sold the Land to Ed. Turvile for life, remainder to the Queen in Fee upon condition, if he paid 20 s. to Ed. Turvile during his life, or, after his death, to the Queen, or her successors at the Receipt of the Exchequer, that the bargain and sale should be void; and, That the said G. A. might re enter. And they further found, That G. A. paid the 20 s. to Ed. Turvile, and entred, and demised three acres to the Plaintiff, who entred: and, that the Defendant, by the command of J. Stap. ejected him out of the three acres. Et si upon all this matter, &c. The first point was, If this Devise being void for a third part (so as the Devisee ought to have had but two parts, and the third part have descended) the Devisee entering generally, and letting all, and the Lessee occupying all, whether this shall gain the possession of the entire, and

(41)

1 Rol. 740. 1.
2 Rol. 215.

Co. Litt. 199.

Co. Litt. 374.2

Co. Litt. 241.2

Fost. 699.

Co. 2. 53.

and devise it out of the Heir : so as, at the time of the Fine levied, he had not any thing, and so nothing passed thereby to G. A. the Lessor. Secondly, admitting the Fine were good for the third part, when G. A. bargained, and sold it to Ed. T. for life, remainder to the Queen in Fee upon Condition, &c. Whether by the payment of the 20 s. to Ed. Turv. it shall devise the whole Estate, or no part thereof, without Office, or Monstrans de droit? Coke Attorney General, and Crew for the Plaintiff; That by none of these acts the Heir was out of possession: but that his Fine was good. For, first by the Devise the Heir is to be Tenant in common with the Devisee: and if one Tenant in common enters into the entire Land, his possession shall be adjudged the possession of his Companion also: and he shall not be put out of possession. And Crew said that in 26 Eliz. in the Common Bench, between Pollard and Allcock this point was in Question, and Ruled: Where the Devisee enters into the whole, and the Heir without entry Levies a Fine of his third part to a stranger, that it was good; for it never was out of his possession: and, if the entry did not gain the possession, the Lease for years did not alter it; for nothing passed thereby, but what might lawfully pass, no more then in 26. H. 8. 9. Where a Tenant in common levied a Fine of the whole Land, the Hovety only passed, for he could not gain the entire possession. But, if he had actually expelled his Companion, It had been a disseisin in Deed: or, if he had made a Feoffment, or a Lease for life of the entire Land, it had been a disseisin of the whole, and it had all passed: and when at first he entered generally, the Law will not impute any Tort therein; but, that he entered as lawfully as he might: and he cannot afterwards by any words devise his Companions possession. But Coke said, That, if afterwards he had made a Feoffment of the Entire, that had expressed his first intent to be to enter into the Entire, and to give possession of the whole. And as to the second point they held, that by this payment the entire Estate is devised without office. For, when the Free-hold is in a common person, and the remainder only in the Queen, by the limitation of the party and not by any settled interest, it may well be devised out of the Queen, by matter of Fact, and, in many cases, by matter in Law; as in Nichols Case, Plow. 477. by a condition performed for the increase of the Estate: So there fol. 483. by a Remitter. So, if a disseisor makes a Lease for Life, Remainder to the Queen, yet the disseisee may enter, or have an Assise against the Tenant for life, and thereby devise the Estate from the Queen: and, as the Estate commenced by the Act of the party, so by his act it may be defeated. And 49 Ed. 3. 16. is, That if one devise, that his Executors should sell his Land, and dies without Heir, the Land should Escheat to the King; yet the Executors may sell, and thereby devise it out of the King. Wherefore, &c. Tanfield, and Ge. Croke on the other side; that this entering generally, although he claims not the whole by express words, yet entering by force of the Devise, which was of the whole, is, and amounts to an express claim of the whole; and where two have title descended unto them as Co-parceners, or a title devolves, or comes to two, as Tenants in common, if the one enters first and claims all, before the other hath entered

entred, that shall gain the possession of the entire Estate. But, if they were once in possession, then the claim of the one only, or the occupying of the one only, shall not oust his Companion. And therefore Litt. 160. if the one Coparcener enters claiming the Entirety, and makes a Feoffment with Warranty, that is a lineal Warranty for the one Moiety, and collateral for the other. And if the Feoffment be a disseisin, and not before, it shall then be a Warranty commencing by disseisin. So 26 All. 2. where the one Coparcener enters, claiming the whole, and a stranger enters, the solely shall have an Assise: And here the Case is stronger; for the Heir, and Devisee do not claim by one Title; and therefore the entry of the one shall not be an Entry for the other: Especially where the Devisee pretends, that he had the Entire, and the other doth not contradict it; for otherwise, great mischief would ensue. For, if the Devisee continues divers years, and after dies seised, and a descent is cast, and his Heir enters into the whole, and levies a Fine with Proclamations, and so more Fines or Descents, if it should not be good for the whole after, but a long possession be drawn in question, and the Fines avoided without claim, it would be very mischievous, that, by a sleeping Tenure, the Devisee should be avoided for a third part, and the purchasers disturbed. And to that purpose was a precedent shewn, Hill. 30. Eliz. 101. 342. betwixt Reignolds, and Kingman, where, in such a Case, the Devisee entred into the Entirety, and made a Feoffment of the entire house with Letter of Attorney; the question was, Whether the Entire, or but two parts of the House passed? and it was held, That the Entire, although that, in the same Case, the Devisee was void for a third part, by reason of the Tenure, &c. yet the Devisee, entering into the whole, had thereby gained the possession of the whole, and the whole Entirety passed. And, as to the second point, it was moved that the Queens Estate cannot be Defeated without matter of Record; and that shall privilege the Estate for life: For there cannot be a fraction in Estates; For he, who enters for a Condition, ought to reduce the entire Estate, and not part thereof; And to confirm that, the Book of 9 H. 4. 4. and Cholmleys Case in the Exchequer, were cited; where it was held, that by the payment of a sum in the Country, without office, the Queens Estate could not be defeated; and that shall privilege the Estate for life, that it shall not be defeated. Wherefore, &c. But all the Court except Fenner as to the first point, Resolved, that this Entry, and Lease, did not gain any possession but of the two parts; and the Heir was never out of possession thereof, and so his Fine good. Secondly; they all, besides Gawdy, held, that, by the performance of the Condition, the Entry is lawful upon the Tenant for life; and the Frank-Tenement being defeated, The Queens Estate is defeated: For she is the Person, against whom the Free-hold was demandable, and recoverable; But if the Queen had had the immediate Estate, it had been otherwise, And Popham denied the Law to be so in Cholmleys Case, and that some of the Barons denied it. He denied also, that the Law was so, as it was cited in Reignolds Case, unless that the Words were, Of all the House; then he said, all had passed. Wherefore, for the matter, they resolved for the Plaintiff,

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and

Ant. 115. 615.

Hob. 120.

Co. Lit. 354.6

Co. 2.53.

and gave day to the Defendant to shew other Cause, otherwise Judgment should be entred for the Plaintiff. At which day it was moved in arrest of Judgment, That the Verdict was imperfect. First, because it is not found, that Gertrude, from whom the Plaintiff claims, was Heir to Hen. Stapleton the Devisor, but to Faith; and it may be, that she was Heir to Faith, the Daughter of the Devisor; for a Verdict ought to be full, and perfect; and it may be, although Faith was the Daughter, the Devisor might have a Son, or that she was Heir to him by a second wife: And a Verdict ought to have so great certainty, that no apparent intendment can be against it: And, if it be false, that an attainr may be brought. And, to that purpose, a Case was cited to be ruled in this Court accordingly, betwixt Price, and Johns, 35 Eliz. Secondly, because it was found, that the Devise was found to be to Elizab. for life, remainder to Faith, ita prout in ultima voluntate ipsius Henrici apparet, cujus tenor sequitur in hæc verba (wherein is mentioned, that the Devise was made to the Son of Will. Stap.) But it is not so found by the Jury. Thirdly, Because the Ejectione Firmæ is brought of 400 acres of Land; and the Jury found the Defendant, Quoad all besides three acres parcel Tenementorum prædictorum, Not-guilty, & quoad the three acres, they find all the matter ut supra. And, that Gabriel Armstrong Lett the aforesaid three Acres to the Plaintiff, & that he was possessed; and, that the Defendant ejected him out the three acres, parcel Tenementorum prædictorum; and they did not find the Ejectment of the aforesaid three acres Lett, &c. And it may be, that the Ejectment was of the other three acres. And, for this cause, the whole Court held it to be ill: But to the two other exceptions, they spake not much. Wherefore a Ven. fac. de novo was awarded. And, at the Trial, the matter was compounded.

Riesby versus Wentworth.

- (42) **P**rohibition upon a Sute for Tythes, and grounds his Prohibition upon the Statute of 31 Eliz. cap. supposing, that the said Parson had committed Simony in coming to the Parsonage; and thereby the Church was void, and the Tythes not appertaining unto him. And it was agreed per Curiam, Glanville absente; that a Prohibition lay not: For the Simony might more aptly be tried in the Spiritual Court. Wherefore consultation was awarded.

Button versus Downham.

Trin. 40. Eliz. rot. 865.

(43)
2 And. 121.
Noy. 73.
Moor. 398.

DEbt upon Obligation, conditioned to save him indemnified from an Obligation, wherein the Plaintiff and Defendant were obliged to one Wolmer, &c. and from all Sutes, and Actions concerning it. The Defendant pleaded the Statute of Usury; and that it was corrupte aggregatum between him and Wolmer; that the Defendant for the forbearance of 20 l. for a year, should give to W. 10 l. if A. his Son were then alive; And, that the Obligation was made for that cause, and so void: which

which the Plaintiff might have pleaded in Debt against him, by W. &c. And it was thereupon demurred. And Williams moved, that it was not any Usury; in regard the payment of the 10 l. is appointed to be upon an uncertainty, viz. the life of A. &c. Co. 5. 70. a. Post. 74. 1. And Anderson, Walmley, and Owen (Glanvil absente) held it to be Usury for the corrupt agreement (which is confessed by the Demurrer) makes it usury; and it is the intent makes it to be so, or not so. For, if there be a wager betwixt two, to have 40 l. for 20 l. if one be alive at such a day, that is not any Usury: for the bargain was bona fide; and not for Loan; but, if the intent hereby was to have a shift, it is otherwise. Ant. 588. But here forasmuch as the Condition was to save him harmless from all Sutes, which he had not done, nor doth the Defendant answer thereto, but to the Obligation only, they held the Plea to be ill; For, although the first Obligation were void, yet the second Obligation is forfeited; because the Plaintiff had not saved him harmless from Sutes concerning it.

Anonymus.

Action upon the Case for Words, viz. That he keeps a Bawdy-house. And ruled, that the Action lies not: For, by the (44) Common-Law, he is not punishable; but by the Custome of London. And therefore this Action ought to have been sued in the Spiritual Court. 2 Rol. 295.

Wrenford *versus* Gyles.

A Lease was made for twenty one years, if the Lessee lived so long, and continued in the Lessors service. The Lessor dies. Whether the Term was determined? was the Question. And Anderson, Owen, and Glanvil held, that the Lease continued: For there is not any Laches in the Lessee, that he did not serve; but it is the Act of God, that he cannot serve any longer: And it is like to Sir Tho. Wroths Case, &c. But Walmley strongly against it; because it is a limitation to the Estate, that it shall not continue longer, then he serves. (45) Quære.

The Countess of Warwick *versus* the Lord Berkeley.

IN a Writ of Partition, Judgment was, Quod partitio fiat. (46) Whereupon, before the second Judgment, the Lord Berkley brought a Writ of Error; but all the Court held, that, until the second Judgment given, Quod partitio stabilis sit, the Record is not full, nor the Judgment perfect. And therefore the Record should not be removed. Co. 11. 40. Co. Lit. 168. a. Ant. 636.

Chambers *versus* Leversage.

Action upon the Case, upon an Assumpsit; For that William Leversage, Testator to the Defendant, was indebted unto him, by Obligation, in 20 l. And the Defendant having Assets, &c. promised to the Plaintiff, in consideration, Quod daret diem solutioni pro uno anno, that he would pay it. The issue was Non Assumpsit (47)

Ante 67.

Assumpsit, and found for the Plaintiff; and the entire Debt given in damages; and exception taken, because a day cannot be given; but the day of payment may be deferred; and the Court said, True it is, a day cannot be given in proper sense; but it is to be intended, according to the vulgar and common discourse, as deferring the day of payment; and the Court further said, that here was a great mischief to the Defendant; for, notwithstanding this recovery, the Plaintiff may have Debt upon the Obligation; and therefore the Jury ought to have given damages only for the non-payment at the day, and not to have given the entire debt: But, upon the Plaintiff's promise to deliver the Bond to the Defendant, the Plaintiff had Judgment.

The Earl of Lincoln *versus* Topcliff.

- (48) Debt upon a Bill ensealed, whereby the Defendant acknowledged, that he had received of the Plaintiff 7 l. ad emendum a pair of Bellows, and other things to the use of the Earl; and avers, that he had not bought the things, nor paid the Money; and thereupon the Defendant demurred: For he objected, that the Plaintiff in this Case, ought to have had accout and not debt. But all the Justices held, that he might have neither the one or the other, at his election. Wherefore without argument, it was adjudged for the Plaintiff.

1 Cr. 142. 503.

Powel *versus* Brazen-nose Colledge.

- (49) Formedon. The Writ was Præcipe quod reddat 20 acres Hedington (in being omitted) Williams prayed, that it might be amended; and shewed the Court, that it was only the default of the Clerk; for he had writ it out of a paper delivered him to make the Writ, wherein this word In was in (which the Curstior confessed, but his examination here, upon his Oath) whereupon it was amended by the order of the Court. But Walmsley first doubted thereof; because it being an Original Writ, whether it might be here amended, where the defaults of their own Clerk are only amendable; but afterwards he assented to the amendment.

Ant. 119.

Darrel *versus* Wilson.

- (50) R Eplevin. The Defendant avows for a Rent-charge, as Executor; And the Grant of the Rent was to his Testator for forty years; with a clause of distress in the Deed, that the Grantee and his Heirs, might distrain for the Rent, during the Term; yet it was ruled, that the Executor should have the Rent, and distrain for it, and not the Heir.

Reads Case.

- (51) Action for words. Whereas the Plaintiff was a Justice of Peace, within the County of Lincoln, that the Defendant spake these words; I heard it spoken, that Mr. Read was one that was at Burrels Robbery; and that four of them went to his house the

the

the next morning, *ubi reuera* the Defendant never heard any such words, &c. The Defendant pleaded Not-guilty; and it was found against him, and 100 Marks damages given; and it was moved by Harris, that the words were not actionable; for they be not spoken out of malice, but upon anothers report: Neither is it said, that Mr. Read was one of the robbers; and it may be taken in good part, that he was one of the company of the parties robbed: And, when it stands indifferently, the best shall be taken. Yelverton contra; for when he speaks words upon report, whereas there was not any such report, it was a slander in him; otherwise every one, by such an addition of a report, would slander another; and it was therefore adjudged in 22 Eliz. between Meggs and Griffin, where an action was brought; A woman hath told me, that she heard say; that Meggs his wife killed her first Husband: And avers, that there was not any such report: And adjudged, that the action was well brought. Wherefore, &c. And the Justices doubted thereof; for words of slander ought not to be taken by implication: And willed the parties to agree; and the Plaintiff took 15 l. for all; and Judgment was entred by consent.

Ante 400.

Hale versus Cranfield.

Action upon the Case, for that he spake Quædam scandalosa verba of the Plaintiff; Tenor quorum sequitur in hæc verba, Thou art a consening Knave, and a Bankrupt, vel consimilia. The Defendant pleaded Not-guilty, and found for the Plaintiff; and Judgment entred for him without privy of the Court: and the Court being now moved therein, held, that an Action lies not. And Walmsly said, it was by reason of the word consimilia, as it was adjudged in Garters Case: it is not good also, for that it is said, that he spake divers words Tenor quorum sequitur. Wherefore it was commanded, that the Roll should be amended. (52)

Allen versus Stear.

Information brought in London, upon the Statute 13 Eliz. cap. 5. for justifying apud L. of a fraudulent gift of Goods, made by Holden to the Defendant, to defraud the Plaintiff of his debt; the Defendant saith, that H. gave those Goods unto him at Coventry, bona fide, and that he justified the gift there, and traverseth the justifying at London. Et per curiam ruled to be no plea; for, although the Statute of 31 Eliz. cap. 5. restrains common Informers to bring their Action only in the proper County where the offence was done; yet, that doth not extend to a party grieved, but that he may inform in what County he please; for he is not a common informer. Wherefore the Defendant waved that plea, and pleaded Not-guilty. (53)

Post. 736.

Anonymus.

ATraint upon a Verdict in the Exchequer. The parties were at Issue Quod bonum fecerunt Sacramentum. And at the day of Trial, the grand Jury appeared, and the Record of the Exchequer (54)

Erchequer was not removed hither ; and it was debated what should be done : For it was agreed per Curiam, that no day shall be given to the Plaintiff to bring in the Record; for the Plaintiff, at his peril, ought to have brought in the Record before that time. And a precedent was then shewn in 26 H. 6. that the Judgment in such Case was, Quod querens nihil capiat per Breve; Et quod tam Defendens, quam juratores eant inde sine die ; and no Fine put upon the Plaintiff. And so it was done here.

Anonymus.

- (55) **D**Ebt against two upon a Contract. The one pleaded Nihil debet per patriam. The other wages his Law. And it was held by all the Court, except Glanville, that the one only cannot wage his Law; but he ought to plead also per patriam, because the Debt is joynt, But Glanville e contra; because otherwise every one might be ousted out of his Law, by joyning one of the Plaintiffs Friends with him in the Action. Vide 40 Ed. 3. 35. 38 Ed. 3. 27.

Gybbins Case.

Trin. 40. Eliz. rot. 3339.

- (56) **A**ction upon the Statute 1, & 2. Ph. & Mar. for the taking a Distress apud D. in Comitatu Suffex. and driving it to S. in Comitatu Kancie. The Defendant pleaded Not-guilty; and it was tried by a Jury of the County of Suffex. And this matter moved in arrest of Judgment; because the Ven. fac. ought to have been from both Counties; For the Tort consisted of two parts. And of that opinion was the whole Court.

Smalpeace *versus* Smalpeace.

Hill. 40 Eliz. rot. 912.

- (57) **D**Ebt against the Defendant, as Administrator of F. He pleads a recovery against him, as Executor; and besides, to satisfy that, he hath not any Assers. And it was thereupon demurred, and adjudged to be a good Plea; and he shall not be twice charged. Wherefore it was adjudged for the Defendant.

Stepney *versus* Lloyd.

Trin. 40. Eliz. rot. 1157.

- (58)
4 Inst. 97.

4 Inst. 97, 7.
Post. 651.

DEbt. upon an Obligation. The Case was, That Stephens, Sheriff of Carmarden, by vertue of an Attachment under the Privy Seal of the Court of Requests, took the Defendant; and, for his enlargement, he made this Obligation, to appear before the Queens Council, attending in the Court of Requests at Westminster. And, in Debt hereupon, the opinion of Anderson Chief Justice, and Glanville was, that the Process was not any Warrant to the Sheriff to take the body, nor to take the Obligation; For that Court hath not any power, by Commission,

Commission, by the Statute, or by the Common Law: but the Sheriff ought to obey the Process out of the Court of Wards, and Dutchy-Court; for they are appointed by the Statute. Wherefore they held, that this Obligation is not within the Statute of 23 H. 6. For the said Statute intends only Obligations taken by such who are in their custody by the course of Law. Wherefore this Obligation was taken per Dares, and so avoidable. And although it was alledged, that this Obligation is within the Statute, in regard the Sheriff took it by colour of his Office, although he was not lawfully in his custody, it was notwithstanding adjudged for the Defendant. 2 Cr. 591.
1 Cr. 596.

Termino

Termino Hillarij,
Anno Quadregesimo primo
ELIZABETHÆ, in Banco Regina.

Audley *versus* Frank. Mich. 49, &c. Eliz. rot. 557.

(1)

DEbt in Chancery (for that the Plaintiff was servant to the Lord Keeper) upon a Contract, and upon arrerages of Accompt. The Defendant quoad that, which was upon accompt, pleaded Nihil debet per patriam, and quoad residuum he waged his Law, and the whole Record was sent hither. And the Defendant had day to wage his Law; and at the day was ready to make it. And Fenner doubted, Whether he ought to make his Law here? for none of the Clerks could remember any such president. Wherefore he only being in Court, sent Kemp the Secondary, into the Common Bench, to know their opinions. And they also were doubtful. Wherefore, de bene esse, he caused him to make his Law, &c. and would advice of the recording thereof.

Davies *versus* Taylor.

(2)

2 Cr. 144. 430.

Action for these words; Thou art rotted with the Pox. And by Fenner, being only in Court, adjudged, that the Words were actionable: for it is to be intended of the French Pox.

Beverley *versus* Beverley.

(3)

DEbt in the Common Bench against John Beverley, and Joseph Beverley, upon an Obligation; and Judgment against both; And a Capias ad satisfaciendum issued against Joseph only: And thereupon, being Outlawed, brought Error. And, because it ought to have been awarded against both, as 34 H. 6. 33. is; as also, because it appears not by the return of the Exigent, that the Judgment of the Outlawry was by the Coroners, as it ought to be; as 21 H. 7. 33. is: the Court reversed the Outlawry upon both these reasons.

Razing, Scot, and others *versus* Ruddoch.

Pasch. 39. Eliz. rot. 359. Eborum.

(4)

Co. 6. 25. a.

Error by Sir of a Judgment in the Common Bench, in Replevin against them: where one of the Sir, viz. Razing, abolved in

in his own Right for an amercement in a Leet. Scot, and the other five, made Conulance, as his Servants, and Judgment against the six, and Damages and Costs given against them; and to be discharged of the Costs and Damages, they shew brought Error. And the release of Scot (hanging the Writ) of all Actions was pleaded in Barr; and it was thereupon demurred, and moved, that this was not any plea. For the difference is, where an Action is brought by divers in discharge of themselves; the Act of one, as Non-sute, or Release, shall not prejudice his Companions to barr them to proceed in the Sute; as in Audita Querela by divers, there the Non-sute of one shall not be a Barr to the rest; as 15 Ed. 3. Severance 23. is. So of an Attaint, 16 Ed. 3. Severance 13. and 29 Ass. 35. accord; but, where an Action is brought to charge another, if the Action is brought by divers, the Release, or Non-sute of one of the parties, shall barr his Companions; and this difference is put in 2 H. 4. 16. And the book of 26 H. 8. 3. is to be answered upon this reason, where many were Plaintiffs in an attaint upon a Cleric against them in trespass, the Non-sute of the one should barr the others, is to be intended where they were Plaintiffs before, and sued to charge another; and according hereunto is the opinion of Fortescue 35 H. 6. 19. Gawdy held, that it was a barr; for the Writ is to be restored to a personal Duty (viz. Damages and Costs, which they had lost) which being personal, the act of the one shall prejudice the other; but the Case of Audita Querela is well to be agreed; for that is as well to discharge the execution of the Land, which is in the Realty, as of the Goods, and therefore 30 H. 6. barr. 59. and 256. and 18 Ed. 4. 14. in an Assise by two, the release of one of the Plaintiffs is no barr for the Land, nor for the Damages; because they ensue the Realty. Popham; The difference is good Law, where many are actors by way of charging another, the act of the one shall prejudice the other. But otherwise it is, where they be Plaintiffs to discharge themselves, for, in the first, The Law presumes a folly in them to joyn with one, who might discharge all. But otherwise it is on the part of the Defendant; for it is not in him to appoint shall be joyned with him in the Action. And, when they are compelled to joyn in a Writ of Error, or Attaint, to defeat a Judgment, it is not reason, that the act of one should prejudice his Companions. And the Case would be more mischievous; for the Plaintiff might bring an Action against one, who should collude with him, and oust all the rest of their Writ of Error, or Attaint. But, if two be Plaintiffs in debt, and they be barred by an erroneous Judgment, and Costs are taxed against them; and they bring Error to avoid those Costs, the release of the one shall barr the other: for it was their folly to joyn in the first Action. Wherefore, &c. Afterward being moved again on another day, Popham, Clinch, and Fenner agreed, that it was not any barr, Gawdy absente, And it was so adjudged, and day given to examine the Errors. 6. Co. 25.

Davy *versus* Matthew. Hill. 40. Eliz. rot. 740.

Ejectione firmæ. Upon a special Verdict, the Case was: Let see for 20 years Letts it for 10 years, rendering Rent, upon condition, That for the Non-payment the Lease should cease.
D o o o The

2 Cr. 117.

Co Litt 139a.
Ant 448.

Ant 448.
Moor 17.
Co 6f 26. a.

2 Cr. 117.

(40)

1 Rol 473.4.

Co. 214. b.

32 H. 8. c. 34

Co. Litt. 215. 2
Ant. 600. 617.1 Rol. 474.
Co. Litt. 214. b.

the Lessee for 20 years by deed grants all his interest, and term, to the Lessor of the Plaintiff; the Lessee for 10 years attorns; the grantee for the Rent arrear, afterwards enters: and whether his entry were Congeable? was the question: it was moved, that his Entry was Congeable by the Common-Law: for the Condition being, That for non-payment, his Estate shall cease, it shall be without Entry, and a stranger may take advantage thereof; as appears 11 H. 7. 17. And, if he cannot by the Common-Law, yet he is a Grantee of a Reversion within the Statute of 32 H. 8. to have advantage of the Condition; for the words of the Statute are, That the Grantee, his Executors, or Assigns shall take advantage of a Condition which word Executor is necessarily to be intended of a Grantee for years. And the case of *Matures versus Westwood*, ante, Mich. 41. Pl. 2. is; That such a Grantee shall take advantage of a Covenant. Wherefore, &c. Clinch and Fenner held that, in this case, he shall take advantage by the Common-Law: for the Estate shall cease without Entry; for, beginning by Parol, it may so determine. And, if he cannot by the Common-Law, he may clearly by the Statute; for by that Lease made, the Lessor hath the Reversion, and the Grantee hath that Reversion, and Rent, and is within the intent of the Statute: for he hath the entire Reversion. And of that opinion was Gawdy; that he was within the Statute: but he doubted whether he might by the Common-Law. Wherefore, Popham absente, it was adjudged for the Plaintiff.

Helier versus Whytier. Mich. 40. & 41 Eliz.

(6)
Co. 6. 24. 5.
2 Vol. 712.

Post. 754.

Post. 918.

R Eplevin, The Defendant made Conuſance, as Bayliff of Herbert, Dr. of the Requests, for Damagefeasant; for that one Rich. Arch Lett the Land, where, &c. in 1 Ed. 6. to one John Arch for 80 years; that John Arch 2 Eliz. granted in to Jane Arch; and that she in 35 Eliz. granted it to Sadler, who in 31 Eliz. conveyed it to Dr. Herbert his Master. The Plaintiff confesseth the Lease, and grant to Jane Arch, and further alledgeth, that she took to Husband one Tarr who in 9 Eliz. granted it to the Plaintiff; and traverses the Grant 35 Eliz. to Sadler. And thereupon the Plaintiff demurred. Tanfield and Foster for the Defendant, moved; That the Plea was ill: for he, by his first Grant pleaded, hath confessed and avoided the Grant alledged to the Defendant; and therefore he needed not Traverse it: for where the Plaintiff conveys to himself Title before the Defendants Title, there a Traverse is not requisite; but otherwise it is, where he conveys an after-Title, there he ought to traverse, otherwise his Title is not good, and in proof thereof relied upon 33 H. 6. 28. 2 Ed. 6 Br. confess. 65. Godfrey e contra; Here ought of necessity to be a traverser to the Grant alledged by the Defendant, for that is neither confessed, or avoided by the allegation of the first Grant; for a confessing and avoiding is to confess it, and shew it to be by a defeasible Title; as 5 H. 7. 13. where a Feoffment is pleaded by the Defendant; The Plaintiff saith, that the Feoffor disseised him, and infeoffed the Defendant, &c. and therefore cited 1 Eliz. Partridge's Case, Dy. 171. And it may be, that here after the Grant to the Plaintiff in 9 Eliz. that Jane Arch had Title, and granted it to the Defendant. And of that opinion were Gawdy and Clinch, for this last reason alledged;

alleged: especially as the plea is, That Jane Arch was possessed 35 Eliz. and granted it to Sadler. But Popham and Fenner e contra: For Popham said, there would be a difference, when a Feoffment is pleaded, and when a Grant of a particular Estate: for in the first Case, If the other well entitle himself by an elder Feoffment, he ought to traverse, but not in the last Case: because a man may come to a Fee-simple by divers means viz. by Disseisin, and Tort, or by lawful means; but he cannot come to a particular Estate, but by lawful means. And therefore, when one entitles himself to a particular Estate by an elder Grant, he shall not traverse the last Grant, but shall compel the other to shew, by what Title he claims it after the eigne Grant: but he agreed to the Case 1 Eliz. Dy. 171. where he entitles himself by a meer stranger, there he ought to traverse, &c. And after, upon another day, with the assent of Clinch, absent Gawdy, it was adjudged for the Defendant. 6 Co. 24.

Ante. 30.
Co. 6. 25.

Ant. 456.

Brograve versus Watts.

DEtinue for Goods. The Defendant pleads, how, upon a Sute depending against the Plaintiff in the Court of Requests, a Commission under the Privy Seal was directed unto him out of that Court, being then Sheriff of London, to seise those Goods, and deliver them to the Mr. of Requests: Whereupon he seised, and delivered them accordingly. And it was thereupon demurred, and adjudged without argument for the Plaintiff: for the Commission was against Law; for if a man be sued in a Court of Conscience, and will not obey, his body is to be imprisoned, and no Commission ought to be awarded for the taking of his Goods. Therefore, &c. (7)

Ant. 646.

Ardes versus Watkins. Ante, Mich. 40 & 41. Plac. 35.

THe Case was now moved again. And Gawdy, and Fenner, and Clinch agreeing with them held, that the Devise was good, and well severable: for, as to that objection, that a mischief may happen to the Tenant, that he shall be subject to two actions and distresses, that is his own fault: for, if he pays his Rent, he shall avoid it: and the same mischief is, where he deviseth part of the Reversion and Rent, which is agreed on the other part to be well enough: and although a Contract, or a thing in action cannot be transferred, nor divided, yet Rent only may be. For it is a thing in possession, for he doth not grant the action, but the Law gives it as incident to the Rent. And 10 Eliz. Dy. 326 Huntleys Case is expressly, where a devise was of a Reversion, upon a Lease for years, with the Rent to a man, and his sister, and the Heirs of their bodies: the sister dies without issue; the brother dies having issue; the Heir had the Moiety of the Rent. Popham e contra. For the difference will be, when part of a Reversion, and Rent is granted, that is good, but when the Rent is severed from the Reversion, it is otherwise. For then it is but in nature of an annuity, which cannot be granted by parcels, but entirely: but an Annuity or Rent only, are grantable over, because they are things of continuance, and are not personal. And the reason of Huntleys case is, because the Rent is divided with the Reversion. But notwithstanding, in regard three of them (8)

1 Rol. 234.
Ant. 637.

Post 851.

Post. 851.

them agreed, he consented, that Judgment should be entred for the Plaintiff. Note. That in the argument of this Case, a Case was cited in this Court *Pasch. 28. Eliz. rot 344.* where a Devise was of an entire Reversion and Rent, which was void for a third part; because it was holden *in Capite*, and Debt was brought for two part of the Rent, and adjudged maintainable.

Bonner versus Stokeley, Pasch. 40. Eliz. rot. 131.

(9)
1 Rol. 895.
Post. 706.

Ant. 525.
Co. 5. 88. b.

Action upon the Case. Whereas he had sued an Action of Debt against J. S. wherein Process continued, until he was outlawed: and he thereupon sued a Cap. Uclagatum, which was delivered to the Defendant, being Sheriff of the Vill of Nottingham, by force whereof he arrested him: that afterwards he lett him at large, the Plaintiff not satisfied, and therefore had brought his Action. The Defendant demurred; and after argument at the Barr for the Plaintiff, none being there for the Defendant, the Court held clearly, That the Action well lay, because the Plaintiff hereby was delayed of his debt.

Anonymus.

(10)

Ant. 625.

Error of a Judgment in the Common Bench against three Executors: The Error assigned was, That one of them died, pending the Writ before Judgment. And Warburton moved, that this was Error, but when one of the Executors Plaintiffs die, this is no Error, for they might be severed; but the Court held it no Error, 3 H. 7. 1. 38 Ed. 3. 11.

Levett versus Hawes, Antea, Mich. 41, & 42. Pl. 8.

(11)
Ant. 619.

The Case was now moved again. And Popham was of Opinion, that the Action ought to have been brought by the Son, and not by the Father; for the promise is made to the Sons use, and the ordinary Covenants of Marriage are with the Father to stand seised to the Sons use, and the use shall be changed, and transferred to the Son, as if it were a Covenant with himself, and the damage for Non-performance thereof is to the Son; and of that opinion was Fenner, but Clinch doubted, Gawdy was absent. And Towle of Counsel with the Plaintiff cited a Case adjudged in this Court between Cardinal and Lewes, where in consideration of Marriage betwixt the Defendants Son and the Plaintiffs Daughter, the Defendant assumed to give a stock of 100 l. to his Son; and for Non-performance of that promise the Father brought the action, and adjudged maintainable. And the Court willed him to shew that President, Et adjournatur. And it was afterwards adjudged for the Defendant. Mich. 43, & 44. Pl. 3.

Walker versus Nicholson.

(12)

Covenant, and declares, how the Defendant by Indenture had bound himself apprentice to the Plaintiff for seven years, and had Covenanted, that he would not depart within the said Term, and shews, that he departed within the Term, whereupon

upon he brought this Action. The Defendant pleads, that the was within the age of 21 years at the time, &c. The Plaintiff replies, that the custom of London is, that any Infant, above the age of 12 years may bind himself to be an Apprentice, &c. And upon this replication it was demurred in Law, and the cause shewn, for that it was a departure in pleading. Flemming, the Queens Solicitor, moved, That it was not any departure, but stands well with the Declaration, and in proof thereof cited 21 H. 7. 17. and answered the book of 37 H. 6. 5. That where a custome is alledged generally, that any one may devise, &c. He cannot maintain it afterward by another custome, That an Infant may devise, for there be divers customes, and the Court seemed to doubt thereof, wherefore they would advise: but they said, That, notwithstanding this custome, a collateral Covenant shall not bind an Infant. Et adjournatur.

Quarles versus Fayrchild.

Prohibition surmising, That the Church of Brian in Cornwall was a Donative, and that King Hen. 8. was seised in Fee of the Advowson thereof, and granted it to Charles Brandon, from whom he conveys Title unto himself; and, that one Ainsworth pretending it to be presentative, and that he was Patron, presented the said Fayrchild, who sued in the Court of Arches to have Induction, and cited W. Forth, who had it of the Donation from the Plaintiff, who appeared, and appealed to the Delegates, and died, and the Plaintiff comes in pro interesse suo, and pleaded this Title, That he had this Church as a Donative, and because this plea was refused, he obtained a Prohibition: and now consultation was prayed: for it was moved, that the Plaintiff was not an actor there, and the plea is determined, and therefore there is not any cause for a Prohibition. Popham held, that consultation ought to be granted, because the Defendant claimed nothing, but Induction, which cannot any way be prejudicial to the Plaintiff: For, if it be a Donative, the Induction is to no purpose; and, if it be presentative, the other can have no remedy for the profits until Induction, nor try his right; and therefore no reason to prohibit it. And although Forth be dead, the lute is not determined, as it was alledged: for it is made to the Judge, and he ex officio is to bring in the party, who pretends interest. Wherefore the Court may well grant consultation to proceed. And so was the opinion of the whole Court, and consultation was granted. (13)

Bowes versus Paulet.

Error in an Assumpsit; wherein the Plaintiff declared, Whereas the Defendant was obliged unto him in 200 l. the which Obligation (he being indebted to the Queen) had assigned unto her; that the Defendant in consideration, that the Plaintiff would forbear to procure any process against him for the said debt until Hillary Term then next following, promised unto the Plaintiff to pay unto him 200 l. The Defendant pleaded Non assumpsit, and round against him, and Judgment for the Plaintiff. Whereupon the Defendant brought Error in the Exchequer Chamber, and assigned it, because there was not any consideration. And so held all the (14)

the Justices and Barons; for by the assignment of the debt, it was conveyed to the Queen, & therefore the forbearance of procuring of process was not any benefit or ease to the Defendant. For it might have been awarded against him for the Queen, notwithstanding the Plaintiffs promise. Wherefore the Judgment was Reversed.

Stanton versus Suliard.

(15)
1 Rol. 26.

2 Cr. 103.

2 Cr. 103.

2 Cr. 103.
1 Cr. 287.
Ante 335.

2 Cr. 103.4

Ante 335.

EROR in the Exchequer Chamber of a Judgment in the Queens Bench in an Assumpsit, wherein the Plaintiff declares, that, he being Sheriff of Essex; the Defendant assumed (in consideration the Plaintiff would levie an execution for the defendant) to pay unto him such a sum (which was allowed by the Statute of 28. Eliz. for a Sheriff to take) and upon Non assumpsit pleaded, & found for the Plaintiff, and adjudged for him; Error was brought, and assigned, that there was not any sufficient consideration, and of that opinion was Glanville Justice: for, at the Common-Law, a Sheriff ought not to take any Fees, but it was extortion, and this Statute is only to discharge a Sheriff from extortion, if he take such Fees only, as are given him by the Statute: but the Statute gives him not any means to obtain them; for he ought to execute the Writ at his peril, otherwise he shall be punished; and it is not any excuse for him to say, that the party would not pay him his Fees; and if he execute it, he cannot have an Action of debt, nor any other remedy: for the Fees given him by the Statute is not any debt in him, and so it was adjudged in the Common Bench in St. Stephen Some's Case, when he was Sheriff of London; but the other Justices and Barons held it to be a good consideration: because the execution was made at his request, and was a benefit unto him, and by the Statute a Sheriff may lawfully take his Fees, and therefore may take a promise to have them paid him; and therefore they were of opinion to have affirmed the Judgment. But then another Error was assigned; for that the action was brought by Suliard by the name of Sheriff of Essex, and the Tales de circumstantibus was returned by himself, & for this cause the Judgment was reversed.

Clyncards Case.

(16)

CLYNCARD was indicted upon the Statute of 8 H 6. The Record was ad Sessionem pacis, &c. per Sacramentum A.B. C.D. & aliorum legalium hominum de Comitatu predicto presentatum existit, &c. And it appeareth not, that it was per Sacramentum 12. for, if it were presented by a lesser number, it was clearly ill. Wherefore it was reversed.

Crouthers Case.

(16)

Ante 270.

CROUTHER was indicted, for that a Burglary was committed in the night by persons unknown, and I. S. gave notice thereof unto him, being then Constable, & required him to make Hue & Cry, & he refused, &c. exception was taken to the matter of the Enditment, because it hath been adjudged, that an Hundred shall not be charged with a robbery committed in the night, because they be not bound

bound to give attendance; no more ought a Constable to do it in the night. But all the Court held the Endictment to be good notwithstanding: for it is not like to the case of an hundred; because it is the Constables duty, upon notice given unto him, presently to pursue. And it was said, that in every Case, where a Statute prohibits any thing, and doth not limit a penalty, the party offending therein may be endicted, as for a contempt against the Statute. Another exception was taken, because he did not shew the place of the notice: and that was held to be material. Whereupon the party was discharged.

Kelley versus Walker.

Prohibition: and surmisseth, That the Defendant was a Clerk, and made an assault upon his servant, and he coming in aid of his servant, and to keep the peace, layed his hands peaceably upon him; whereupon the Defendant made an assault upon the Plaintiff, and he defended himself; and afterwards sued him in Court Christian before the Delegates, pro violenta injectione manuum super Clericum, where he pleaded all this matter, and that, if the Defendant had any hurt, it was de son assault demesne. But the Court Cristian would not allow of that plea, but proceeded to Sentence against him, and fined him 10 l. and awarded damages to the Clerk. Whereupon he brought the prohibition. The Defendant confesseth, that the Plaintiff pleaded this plea in the Spiritual Court; but he shews, that the Plaintiff was condemned there for Non-attendance upon that Sute: and traverseteth the refusal of the plea, and it was thereupon demurred. Godfrey moved for a consulation: for the Sute was well begun in the Spiritual Court, it being for the beating of a Clerk, by the Statute of Artic. Cleri. cap. 1. vid. Nat. Br. 51. And this plea pleaded there, was well triable there; as 1 R. 3. 4. and 46 Ed. 3. 32. And then the allegation, for the taking away the jurisdiction of that Court, is well traversable; as where a Cause is alledged for removing of a Sute out of an Ancient-Demesne-Court, it is traversable; as 6 H. 4. 1. and 27 H. 6. 4. Wherefore, &c. Gawdy held, that this Case was out of the Statutes of Artic. Cleri. and of Circumspecte agatis: for here the party had good cause to beat the Clerk. And, as to the Traverse it is not good; for the surmise is not traversable; but he agreed to the Case of an Ancient Demesne: For otherwise the Lord should lose his Franchises. But it is not so in the other Cases, as in the Cases alledged to remove a Plaint in a Recordare, it is not traversable; and of that opinion was all the Court. Wherefore it was adjudged for the Plaintiff.

(18)

Lowe and Terries Case.

Audita Querela. The Case was, Two were obliged in a Statute the Defeasance whereof was, That they and their wives, upon request, should make assurance of such Lands, as should be devised. The breach Assigned was, For that a Deed of Feoffment (shewing what) was offered unto Terry to be sealed, and he refused, &c. Whereupon the Plaintiff demurred; for it was alledged, that this Request to one is void: for it is to be made to both; as 30 H. 8. Condition 109. and 33. H. 8. Joynt-tenants 60. But all the Court

(19)
1 Rol. 454.

Ant. 101.

Court held, that the breach was well assigned, for although the request ought to be to both, yet they needed not to be together at the time of the request; for then peradventure he should never find them; wherefore, if he required the one at one time to seal it, it was good, and he might request the other afterwards, and it had been good: but when one refuseth, it is a breach presently, and therefore the Statute is forfeited. Secondly, it was alledged, that the plea was uncertain; for the Deed tendered was of Land in the parish of St. Magnus, and the devising of the Deed is alledged to be in Parochia St. Margaret. And the Tender and refusal in Parochia dicta, which is uncertain; for it appears not which of the Parishes is intended. But the Court held it to be well enough; for it shall be intended the Parish mentioned in the Plea, and not the Parish mentioned in the recital of the Deed.

Walsal *versus* Heath. Mich. 39, & 40 Eliz. rot. 3104.

(20)

Ant. 438.

Replevin. The Avowry was, that J. S. seised of Lands for the life of Sibyl his wife, in right of his wife, the reversion in Fee to the Baron; he, and his Feme made a Lease for years without writing, reserving 4 l. Rent per annum; the Baron, being indebted by obligation, made the said Sibyl his wife Executrix. The debtee brings debt against her by the name of Isabel, and recovered, and upon a Writ of Fieri facias a Devastavit was returned, and thereupon an Elegit awarded, and the Sheriff returned, that Isabel had 4 l. Rent issuing out of that Land, upon a Demise made by her, and her Husband, and delivers the moyety of that Rent, and thereupon he avows for the same. And it was thereupon demurred, and adjudged ill for three causes. First, Because a Lease for years by Baron, and Feme, without Deed is void against the Feme. Secondly, the recovery against Isabel is void against Sibyl, and the Sheriff cannot extend her Land. Thirdly, the Sheriff delivering the Rent without the Land, so as there is not any Reversion, it is but a Rent seck, and a bare Rent cannot be delivered ut liberum Tenementum. Wherefore, it was adjudged for the Plaintiff.

Andrews *versus* Needham. Mich. 40. & 41. rot. 2421.

(21)

Covenant. The breach was assigned in hoc; Whereas the Defendant, being Lessee for years, covenanted at the end of the Term, to leave, and yield up the Tenements well repaired to the Plaintiff, that he had not left, &c. The Defendant pleaded, That one Blunt was seised in Fee, untill by the Plaintiff disseised, who Lett to the Defendant, and afterwards Blunt re-entred, who Infeoffed I. S. who is yet seised, &c. And it was thereupon demurred, and adjudged a good barr.

Termino Paschæ,
 Anno Quadragesimo primo ELIZABETHÆ,
 in Banco Reginae

Domina Russel *versus* Gulwel.

Hill. 41 Eliz. rot. 192.

DEbt upon an Obligation of 500 l. conditioned for the performance of all Covenants, Articles, and Agreements in such an Indenture, betwixt the Plaintiff on the one part, and the Defendant on the other part, on the part of the said Gulw. to be performed. And in the said Indenture was contained. That the said Lady Russ. lett to the Defendant certain Lands, called, Eyford-Pastures, excepting a Close called Eyford-Church-close. The Defendant pleaded, that he had performed all the Covenants, &c. The Plaintiff assigns for breach, that the Defendant entred into the Close excepted, and thereof disseised her. Et li, &c. The Defendant demurred in Law. Coventry for the Plaintiff moved, that it was a breach; for the Exception is an agreement, that the Lessor shall retain it: For an Indenture is the Deed of every the parties, and therefore the disturbance of the Plaintiff from the occupying thereof, is a breach of the agreement; and therefore 11 H. 7. 22 Plowd. 134. and 14 H. 8. 15. are: That an Indenture is as the words of both parties: And this Case is put in Plowd. 67. by Montague; That, if the Lessee disturb the Lessor from enjoying the Close excepted, it is a breach of the agreement. Wherefore, &c. And of that Opinion was Gawdy. For the words in an Indenture put in the Generality, shall bind both parties, and shall be taken to be the agreement of each party; and to that purpose cited 35 H. 8. Dyer 37. 21 H. 7. 37. That a Reservation of Rent is as a Covenant on the Lessees part. Popham and Fenner e contra. They agreed, That an Exception is an agreement of the Lessee, That the Land excepted shall not pass by the Demise: But it is not any agreement, that he shall not occupy. But some times an Exception is an agreement, that shall charge the Lessee: But that is, where he agrees on his part, that the Lessor shall have a thing dehors, which he had not before. As if he lett Lands, excepting a Way, or Common, or any other profit a Prender; that is an Agreement of the Lessees, that he shall have the profit. And; if he be obliged to perform all the Covenants and Agreements: If he disturb in this, he shall forfeit his Obligation: For there the Lessor hath an interest in the thing excepted. Wherefore, &c.

P p p p

After.

(1)
 1 Rol. 431.
 Co. 11. 50. b.

Co. 11. 51. a.

Post. 675.
Ante 410.

Afterwards, it was at another time moved again, and Popham said, that he had conferred with the other Justices, and the greater part of them agreed, that this Exception is not such an agreement, as is within the intent of the condition of the Obligation; and, that the Obligation is not forfeited by this disturbance: Wherefore it was adjudged for the Defendant. And here the Plaintiff would have been non-suited, and could not; because he appeared once in this Term. And the Demurrer was argued, Wherefore, &c. Vide 11 Co. 59.

Spark *versus* Spark. Mich. 40, & 41. rot. 387.

(2)
Post. 666. 840.

T Respass. Upon Demurrer in Law, the Case was, That a Lease for life was made to I. D. by Indenture: And after by another Indenture, he lett it to I. S. for 99 years, after the expiration, or determination of the first Lease, Si tam diu vixerit; and further grants to I. S. survivor of them: that after the death of the survivor of the said I. S. the Lands shall remain to the Executors of I. S. for twenty and one years: I. D. died, and after him I. S. dies intestate: Whether his Administrator shall have this Term: or whether it ought to have vested in the Executor as a purchase, and not in the Testator? was the sole question, and for that Vide 11 H. 4. 34. 46 Ed. 3. 31. 16 Ed. 3. Quid Juris clamat, 22 14 Eliz. Dy. 309. But the Court delivered not any Opinion to the matter in Law: For, in regard of an Exception to the pleading, Judgment was given against the Plaintiff, viz. for that the Defendant pleaded his Freehold. The Plaintiff by replication shews, that a Lease was made by Indenture to I. D. for life, and after lett to I. S. for ninety and nine years, &c. and a Grant further per Indenturam prædictam, That after the death of I. D. and I. S. that it should remain, &c. And the second Lease is not pleaded by Indenture. And prædictam refers to the first, whereto I. S. was a Stranger, and therefore ill. And, for this Cause, it was adjudged against the Plaintiff. Postea, 41 Pasch. Pl. 19.

Ante. 101.

Ewer *versus* Heydon. Ante, Trin. 38. Pl. 4.

In Camera Scaccarii.

(3)
2 Rol. 49. 50.
2 And. 123.
Ante 476.
2 Rol. 47. 49. 50
Mo 360.

T He Case was now moved again, & the Error assigned in point of Law, and after argument, Anderson, Walmsley, Glanvil, Savil, and Kingmil agreed, That the Houses in W. did not pass by that Devise; for properly, Houses will not pass by the Name of the Lands: For they cannot be recovered in a Præcipe by that name. And when he names Houses in the first part of the Devise of the Land in L. in the County of Oxon, and in the second part of the Devise deviseth only Lands, and adds thereto Meadows and Pastures; that expounds what he intended by Lands, viz. Arable Land only: And it shall not be intended to pass Meadow and Pasture, unless he had added them: And the addition of them excludes Houses and Woods. And therefore it was resembled to the Case 9 Eliz. Dy. 261. A Man hath Land in a Vill, & in two Hamlets of the same Vill; and deviseth all his Lands in the Vill, and in one of the Hamlets: the Lands in the other Hamlet passeth not: But, if he had devised all his Lands in the Vill, the Lands

Lands in both Hamlets had passed. But naming the one Hamlet, it shall be presumed, that he intended not to pass any thing in the other Hamlet. Wherefore the Judgment was affirmed. But Periam and Clerk seemed to doubt therein.

Penruddock versus Clerk. 5 Co. 101.

The Judgment was affirmed. But it was now debated, whether costs should be allowed to the Defendant in the Writ of Error, by the Statute of 3 H. 7. First, Because no costs were recoverable in the first Action. Secondly, For that there is not any execution to be had, but an abatement of the Rursance. Thirdly, In regard that it appears, that the Writ was not sued for delay, but upon a doubtful matter, which hath been oftentimes argued in this Court. But notwithstanding these Reasons, it was resolved, that costs are allowable in every Case, where a Writ of Error is brought before Execution sued. And, notwithstanding that the matter was doubtful, yet there was not any Case, but that costs are allowable. But it is in the discretion of the Court what costs shall be allowed: But they must not at all deny it. Wherefore it was awarded, that the Plaintiff in the Writ of Error should pay costs. (4) Ante 234. Aut. 617.

Paget versus Crumpton.

Prohibition; For that the Plaintiff was sued in Court-Christi-an, for a Caration towards the reparation of the Church of Belbroughton; within which Parish he had Land in his hands, but was not an Inhabitant within the Parish, nor had any House therein. The Question was, Whether the custome of a Parish (which was alledged) for taring those who had Lands in their Manuel Occupation within the Parish, but inhabited elsewhere, towards the reparations of the Church, and providing of Books and Vestments be good, or not? Popham at the first, was of Opinion, that it was not good, because they, who inhabit not within the Parish, have not any benefit of the Divine Service there: There being no reason to charge them. But, afterwards a Preident was shewn, 33 Eliz. between Jeffries and Foster in this Court; where it was adjudged, That they who occupied Land within a Parish, although they inhabited in another place, should be contributory to the reparations of the Church, without any custom: because, otherwise, all Churches would fall to decay. If one might purchase the greater part of the Land in a Parish and reside else-where; all the charges would fall upon the poor of the Parish. But it was said to be agreed in that Case; If he lets the Land to one, rendring a firm Rent, and he inhabits out of the Parish, his Lessee shall pay towards the reparations of the Church, and not the Lessor. And to that Opinion all the Justices here agreed; Et Popham mutavit opinionem. Secondly, It was moved, That in this Suit, they of the Spiritual Court would try the quantity of the Land, for they were tared according to the rate of their Land. And they pretended that he hath more Land there, then in truth he hath, which is always triable at the Common Law. Sed non allocatur. For the Principal being (5) Post. 843. Co. 5. 66. b. Co. 5. 67. b. Post. 666. Woul. 173.

ing liable there; the Circumstances concerning it are inquirable; and triable there also. Wherefore a Consultation was awarded.
5 Co. 66;

Munday *versus* Martin.

- (6) **A**ssumpsit. Whereas the Plaintiff the first of November. 31 Eliz. had delivered to the Defendant three Cloths; that the Defendant in consideration thereof assumed to pay 30 l. one moiety within a year following, the other moiety within the second year ensuing. Upon Non assumpsit, the Jury found, that the delivery was on the first of August 31 Eliz. and all the residue ut prius. And, whether this was found for the Plaintiff or Defendant? was the Question: And adjudged for the Defendant: For this is not the same Assumpsit, whereof the Plaintiff had counted, but differing from it. Wherefore, &c.

Moor. 470.
Ant. 79.

Johnson *versus* Awbrey, Vicar of Bradfield in Berks.

- (7) **P**rohibition for Tithes claimed of Hay of the latter Haths; and alledges a prescription: That in consideration the Occupiers of that Meadow had used to make the Hay of the first Haths into Cocks, and to set forth the tenth Cock for the Vicar, they had used to be discharged from the payment of any Tithes for the latter Haths. Williams moved for a Consultation, because the Suggestion is not sufficient; for he doth no more then the Law requires. But the Court held it to be a good Prescription, and reasonable. And Coke cited one Nichols Case, to be adjudged in this Court, That Tithes shall not be paid for the Baking of Corn; unless it can be averred, that they were foul Bakings, and covinous, to defraud the Parson, &c.
- 1 Rol. 648. 9.
2 Cr. 42.
2 Cr. 42.
1 Cr. 403.
Ante 353.
1 Cr. 403.
2 Cr. 42.
Post. 702.
Ante 475.
363. 446.
2 Inst. 652.

Keble *versus* Brown.

- (8) **A**ssumpsit. Whereas the Plaintiff the twenty second of January, 38 Eliz. bargained with the Defendant for all his Lands in Yarmouth; and they agreed to stand to the Order of one Skarborough, for the sum, which the Plaintiff should pay, and what Assurance the Defendant should make; and, that they promised, the one to the other, to perform that Order made by Skarborough; and alledgeth in fact, that the said Skarborough, the said twenty second of January. Anno 38 Eliz. appointed, that the Plaintiff should pay such a sum for the Land; and, that the Defendant should make an Indenture of Bargain and sale of all the Lands, which the Defendant then had in Yarmouth: And shews further, that on the fourteenth of September 39 Eliz. he devised, and tendered to the Defendant an Indenture of Bargain; whereby he sold to the Plaintiff all the said Lands, which he then had in Yarmouth, habendum to him, and his Heirs, secundum Conclusionem & Agreementum prædictum. The which the Defendant refused to enfeal: The Defendant pleaded Non Assumpsit, and found against him to his Damages of 300 l. And it was now moved by Godfrey, in Arrest of Judgment: That the Indenture of Bargain and Sale is

is not warranted by the agreement; and therefore the Defendant was not bound to seal it, because it might be, that he had other Land on the fourteenth of September, 39 Eliz. then he had at the time of the agreement, on the twenty second of January 38 Eliz. And the assurance ought to have been made of the Land only, which he had at the time of the agreement. And of that Opinion were Gawdy and Fenner; for the assurance is not drawn according to the agreement: And therefore he needed not seal it, although he had not in truth any more Land on the fourteenth of September, 39. then he had on the twenty second of January 38. and in proof hereof, was cited, Mich. 4 and 5 Eliz. Dyer 218. Strodes Case But Popham e contra. For, although the Indenture varies in words from the agreement, yet if it varies not in substance, it is not material: And therefore, if he hath no more Land then he had 22 January 38 Eliz. he ought to have sealed it: For it stands with the agreement. And if he hath, he might refuse: And it ought to be specially shewn on his part: For it is not necessarily to be intended. And always, if the Assurance drawn agrees in substance with the Covenants, although they vary in words, it is not material. As if it were covenanted to assure all his Lands in D. and the Assurance is drawn by particular Names, yet it is good. Quod Gawdy concessit, but said, that here it is especially appointed, that he shall make assurance of all the Lands which he had at such a time, which differs much, &c. Therefore, &c. Et adjournatur. The matter was afterwards referred to Compromise,

Post. 682.

Post. 682.

Ant. 344.

Holiday versus Hicks.

Ante, Mich. 40, & 41. Pl. 37. & Hill. 42. Placito 25.

The Case was now moved again, and all the Court resolved for the Plaintiff: For by the Contract, and receipt of the money, the property thereof was in the Plaintiff. And Fenner said, That it was adjudged; where a Servant takes Gold from his Master, and changes it into Silver, that the Master should have restitution of the Silver by the Statute of 21 H. 8. cap. 11. and this was Hanberries Case. Therefore it was adjudged for the Plaintiff: But afterwards, Error being brought thereof, it was Reversed: For all the Justices and Barons resolved, That this action lies not, for money found, unless it be in a Bag or Chest. Postea

(9)

Ant. 638.

Post. 746.

Post. 819.

Gay versus Kay.

Trespas. Upon Demurrer, the Case was; That a Feme received Dower of the Mannor of Fremington, wherein were many Copholds for life, and a Custome, quod Dominus pro tempore might demise for one, two, or three Lives in possession, or in Reversion: And upon a Writ of Habere fac, Seisinam, the Sheriff returned, that he had delivered to the Feme the third part of the Mannor, viz. such several Tenements, reciting them particularly (whereof a Cophold Tenement in the Tenure of Alice Pilcher was one) the Tenant in Dower kept Court, and granted the said Cophold Tenement to the Plaintiff, and to two others for their Lives, Habendum post Mortem A. P. the Tenant in Dower, afterwards

(10)

1 Rol. 499.

Moor. 147.

Co. 4. 23, b.

Ante 103.

afterward died, and then A. P. died. The Lord enters, the Plaintiff enters, and the Defendant ousts him. And, Whether this Grant by Copy in Reversion, which was not executed during the Life of the Tenant in Dower, be good or not? was the Question. Williams Serjeant moved for the Plaintiff, that it was good, and said, that it was so adjudged in the Common Bench, 28 Eliz. between Brag and Bourn, and in Sir Peter Caryes, and Southcotts Case in this Court; and in 17 Eliz. Dyer 343 in Count d' Arundels Case: Wherefore, &c. And of that Opinion were Popham, and Clinch, Justices: They being only in Court, and were ready to have given Judgment accordingly: For Popham said, That it was now without Question held to be good, although it were not executed in the life of the particular Tenant, who granted, although it were doubted in the E. of Arundels Case, Trin. 17 Eliz. For the reason why Tenant in Dower, or a particular Tenant may grant a Copyhold in Reversion, as well as in Possession, is the Custome, and thereby the Grant is warranted; and therefore there is not any difference in either of the Cases: But one, who hath a particular Estate in a Mannor, cannot grant a Copyhold by parcels, or demise part, and retain the residue himself. And therefore, If a Feme be endowed of several Copyhold Tenements, she cannot grant part of them by Copy in Possession, or Reversion. Wherefore, H. Wyat took exceptions to the pleading. First, Because it is not alledged, that any the Services of any of the Freeholders was allotted to the Feme, but the Demesns, and Copyhold Tenements only: So as she hath not any Mannor, nor can keep any Court, nor Grant any Copies, &c. But Popham held clearly, that she might notwithstanding: For, although she, having no Services, cannot have a Court Baron, yet she may have a Special Court for this purpose: And it is good enough. And so it was adjudged in Sir Christ. Hattons Case for Wellingborough, where he had twenty Copyhold Tenements, parcel of the said Mannor, granted unto him by the Queen: And, because some of them refused to come to his Court, they forfeited their Copyhold. Wherefore, &c. Secondly, he moved, that the Grant is not well pleaded; for he pleads it as a Grant in Possession, and not as in Reversion. And the Record was viewed, and it was, that he granted Tenementa prædicta per nomen of a Messuage, which A. P. held for life: And it was resolved to be an incurable default: for it is not alledged, that he granted the Tenement in Reversion: And the per nomen will not help it. Wherefore, for this cause, it was adjudged for the Defendant.

Colchin *versus* Colchin.

(11)
1 Rol. 499.
2 Cr. 36.
Ante 90.
2 Cr. 36.
Co. 4. 22, b.
2 Cr. 31.
Co. 4. 23, a.
Ante 504.

T Respass. Upon a Special Verdict, the Case was; Baron and Feme, Copyholders to them, and the Heirs of the Baron; the Baron dies, the Heir, in the life of the Feme, before admittance, surrenders into the hands of two Tenants, who might take surrender by custome: And, whether it were a good surrender? was the Question: And without argument ruled to be good. And it was held by Popham, and Fenner, that if a surrender be to the use of one for life, remainder in fee, and the Tenant for life is admitted, that is an admittance for him in remainder.

The

The Lord Hunsdon *versus* Baker.

MOnstans de droit, for certain Lands in ward to the Queen, for (12)
 the Non-age of John Baker; whereof an Office was found 2 Rol. 643. 5. 6.
 for the Queen. They were at Issue in Chancery, and the Record
 sent into the Queens Bench to be tried: and now a challenge
 was made to the Array, put in by the Queens Attorney for the
 Queen: Because Thomas Kemp, Sheriff of Kent, who returned the Co. Lit. 156. 2.
 Panel, was Tenant to the Lord Hunsdon. And a Counter-Plea
 was put in thereto, that the said Sheriff was Tenant also to
 the Queen: And it was thereupon demurred, and much deba-
 ted, whether this challenge were good: For it was but for fa- Co. Lit. 156. 2. 1 Vol. 309.
 vor: And every Subject is bound in obedience to favor the Queen
 more than his Lord; and therefore the Law will not presume the
 contrary; and for this cause the challenge is not good; which is
 the reason, that the challenge for the other party against the
 Queen for favor is not good. And the Opinion of the Justices of 2 Rol. 646.
 the Common Bench was demanded, and they doubted, but
 seemed to incline that it was good: wherefore the Court advised
 until the next day; and it was then moved to be a good challenge:
 For this cause doth not concern the Queen only; but it concerns
 the Heir also for his inheritance; and he is interested therein:
 And hereunto the Court inclined: But they held the Counter-
 plea to the challenge to be little material: For although he were 2 Rol. 643.
 Tenant to both, yet he, who takes the challenge, shall have ad- Ant. 23.
 vantage thereof. And afterwards, by consent of the Council,
 the Lord Hunsdon waived the Plea, and confessed the challenge:
 Whereupon the Array was quashed, and a new Ven. fac. awarded.
 Vid. 4. H. 7. 3. & 8. 19. Ass. 8.

Boughton *versus* Gousley.

Information upon the Statute 21 H. 8. for Non-residence, The (13)
 Defendant pleaded, that he was chosen Gospeller in the Church
 of St. Pauls London, that he was resident there by reason of
 that dignity; and it was thereupon demurred: And it was argu-
 ed by Waterhouse for the Plaintiff, that this was not any dignity
 to excuse the Defendant. The Civilians divided Spiritual Functi-
 ons into three degrees. First, a Function, which hath a Juris-
 diction, as Bishop, Dean, &c. Secondly, a Spiritual Admini-
 stration with a Cure, as Parson of a Church, &c. Thirdly, they
 who have neither Cure, nor Jurisdiction: as Prebends, Chap-
 lains, &c. And they defined a dignity to be Administratio Ecclesia-
 stica cum Jurisdictione, vel potestate conjuncta, and thereby they exclude
 the two last degrees from being any dignity: A multo fortiori,
 the Common Law doth so, and to that purpose Vide 27 H. 6. 5.
 25 Ed. 3. 41. 24 Ed. 3. Br. Nosm. 25. That an Arch-Deacon is not a
 Name of dignity: And 11 H. 4. 40. That a Parson is not a Name
 of dignity: 17 Ed. 3. 31. A Provost is not a Name of dignity:
 14 H. 6. 14. A Precentor is not a Name of dignity: 27 H. 6. 3. A
 Chaplain is not a Name of dignity: And 27 H. 8. 10. is, That if
 a Vicar of St. Pauls hath a Benefice with Cure, he ought to be
 resident upon it: And that is a greater dignity then Gospeller.
 Where-

Wherefore, &c. And of that Opinion were Popham and Clinch, cæteris Iusticiariis absentibus; That it was not a Dignity within the Statute: But they would advise upon hearing the Defendants Council. Et adjournatur. Afterwards the Defendant compounded.

Fineux versus Hovenden.

(14)
Co.Lit.56.b.
11 Cont. 208.

Co.Lit.125.b.

Co. 5.73.a.

Ant. 90.

Co.Lit.56.a.

Action upon the Case. Whereas there had been a way within the City of Canterbury, leading from St. Peters Street unto a Street called Rushmarket; And that all the Inhabitants of the City had used, time whereof, &c. to pass that way; and, that the Plaintiff was an Inhabitant there; That the Defendant had made a Ditch, and erected a Pale cross that way; whereby he had lost his passage, &c. The Defendant pleaded Not Guilty; and by a Visne awarded of W. in the County of Kent, by assent of the parties (in regard the cause concerned all the Inhabitants of Canterbury) it was found for the Plaintiff. And now moved in Arrest of Judgment, that it was a mis-trial. First, because it ought to have been by a Visne of Canterbury. Vide 21 Ed.4. 31. Dyer 299. But the Court held it to be well enough; because it was by assent of the parties, which is entred upon Record. Et consensus tollit errorem. Vide 44 Ed.3. 6.44 Ass.4. Dy. 367. And Fenner cited the Lord Cromwells Case to be adjudged, that an Issue tried by another Jury then it ought to be, yet, being by assent, was well enough. Secondly, It was moved by Coke Attorney General, That this Action lies not for a private person, because it is a Common Nuisance, and is punishable in a Court Leet only, unless he can shew some special prejudice; as 27 H.8. 27. is, and so it was adjudged in this Court between Serjeant Bendlows and Kemp, That he might maintain an Action upon some special prejudice. And at S. Albons Term between Williams and Johns, it was adjudged, That where a Chappel was within a Mannor, and the Parson of the adjoining Church used to read Divine Service every Sunday for the Lord and his Tenants in the said Chappel: And for that the Parson had failed therein, the Lord brought an Action upon the Case, and adjudged, that it lay not: For so every one of the Tenants might bring the like Action, which would be inconvenient, that he should be liable to all their Actions; but he ought to be punished by the Ordinary in this Case. But peradventure, where there is not any other remedy to be had, then by Action, there every one may have his Action, who is grieved: And therefore it was adjudged between Westbury and Powel, where the Inhabitants of Southwark had a Common Watering place, and the Defendant had stopped it, the Plaintiff being an Inhabitant there, brought his Action upon the Case, and adjudged maintainable. But it is here punishable in the Leet. Wherefore, &c. And of that Opinion were Popham, Gawdy, and Fenner; That without a special grief shewn by the Plaintiff; the Action lies not. But Clinch e contra: For the stopping of it self is a special prejudice to the Plaintiff, that he cannot go that way. Wherefore it is reason he should maintain the Action, Sed adjournatur. Co. Littleton, fol. 56.

Some *versus* Taylor.

NOte, A Question was between them for an Assurance of Land. *Popbam* (15)
 said, That it had been resolved by all the *Justices* That if one be ob-
 liged to assure twenty Acres of Land, That the Acres shall be accounted ac-
 cording to the Estimation of the Countrey where the Land lies, and not *Ant. 476.*
 according to the measure limited in the Statute.

Ferrers *versus* Borough. Trin. 41 Eliz. rot. 831.

UPon a Special Verdict, the Case was, A man made a Lease (16)
 for years, upon Conditions to be performed on the part of
 the Lessor, and before the time of the performanee of the Condi-
 tion, the Lessor letts it to a stranger for years by Indenture, and
 then performs the Condition, and enters: Whereupon the first
 Lessee brings Trespals. Harris Serjeant moved, That he might
 not enter; for by his making a second Lease by Indenture, he hath
 dispensed with the Condition: But all the Court e contra. For
 the Estoppel is only between the Lessor and the second Lessee, so
 as the Lessor is at large against the first Lessee to enter upon his
 Condition, notwithstanding the second Lease. Coke Attorney
 General, being in Court, said, This Case was clear; But if one
 makes a Feoffment upon Condition, and afterwards levies a
 Fine to a stranger, his Condition is gone. And Judgment
 was then given, that the Lessors entry was lawful.

Mature *versus* West.

Assumpsit. Whereas the Defendant was indebted unto him in (17)
 such a Sum in Consideration, that the Plaintiff would
 give unto him day of payment, that the Defendant assumed to pay
 at the day, and alledges, that he gave unto him such a day, and
 that the Defendant had not paid. The Defendant pleaded Non
 assumpsit, and found against him, and now moved, that this
 was not a sufficient Consideration, for it is at the Plaintiffs
 liberty, what day he will give, so as he may give the same day,
 wherein the Assumpsit was made, if he will, and so there is not any
 benefit to the Defendant. But the Court held it to be well e-
 nough; for it is alledged, that he forbear it for such a time certain. *Ante 19.*
 Wherefore it was adjudged for the Plaintiff.

Cross *versus* Tyrer.

ERror of a Judgment in the Common Bench. The Error as- (18)
 signed was; for that the Defendant appeared per J.S. Attorna-
 tum suum, that there is not any such J.S. in rerum natura. The De-
 fendant pleaded, In nullo est Erratum, and so confelles it: Yet the
 Court held it to be no Error, for it is against the Record; for the
 Court hath it upon Record, that he appeared by such an Attorney,
 and the party is estopped to say the contrary; but he might
 have assigned, that J.S. had not any Warrant of Attorney. Where-
 fore the Judgment was affirmed.

Termino Paschæ, Anno 41 Eliz. in Communi Banco.

Spark *versus* Spark [Antea Pl. 2.] Mich. 40, & 41 El. rot. 2215.

(19)

1 Rol. 916.
2 Rol. 47.
Post. 840.
Ante 658.

1 Rol. 916.
Co. Litt. 54. b.
Post. 841.

Moor 100.
Dy. 309.

Ejectione firmæ. Upon a special Verdict, the Case was, Nich. Spark leased in fee, by Indenture lets it to W. S. for 80 years, if he live so long, the remainder after his decease to the Executors, or Assigns of the said W. S. for 40 years. W. S. dies intestate, his wife (the now Plaintiff) takes Letters of Administration, and enters, claiming the Term. Nich. Spark the Lessor (now Defendant) ousts her, Et si, &c. The sole Question was, Whether this remainder for 40 years vested in W. S. or if it failed, because he had not made any Executor? And all the Justices delivered their Opinions severally, That this Term vested in W. S. and that the Plaintiff should have it as Administratrix unto him, and it should be Assets in her hands; for the intention of the Lessor appears, that the Executors or Assigns of W. S. should have it; so by the word Assigns is intended, that W. S. may dispose, and make an Assignment thereof, and therefore it vested in him, and shall go to his Executors or Administrators, as Assigns in Law, and as a thing, which came unto them from their Testator, and not as a Perquisite by themselves. For Walmesley said, It never yet was questioned by any, that if these two Terms had been in one clause, but that they should have vested in W. S. as if it had been Habendum for 80 years, if he live so long, and for 40 years after his decease to his Executors. But it is here devised to W. S. for 80 years, if he live so long, remainder to his Executors for 40 years. Yet, notwithstanding, it is all one, and the Executor shall have it as Executor, and it shall be Assets in his hand, it being in the Testator disposed of. And it was afterwards adjudged accordingly. Note, That in this Case Walmesley said, The Difference betwixt this and *Cranmers* Case in 14 Eliz. Dyer, is, because it is there limited by way of use, and by the Party himself, so he shews his own intent, that it should not vest in himself, but in his Executors. But here the limitation is by a stranger, wherein there is not any intention appears, but that it should vest in the Lessee himself. And by this difference all the Books are reconciled. Vide postea, Tr. 43. Pl. 17.

Mallary *versus* Marriot.

(20)

Ant. 595. 659.
Ante 88.
2 Cr. 269.

Prohibition for suing for Tithes-Pidgeons. The Defendant in the Court Christian pleaded payment, and offered to prove it by one Witness, and they refused to admit thereof without two Witnesses, and he thereupon brought a Prohibition; and ruled, that it well lay; for it would be a greater inconvenience to bring two Witnesses to prove payment of every sort of Tithes, &c. Wherefore, &c.

Sir Walter Sands *versus* Lane. Mich. 40, & 41 Eliz. rot. 2483.

T Respals. Quare Averia cepit apud *Stockbridg*, & ad loca incognita fugavit, &c. The Defendant pleaded, That the Lord Sands was seised in Fee of twelve Acres of Pasture in Motfern, and he took the Beasts there Damage Felant as servant to the Lord Sands, and by his command, and from thence chased them to *Stockbridg* aforesaid, and from thence to *Feversham* in the same County, ad imparcandum, &c. Quæ sunt eadem Captio, & Effugatio, unde, &c. And traverses absque hoc, quod cepit Averia prædicta apud *Stockbridg*, prout &c. And it was thereupon demurred, and after argument at the Bar, ^{Post. 705.} adjudged for the Plaintiff, that the Plea was ill; for the Traversers is a departure from the first Plea, and repugnant to the matter, which induceth it, and, as this Case is, there needeth not any Traversers at all; for where the matter of Justification is local, there he ought to shew the Cause specially, and traverse the Place: But not where it is transitory, as it is here; but it sufficeth, although he justifies in another place, to say Quæ est eadem Captio, &c. ^{Ante 99.} Wherefore it was adjudged for the Plaintiff.

Allen *versus* Sr. Robert Salisbury.

D Fbr. The Process upon the Original were directed to the two Sheriffs of London, the Writ was returned by two, the one of them was Sheriff, the other not; and it was prayed, that it might be amended; for it is apparent to the Court, that it was the default in writing the Names, and the Return by one Sheriff alone had been good, and the addition of a strange name thereto shall not make it ill. And afterwards by Advice of all the Justices it was amended. (22)

Meryweather *versus* Stanton. Mich. 40, & 41 rot. 3316.

R Eplevin. The Defendant avows for a Rent-charge devised unto him, and doth not alledg the Land to be holden in Socage, and therefore adjudged to be ill. And it was said, That so it was adjudged in *Trevilians Case* in this Court. (23)

Sr. Humphrey Ferrers, and two others *versus* Arden.
Mich. 40, & 41. Eliz. rot. 1701.

T Respals, upon the Case, sur Trover, and Conversion of an Ox of the Plaintiffs apud *Ashton* the 10 Jun. 38 Eliz. The Defendant pleads, That at another time, viz. Termino Pasch. 36 Eliz. in the ^{Co. 6. 7. a.} Queens Bench, the Plaintiffs, and a fourth person, who is now dead, brought Trespals against *Simon Wignal* and two others of their Ox taken 11 April. 35 Eliz. that the Defendants thereto appeared, and justified as for an Heriot in right of the now Defendant: Upon which Bar the Plaintiffs demurred, and adjudged against them, and pleaded all the Record in certain, and avers, That the Plaintiff in the said action, and in this action are one (24)

Q q q q 2

and

and the same persons; that the Dr in the said action, and in this is one and the same; and, that the taking in this and in the other action be all one; and, that the Trover and conversion, supposed in this action by this Defendant only, was committed by the other Defendants with him, and they have covenantly and subtilly omitted, and left them out, and not named them in this action, and this Defendant was omitted out of the other action subtilly, they being one and the same Trespass, Thing, and Matter, and not divers, and at one and the same instant of time done. Et hoc paratus est verificare. Unde, ex quo, &c. they were acquitted in the first action, he demands Judgment, Whether the Plaintiffs to this action of the same Matter and cause shall be received to have, and prosecute. And hereupon the Plaintiffs demurred. And Walmsley and Kingsmill held the Bar to be good; because upon the first Judgment, upon Demurrer, the property of the Dr was admitted in that Defendant, in whose right the justification was. Therefore the Plaintiffs shall not have this action without new cause, and although he be a stranger to the Record, whereby the Plaintiffs were barred, yet he is privy to the Trespass; wherefore he well may plead it, and take advantage thereof. And hereto the other Justices agreed, that if it be intended for one same cause, that he well might take advantage thereof. But Anderson and Glanville conceived here, that they be not barred, for a Bar in a wrong action brought is not any Bar, where a right action is brought; as, where one delivers Goods to keep, and brings Trespass against the Bailiff for these Goods, and be barred by Verdict, or Demurrer, that shall not be a Bar unto him in bringing Detinue or Accompt. And here these actions be of several natures, and a Bar in the one cannot be said to be a Bar in the other. Walmsley agreed, that where it is a Bar in an action of Trespass, upon Not guilty pleaded by Verdict, he may have this new action; because it appears not, but that the Verdict was upon the Disposal of the nature of the Action. So it is, if such a Case appears upon Demurrer: But, where a Title is pleaded in Bar to a thing demanded, and, by reason thereof the Plaintiff is barred upon Demurrer, or Verdict, the interest thereby is bound, and the Plaintiff shall be barred from bringing a new action. Et adjournatur. And afterwards the matter was ended by Arbitrament.

Co. 6. 7. b.

Co. 6. 7. 2.

Parman *versus* Bowyer, Hill. 40 Eliz. rot. 259.(25)
Co. 5. 84. a.

R Eplevin. The Defendant abhors for Damage Fesant in his Free-hold. The Issue was upon the Free-hold, and a Special Verdict was found, that this Land is within the Mannor of Porchester; and, that within the Mannor is such a custom, that if any Tenant of the Mannor aliens Lands, holden of the Mannor by Writing or Feoffment, or devise, it by his Will, or surrenders it into the Lords hands, to the use of any other, that such Alienation, Feoffment, Devise, or Surrender præsentata fuerint, & præsentari consueverunt at some Court of the Mannor, there holden, within a year after such Alienation, Feoffment, &c. or at the next Court of the Mannor, there holden, after the year: And if such alienation, &c. were not presented in forma prædicta, tunc hujusmodi Alienatio, &c. sic minime præsentat.

Should

should be void by the Custome of the said Mannor. And they further found, that one Richard Rowle was seised in fee of that Land, holden of the Mannor, and made a feoffment of that Land to the Defendant; and, that it was not presented within the year, nor at the next Court holden for that Mannor: And, Whether this were a good custom, and the feoffment thereby destroyed for not presenting of it? Was the Question. And although it were not precisely found, that a Court was holden there within the year, or after the year; yet the Court held it to be well enough: For it is found by implication, being found, that it was not presented at the next Court after the year; which implies, that there was a Court there holden; and this is sufficient in a Special Verdict. And if there were not a Court holden, &c. then an attainr would lie. And, as to the custom, Anderson held it to be void, unreasonable, and against Law; and therefore not allowable. For here it is, that it was a good feoffment for the time, and that afterward becomes void by not presenting it. So where it was once good by the Common Law, it shall be now destroyed by the custom, and divested for the Non-presenting it. And it would be a great mischief, if the Court-Rolls should be lost; so that the presentment could not be proved, that the feoffee should lose his Estate; and that it presently should be void for not presenting it, without any other Act done, is unreasonable, and against the Rules of the Common Law. Wherefore, &c. But all the other Justices held it to be a good custom, and well allowable, and agreeable to Law: For it is good reason, the Lord should know his Tenant; for otherwise a feoffment may be so secret, that the Lord, nor others should know who was the Tenant: and, this being a Port-Town, it is reason, that it should be publickly known who be Owners therein, that they may be charged with the defence of the Mill. And it is not repugnant to Law, to destroy the Livery, which created the Estate, without other Act done; for the Livery is for the publick Conulance thereof; and this Presentment is for the better publick notice thereof; so it is a corroboration to the Law, and well stands with it, and shall defeat that feoffment, if it be not so presented. And, although the Livery be defeated, this may well be by special custom; as the General custom of the Realm is, that a feoffment *causa Matrimonii* prælocuti shall be defeated by marrying elsewhere; so a Freehold, vested in the Heir, shall be divested by the Executors Sale thereof, by vertue of a Will; so a Lease for years, upon Condition to have Fee, otherwise but a Term: If the Condition be not performed, the Fee returns without any other Act doing. So by the custome of London, Baron and Feme sells the Land of the Feme by Indenture, it shall bind the Feme as well as a Fine. So by the custome there; a Devise of Lands is not good, unless it be enrolled within a certain time. So as, by custom, a Freehold may be transferred from one to another without Livery; so it may be redevest, or defeated by custome, without doing any other Act. And therefore it was adjudged a good custom in Waymouth in the County of Dorset, where the custom of the Mill was (being a Port-Town) that a feoffment there, unless it be made in the presence of some of the Masters of the Mill, shall be void, was adjudged to be a good custom. So here,

Co. 9. 51 b.
Ante 107.

Co. 5. 84. b.

Ant. 64c.
Littl. Sect. 355.

here this custome adds here more than the Law appoints; viz. That there shall be a Presentment thereof: Wherefore it is good, and stands with the Law. And afterwards it was adjudged accordingly. Vide 5 Co. 84.

Leech *versus* Cole. Trin. 40 Eliz. rot. 1703.

(26)
2. Rol. 395.

2. Rol. 395.
Co. 3. 6. b.

Post. 828.

Ant. 21.

UPON Demurrer, The Case was. Tenant for life, remainder to his eldest Son in tail, remainder to his second Son in tail: A Præcipe is brought against the Tenant for life, and the eldest Son, Anno 12 Eliz. and they suffer a common Recovery, with vouching a common Vouchee. The eldest Son dies without issue; whether this Recovery shall bind the youngest Son, by the Statute of 32 H. 8. was the Question; or, whether it were a Discontinuance? Anderson, Walmley, and Kingsmill held, That it is not any Bar to the Estate-tail, nor to the Remainder; for the Land recovered in value shall be in the same degree, as the Land lost is; for when a joynt Præcipe is brought against Tenant for life, and him in the Remainder, it suppoeth them to be Joynt-tenants; and the Judgment shall be accordingly; and the recovery in value shall be according to the action. Whereupon he recovered in value joyntly, and so shall the Execution be also; and then the Recovery in value being accordingly, it is in the same degree as the Estate-tail was; and so no Bar to the Issue in tail, nor to the Remainder: For the cause of the Bar is the Assets recovered in value; and none shall be admitted to say, that the Assets recovered in value shall go in other manner or degree, then the Record is; As where a Recovery is had against a Mortgagor and Mortgagee, with a Voucher over, or against a Lord and his Villain, the Land recovered in value shall go to both joyntly; and although these Recoveries be but Assurances of Estates, yet they ought to go, and to be regarded, according to the Law. And the Statute of 32 H. 8. shall not make any alteration in this Case; for Walmley said, Although the Statute is, That a Recovery which is by the assent of him in Remainder, shall bind; That is to be intended a lawful assent; or in a lawful manner, as by Voucher or otherwise; but not by action brought against him as Tenant, where he is not Tenant; that is an assent, but not a regular assent, nor such as the Statute intends. And Anderson denied the Case in Plowden between Ear and Snow to be Law; and yet, there where one, who hath nothing, joyns with one who is Tenant, he is but Tenant by Estoppel; and a Tenant by Estoppel shall not draw a Reconpence in value. Wherefore, &c. *Glanville* e contra; That the Recovery is a good Bar; and that this Case here is all one with the Case of Ear and Snow, which was adjudged by good advice. Vide Dyer 152. And although the Case of Sir William Cordal is cited to the contrary, that is not sufficient to controul such a Judgment. Afterwards a Rule was entred, that Judgment should be entred according to the Opinion of the three Justices. But the Parties accorded, and no Judgment was entred. 3 Co. 6. b.

Knot and Knot executors of Knot *versus* Barlow.

Pasch. 40 Eliz. rot. 1945.

DEbt upon an Obligation made to the Testator. The Defendant (27)
pleaded a Release made by one of the Plaintiffs. The Plaintiff replies, that this Release was made without any Con-
sideration; and he, who released, was within Age at the time of
the Release made. And it was thereupon demurred, and ad-
judged for the Plaintiff, that it was a void Release, being by an
Infant without Consideration, Ant. 43.
Co. 5. 27. b.

Knight *versus* Lodg. Hill. 40 Eliz. rot. 607.

Ejectione firmæ of a Lease made by Edmund Nevel, who called
himself Lord Latimer. The Defendant pleaded, That long
time before the Lessor of the Plaintiff had any thing, Queen
Mary was seised thereof in Fee in jure Coronæ suæ Angliæ; and by her
Letters Patents gave it to Sir Thomas Hastings, and Winifred his
Wife, and to the Heirs of the body of Winifrid; that Sir T. H.
died, that Winifrid took to Husband Sir Tho. Barington; that the
Reversion descended to the Queen, who now is; that Sir T. B.
lett it to the Lessor of the Plaintiff for life, who lett it to the
Plaintiff; that afterward Sir T. B. died; and, that the De-
fendant, as Servant to the said Win. entred, and ousted the
Plaintiff. Et hoc, &c. The Plaintiff replies, that the Lessor
of the Plaintiff demised unto him for years, prout, &c. And
that the Defendant ejected him. Absque hoc, that Sir T. B. lett to
the Lessor for life, prout, &c. And hereupon the Defendant de-
murred; because he takes a Traverse without making any Title,
and without any Inducement. But the Court held it to be
well enough; for the Defendant hath avoided the Plaintiffs
Title; And the Plaintiff traverseth the chief Matter, which a-
voideth his Title; and it is not necessary to make a Title in
an Ejectione firmæ, or in Trespass: But where Land is demand-
ed, it is otherwise. Yet the better way had been to say,
that he was seised in Fee, and demised, &c. But it is well
enough as it is. (28)
Post. 891.
Ante 288.

Veal and others *versus* Road. Mich. 39, & 40 rot. 1187.

Quid Juris clamat. The Defendant pleaded, that he tempore
Levacionis notæ prædictæ was seised in Fee of the Gift of R. R. (29)
absque hoc, Quod ipse tempore Levacionis notæ prædictæ held Tenemen-
ta prædicta pro termino vitæ suæ tantum, &c. And thereupon they
were at Issue: And it was found, that he held them as Lands
entailed, after possibility of Issue, &c. And hereupon they
prayed the discretion of the Court. And the Court resolved
for the Defendant; because it appears to the Court, that the
Defendant hath an Estate privileged from Attornment, to
be made by him: And the inducement of the Traverse, is not any
Cause of forfeiture. Wherefore it was adjudged for the De-
fendant. Co. 11. 80. b.
Co. 11. 80. b.
Co. Lit. 27. b.
Mo. 211.

Morris

Morris *versus* Lutterel

Pasch. 40 Eliz. rot. 1304.

(30)

Post. 694.

Post. 997.

DEbt. Upon an Obligation, conditioned for saving harmless from another Obligation made to C. and H. for the payment of 100 l. at a day and place, &c. The Defendant pleads, That at the day of payment, he was going ad solvendum the said 100 l. to the place, to the said C. and H. and that the Plaintiff, by Con-
vin betwixt him and another stranger, caused the Defendant to be imprisoned, and to be detained in prison, until after Sun-
set of the same day, to the intent, the said 100 l. should not be paid; and that the Obligation, by reason thereof, should be for-
feited, And therefore he could not come to the said C. and H. to pay them the said 100 l. Et hoc, &c. And it was thereupon demur-
red, and adjudged for the Plaintiff, that such a bare Surmise was not any Barr.

Scryven *versus* Dyther.

Hill. 41 Eliz. rot. 1721.

(31)

Co. 10. 101. b.

Co. 10. 101.

Ant. 624.

DEbt. Upon an Obligation, made to a Sheriff, conditioned, If the said R. D. personally appeared before the *Queens Majesties*
Justices at Westminster, a die Pascha in quindecim dies, to answer to J. H. as
shall appertain, and further to do, and to receive, as the Court therein of
him shall consider in that behalf, That then, &c. The Defendant plead-
ed the Statute 23 H. 6. And this Bond was adjudged to be void:
And it was there cited, That in Sir William Druries Case it was
adjudged, That, if a Sheriff takes but one Surety, it is good
enough.

Slade *versus* Allen.

Hill. 41 Eliz. rot. 730.

(32)

Action for these words, Thou art a Murderer, and a bloody Fel-
low, and I am afraid of thee. Upon demurrer adjudged ac-
tionable.

Anonymus.

(33)

Action for words, *Viz.* The Plaintiff was one of them, that brake
Mr. Phillips's house, and did take, and carry away part of the money,
that was stolln. Walmley held, That an action lay not for these
words. For where words are ambiguous, so as they may be ex-
pounded in good, or ill part, no action then lies; for they shall
be expounded in the best sense, and it may be here intended, that
he brake the house upon just cause, and brought the money to an-
other place upon just cause. Wherefore, &c. And so was the Op-
inion of the other Justices.

Stephens versus Lewis.

A Fine was levied of a Rent to the use of another in Fee; Cestuy que Use avowed without attornment, and ruled, That he well might. Exception was then taken to the avowry, because he pleaded, That I. S. who was the Grantor, was seised of the Rent in Fee; and that he and all his ancestors had used to distrain for that Rent in the said Land, &c. and so prescribes in the Distress, and not in the Rent it self. And for this cause Anderson and Glanville held clearly, that the avowry was ill: For the Prescription ought to have been in the Rent: And that the Law was clear herein. Williams Serjeant cited a Case 14 Eliz. to be ruled; That a Prescription alledged in the Distress was good. (34)

R r r r

Termino

Termino Trinitatis ,
 Quadagesimo primo ELIZABETHÆ,
 in Banco Reginae.

Woodden *versus* Osbourn.

(1)

Ejectione firmæ. A Special Verdict was found, wherein the Case was; One Bishop being seised of divers Lands, called Hayes-Lands, which extended into two Mills, Cokefield and Cranfield, devised all his Lands in Cokefield, called Hayes-Lands, to J. his youngest Son, and his Heirs, and after, in another part of his Will, he willeth; that if J. his Son died without Issue, that his Wife should have Hayes-Lands, and dies. J. dies without Issue. And, whether the Feme shall have Hayes-Lands in Cranfield, or only that in Cokefield? was the Question. And it was resolved by the whole Court, that she should have that only, which is in Cokefield, because there was no more devised to the youngest Son. But Popham said, If the Devise had been to the eldest Son; and that, if he died without Issue, that his Wife should have Hayes-Land; there peradventure she should have all, because the eldest Son had all; the one part by devise, the other part by descent. And she should have all which he had. Wherefore it was adjudged accordingly.

Nokes *versus* James. Pasch. 40 Eliz.

(2)

Co. 4. 80. b.
 Ant. 214.

Debt Upon an Obligation, conditioned for the performance of all Covenants and Agreements in such a Lease by Indenture, whereby the Defendant had lett to the Plaintiff, by the words Demise and Grant, an House in London, and covenanted, That he and his Assigns should enjoy it without Eviction by him or any by his procurement, &c. The Defendant pleaded performance of Covenants generally; The breach was assigned, For that the Plaintiff had granted his interest to one A. and one Savery entred upon A. and lett it to one Duck for years; A. re-enters, Duck brings an Ejectione firmæ, and recovers by Verdict. Wherefore, &c. And upon this breach assigned, it was demurred in Law. Godfrey, for the Plaintiff, moved, That the sole Question was, Whether the Defendant be bound by the Covenant in Law (which is by the words Demise and Grant) to warrant it against all persons, or that it be taken away by the cypress Covenant; That he shall hold it without Eviction of the Lessor,

Ant. 214.

&c.

&c. And he held, that he was bound by the Covenant in Law, that the Lessee should have his Action of Covenant upon Ejectment, as 9 Eliz. Dyer 257. And so it was adjudged in this Court between Cheyney and Langley. And this is not taken away by the Express Covenant, vide 31 Ed. 1. Voucher 289. But Foster, not being of Counsel in the Case, put the Justices in mind of one Hammonds Case in this Court, to be ruled; that an express Covenant shall take away the Covenant in Law. And to this Opinion Popham inclined: But the other Justices did not deliver any Opinion therein: But they all held the breach to be ill, because it is not averred, that Savery entered upon a good Title: For, otherwise, there is no Cause of Action. And, although it be pleaded, that Duck recovered by Verdict; yet that is not material; for it may be upon false Verdict, and without Title. Wherefore, they all resolved, That Judgment should be entered accordingly. But it was then prayed for the Plaintiff, that he might discontinue his Sute, and so he was permitted. 4 Co. 80.

Co. 4. 80. 1.

Ante 213.

Ant. 544.

Ant. 179.

Post. 917.

Co. 4. 80. c.

Aut. 658.

Colliers Case.

Prohibition by Collier, Vicar of Bromble, to stay a Sute in the Spiritual Court, the Case was, The Church of B. in the time of H. 3. was appropriated by the Bishop of Sarum, and the Vicar was then endowed. And, upon the Endowment, the Bishop made an Ordinance by these words, Statuimus, & Ordinamus; That the Vicar shall pay annually 20 l. de Fructibus Vicariæ to the Precentor in the Church of Sarum, to the use of the Vicars Chorals within the same Church. And for this Pension a Sute being depending in the Spiritual Court, and a Prohibition thereupon brought, Consultation was now prayed; because it is a meer Pension payable in the Spiritual Court. 11 H. 4. 85. Fitz-H. N. Br. 51. Tanfield e contra, That it is an Annuity, and, that Annuity lies properly for it in the Kings Courts, and in proof thereof was cited 19 Ed. 3. Jurisdiction 28. that Annuity lies for a Pension by Prescription: And, that the Statute of Circumspecte agatis, Prohibition third, is but an Ordinance, as there it is said. So Ed. 4. 12. of an Annuity granted for Composition for Tithes, and 20 Ed. 3. Annuity 32. a Writ of Annuity was brought for such a Pension, as ours is. Wherefore, &c. But all the Court resolved, That the Sute was well brought in the Spiritual Court. For Popham and Fenner said, That there would be a difference, where the Ordinary ordains such a payment as Judgment; there the Sute shall be in Court Christian: And where the Patron and Ordinary make a Grant in the time of the Vacacion. For there they charge as an Interest. And Gawdy said, that for such a Pension Sute might be either in this, or the Spiritual Court: And that it is not denied by 20 Ed. 3. And so is Nat. Br. Whereupon Consultation was granted.

(3)

Post. 810.

2 Inst. 487.

2 Cr. 217.

269.666.

1 Vout. 120.

Sparks Case.

- (4) **E**jectione firmæ. Upon a special Verdict it was found; That a Copyholder made a Lease for a year, excepting one day, which was warranted by the custome. The Lessee being ousted by a Stranger, brings an Ejectione firmæ. And, Whether it lies or not? was the Question. And all the Court held clearly, that it well lies. Popham said, If there were not any custome, yet it should be good against all, but him, who had the Inheritance, and the Freehold: So it is, if a Lessee for will at the Common Law had made a Lease for years. Quod Gawdy concessit. For the Tenant at will is only Disseisor, and the Lease is good against him; as 12 Ed. 4. 12. is. And Fenner said, that antiently an Ejectione firmæ was but in nature of a Trespass, and no Term was recovered; and therefore it is not reasonable, but that it should lie for the Lessee. But Popham said, If a Copyhold be granted for years by Copy, he shall not maintain an Ejectione firmæ at the Common Law. Wherefore, &c. And, afterwards, it was adjudged for the Plaintiff.

Ant. 469.

Withers *versus* Drew. Pasch. 40 Eliz.

- (5) **D**ebt upon an Obligation. Upon a Special Verdict, The Case was: An Obligation was endowed to stand to the Arbitration of four Arbitrators, so as the Award be made in writing, ready to be delivered to the parties, before the fifth day of January then next following. The Arbitrament was made the fifth of January, betwixt the hours of eight and nine in the night. And whether the Defendant be bound to perform it or not? was the question. And after Argument by Flemming the Queens Solicitor, for the Plaintiff, and by Tanfield for the Defendant, the Court resolved, That it was well enough for the time: And, that the Defendant ought to perform it; for it is made before the fifth day. And, although it be made in the ninth of the fifth day, it is well enough: For this done in the night, where personal attendance of another is not requisite, are good: But here is not any personal attendance necessary, but to have notice of the Arbitrament given him, which may at any other day after, being demanded and delivered. And an Arbitration is a judicial act, which may be well done in the night. And then one Sparrows Case, 33 Eliz. was cited to be ruled accordingly. But afterwards, upon another day, Tanfield moved another Exception against the Arbitrament, that it was of a thing out of their submission; for the submission was about an Enclosure between Barton-Down and North-Down. And the Arbitrament was of an Enclosure betwixt the Defendants Down, and the Down of J. S. and it is not averred that they be all one. And then, although the Issue was nul tiel Arbitrament, yet the breach not being well assigned, there cannot be any Judgment for the Plaintiff. And this was held to be a material Exception by Clinch and Fenner, ceteris Justiciariis absentibus. Whereupon the Judgment was stayed.

Ant. 423.

Sir Richard Lewson *versus* Redleston.

Error of a Judgment in the Common Bench, in Trespas of Battery. First, Because the Writ of the Roll of Enquiry of Damages was awarded to the Sheriff of London in this manner; Ideo præceptum est Vic. London. quod inquiret, where it should be Inquirant. But it was ordered by the Court to be amended, for it was but a default in the Clerk, which is amendable. And it was moved, that the Writ was good, and therefore the Roll should be amended: But it was held, that there was not any Cause; for the Writ shall oftentimes be amended by the Roll, but not e converso. A second Error assigned was, for that the Writ is, Præcipe, &c. quod inquiret per Sacramentum proborum, &c. de Civitate prædicta. And there is not any mention of any City before. But it was held to be well enough; for it refers to the Margin. And it is sometimes de Civitate, sometimes de Balliva. Wherefore the Judgment was affirmed.

(6)
Post. 709.Post. 761.
Ant. 554.Arundel *versus* Arundel. Trin. 40 Eliz.

Error to reverse a Fine levied 21 Eliz. Tanfield assigned three Errors. First, Because the Writ of Covenant, whereupon it was levied, bare Teste the second of January 21 Eliz. and the Dedimus potestatem to take the consilience bare date the same second day of January, reciting Quod cum Breve conventionis pendet, &c. whereas it was not depending until the return, which was Octab. Hilarii. Vide 18 H. 8. 5. and 2 Ed. 4. 11. Secondly, Because the Writ of Dedimus potestatem was directed Rogero Manwood Militi, whereas he was not then Knight; and that was now confessed by pleading in nullo est erratum. Thirdly, Because the Concord is entered to be made before three Justices of the Common Bench, when as Rog. Manwood was the fourth Justice there, and not named. But, on the other side, it was thereto answered, to the first, that it was not Error; for the Writ of Covenant is pendant, when it is purchased, Vide 9 H. 6. 54. To the second, that it is contrary to the Record, and it cannot be assigned for Error, Dyer 89. To the third, that it is not Error; for a Fine may be levied before three Justices, omitting the fourth. Wherefore, &c. Gawdy and Fenner only in Court, held as to the first, that it was not Error; for the Writ is pendant presently upon the purchase thereof. For if a Stranger purchase the Land, before the return thereof, it is Champerty; as 30 Ed. 3. 18. So 10 Ed. 4. 13. if an Appeal be purchased within the year, it sufficeth, although it be not returned within the year. To the other two Errors they spake not, nor seemed much to regard them. Et adjournatur.

(7)
1 Rol. 757. 794.
2 Cr. 11.
Yelv. 33.
Ant. 275.
E.N.B. 146. C.Ant. 468.
1 Rol. 57.
2 Inst. 514. 5.
F.N.B. 146. S.
Co. 5. 47. b.Madox *versus* Dawson. Mich. 40 & 41 Eliz. rot. 555.

Error of a Judgment given in Shrewsbury in an Assumpsit. The Error assigned was, because the Entry of the Verdict was, Quod Juratores assidant Damna occasione Assumptionis prædictæ, whereas it ought to have been occasione non performance Assumptionis prædictæ. And that was held to be a manifest Error; and a Judgment cited accordingly betwixt Pain and Pie, where, in a Writ of Covenant,

(8)
Post. 781.

Covenant, the Verdict was entred, *Quod assident damna occasione Conventionis.* And the Judgment thereupon was awarded to be erroneous. But now Tanfield moved, that the Note, given by the Jury to the Clerk, was well, viz. That they found for the Plaintiff, Et Assident damna tantum. And that, which was added thereto, was the mis-entry of the Clerk, and may be amended. And so it was done here in Brome and Hares Case, and therefore he prayed a Writ to the Mayor there to certify it, and had it by the Order of Clinch and Fenner, being only there. Note, That this was after In nullo est erratum pleaded. But this Error was not assigned upon the Record, but ore tenus, &c.

The Bishop of Gloucester *versus* Veal.

(9)
1 Rol. 751.

Error to reverse a Judgment in a Quare Impedit. The first Error assigned was, for that the Plaintiff declares, that a Stranger was possessed for years, and devised it to the Plaintiff; and so by assent of the Executor had it: And he doth not say *Virtue Legationis prædictæ.* Vide 8, & 9. Eliz. Dy. 254. Secondly, Because he shews how the Church is void by the deprivation of the Incumbent: And he doth not shew for what cause; for it may be for such a Cause, as the Queen should have the Presentation; as if it were for Simony by the Statute of 31 Eliz. Thirdly, Because the value of the Church is found to be 40 l. per annum. And the Judgment is, *Quod recuperet damnum, viz. Medietatem dicti valoris dictæ Ecclesiæ per dimidium unius anni, quæ se attingunt ad 20 l.* which is not according to the Presidents. Yet none of these Errors were allowed; but the Court being full, the Judgment was then affirmed.

Pigot *versus* Garnish.

(10)
Post. 734.

Ejectione firmæ. Upon a special Verdict, the Case was such; Anthony Poulter seised in fee of this Land, devised it to Anthony his Son in Tail, with divers Remainders over, and made one Best Overseer of his Will, and willed, That he should have the Education of his Son, untill he attained to his age of one & twenty years; and to receive, set, and lett, for the said Anthony, the said Lands so given to him, and thereof to accompt to the said Anthony. And the said Best to be allowed all his Charges, which he should expend about his bringing up. Best makes a Lease for seven years in his own name, which was to continue half a year after the full age of Anthony. And, Whether this were a good Lease for any part of the Term? Was the Question: For it was found, that the said Anthony, the Son, was not yet of the age of twenty one years; and, that Best was dead. Foster moved for the Plaintiff; that this was not a Lease by vertue of the Authority; because he made it in his own name, reserving the Rent to himself: And he hath exceeded his Authority in letting it beyond the age of Anthony. And he hath not any Interest to lett; for it is appointed, That he shall be accomptable, which he should not be, if he had any Interest in the Land. Gawdy held, That Best had an Interest by this Devise, and so the Lease is good, during the Minority, and to that purpose

Co. 6. 67. b.
Ant. 252.

purpose cited. Dyer 28 H. 8. fol. 26. And the intent of the Devise here shall be construed; That he gave unto him such an Estate, as he might lett, and not that he should make Leases in the Infants name: For then the Infant might avoid them. And whereas the words are, That he may let and set for *Anthony*; It is thereby to be intended, That Leases shall be made for his benefit; and not that they shall be in his Name. And this Lease is void for the remainder after *Anthones* full age, and for no more. Fenner and Clinch held, That whereas he hath authority to let and sett, it is only at will; for there is not any other certain time appointed; and he is not otherwise authorized, then in nature of a Bayliff, to accompt; Wherefore he cannot make any Leases but at will. Popham held, That he had not any authority, nor could have any to lett in the Infants Name; for such an authority cannot be given him. For, if one deviseeth Land, he cannot appoint that another shall make a Lease for years in the name of the Devisee; and it is not any interest. But if he had devised, that one should make a Feoffment, or a Lease for life, that is an interest in the Devisee; for otherwise he cannot make Livery. But to devise, that he might bargain and sell, or lett for years, it is otherwise: For those may be without an Interest: For, when the Lease is made, he shall be in by thy Will. And so he conceived here. And, that this Lease was good, and void only for so much as exceeds the age, &c. Sed adjournatur. Hill, 42. Placito 2. 1.

Baker *versus* Brent & Robinson.

Prohibition in Chancery, to stay a Suit in the Court-Christi-
an: For that R. sued against the Plaintiff to be admitted to
the Church of C. in the County of Somerset: And B. as Patron
came in there pro interesse suo; and in the Chancery it was
pleaded to issue, Whether the Church of C. was void by the
death of one Durston late Incumbent there, which was sent
into the Queens Bench to be tried; where a Special Verdict
was given to this effect: That J. S. was seised in fee of
the Advowson of the said Church, and presented thereto the
said Durston, Anno 16 Eliz. who was admitted, instituted,
and inducted, but read not the Articles according to the Sta-
tute of 13 Eliz. cap. 12. And the General Pardon in 18 Eliz.
was found. And, That afterwards Durston was deprived by
Sentence Declaratory, for not reading of the Articles,
Whereupon he appealed, and, that depending, Baker obtained
a Presentation thereto by the Queen, and was admitted,
instituted, and inducted, and afterwards Durston died: And
then Brent the Defendant, having the Advowson, presented
Robinson the other Defendant, who sued in Court-Christi-
an to be admitted. Et si, &c. Tanfield for the Plaintiff. This
Issue is found against the Defendant. For, by his not
reading of the Articles, The Church was presently void
without any Deprivation. Then, when the Queen present-
ed Baker, the Plaintiff, who was admitted, &c. and in for six
Doneths,

(11)

Co. 5. 102.
Co. 6. 29. b.

Co. 6. 29. b.
Yelv. 27.

Post. 919.

Doneths he is Incumbent, and the Church is not void by the death of Durlston. And, Whether the Plaintiffs Presentation be right, or Corruptious, The Defendant ought not to sue in Court: Christian to remove him, and 23 Eliz. Dyer 377. where a Parson took a second Benefice, and did not subscribe to the Articles, the first Benefice was never void: And so it was Adjudged in this Court 31 Eliz. between Morrice and Eaton, where a Parson sued for Tythes; The Defendant pleaded, That he never read his Articles, and so not Parson: And Adjudged in a Prohibition, That the Church was void for this Cause. Wherefore, &c. Doderidg for the Defendant; This Benefice is not void, until Depriuation in fact. And the Incumbent continues Parson until then: 18 Eliz. Dyer 346. That notice ought to have been given of the Depriuation: Or, otherwise there shall not be any Presentment for Lapse. And, although the words of the Statute be, That the Church ipso facto is void; it is to be intended upon Depriuation, and not without Sentence. And this word Deprived requires the hand of the Spiritual Court thereto: For it is a Spiritual Act. And 10 Eliz. Dy. 275. upon the Statute of 5 Ed. 6. for striking in the Church: That ipso facto he shall be Excommunicated, is to be intended, He shall be Excommunicated, after Sentence, or due Trial and Conviction, and not before. Then here, if this Church be not void until Depriuation, This offence of not reading his Articles, is then pardoned by the Act of 18 Eliz. And the Depriuation afterwards is void. And if it were not void, but good, yet, by reason of this Appeal, it remains as Null until the Appeal be decided, and in proof hereof, Vid, 2 R. 2. Quare Impedit. 143. 2 H. 6. 25. 27 H. Gard: 118. 12 Ed. 4. 14. Dyer 105, and 240. Wherefore, &c. But all the Justices, Popham absente, resolved; That this Church became void presently by the not reading of the Articles, and there needed not any Depriuation. For, otherwise, the Statute should be defrauded, at the Ordinaries pleasure, if he would not deprive. And the Pardon works nothing. For the Church being once void for not reading, &c. he cannot by the Pardon be restored. And the Pardon shall never reach to it, because it was not a Contempt, whereof he might be indicted; but his Punishment is to lose his Benefice. Wherefore it was adjudged for the Plaintiff, Quod Prohibitio stet.

Washington *versus* Murden Executor of Light.

DEbt upon an Obligation of 1000 l. made 7 Eliz. conditioned for the performance of Covenants betwixt the Plaintiff and the said L. The Defendant pleaded performance of Covenants generally. There were in the Indenture two Special Covenants: First, That Light, after Licence of Alienation by him purchased, should enfeof two persons to be named indifferently by Light, and the Plaintiff, of all his Lands and Tenements, to the use of himself for Life; the Remainder of the one moiety to the use of Ursula the Wife of Light, for her Life, if she lived sole: And if she married, that then the use limited unto her should cease, and that it should remain to the Plaintiff and his Wife (the Daughter of L.) in Tail. And for the other moiety, that presently after the death of L. it should be to the use of the Plaintiff and his Wife in Tail. Secondly, He covenanted, that he pro ulteriori assuranca dicti Status would make all such Acts and Assurances as should be devised by the Plaintiff, or his Counsel, at the costs of L. the Covenantor. The Breach assigned was, that in 7 Eliz. at the time of the Covenant made L. was seised of an House, and two Acres in D. and of divers Lands usually occupied with them; and, that in 39 Eliz. the Plaintiffs Counsel devised a Deed of Feoffment, whereby L. should enfeof J. S. of the said House, and two Acres of Land, with the words of all Lands, Tenements, and Hereditaments, usually lett with that House, to the use of L. for Life, Remainder to the Plaintiff and his Heirs, on the body of his Wife engendered: Which Deed he tendered to L. to seal and execute, and he refused; and avers, that at the time of this Assurance devised and tendered, that both the Plaintiffs Wife and the Wife of L. were dead. The Defendant traverseth the tender, and it was found against him: And it was now alledged in Arrest of Judgment by Yelverton Serjeant, and Tanfield; That the Breach was not well assigned: First, In regard the Covenant is to make Assurance of all his Lands and Tenements; and the Assurance is tendered of an House and two Acres, &c. and he doth not aver, that they were all the Lands and Tenements of L. which he then had; for, if he should compel him to make Assurances for every several parcel, it would be inconvenient; especially, the Assurance being to be made at the costs of the Covenantor, which would be a great trouble and charge unto him. Popham and Gawdy held it to be well enough: For, if the Assurances are to be made at the costs of him, to whom they ought to be made, he may well require the Assurance to be made by parcels; for it is not any prejudice, or disadvantage to the other: But, when the Covenantor is to be at the charges, it is otherwise; yet there, if the party requires an Assurance of parcel, the Covenantor is bound to do it: But then he is discharged from making any Assurance of that which remains. The other Justices spake not to this point. Secondly, Because it is not averred, that L. purchased Licence; and he was not to make the Assurance till after Licence. Popham, There will be difference, where the first act is to be done by a Stranger, and where by the Covenantor himself: As where I covenant after the Marriage

S f f

of

(12)

of J. S. and A. D. to make such an Assurance, I am not bound to make the Assurance until after Marriage. But where the first act is to be done by the Covenantor himself, although by his Laches it be not done, yet that shall not impeach the Covenant for the Remainder. And here the Licence is to be purchased by the Covenantor. Wherefore, &c. Thirdly, Because the Assurance is devised, and tendered 39 Eliz. of all the Lands, which were then occupied with the House: And it may be he occupied more Lands to the House, then he had in 7 Eliz. and so variant. But Popham and Clinch held, that it shall not be intended, that he had more Land. And the Assurance is well tendered; and that the Defendant ought to seal it, unless he can shew, that he had more Lands afterwards purchased. Gawdy held, it shall be intended, that he had no more Land, but he doubted, whether he was bound to seal it, because it is variant from the Covenant.

Ant. 661.

Ant. 661.

Wilford Chamberlain of London(13)
Ant. 464.

Co. 4. 64. 5.

DEbt upon a Recognisance, acknowledged to the said Plaintiff in London, according to the custom there, for Dyphantage Money, and alledgeth the custom, that they had used there to take such Recognisances, and the Question was, Whether Debt lieth in this Court, or was to be brought in London only, where it is maintainable by the custom? And all the Court resolved, That it was a good Recognisance; and, the Debt lieth for it in this Court. And Coke, the Queens Attorney, who was of Counsel in the Case, said, That it hath been so adjudged in this Court between Sharrington, and Fulwood.

Shuckborough versus Biggen.

Antea, Mich. 40, & 41 Plac. 27.

(14)
Ante 632.

THE Case was moved again, and Popham and Clinch held; That this Sute is a Sute of the Party, and the burning of the hand cannot be pardoned. And Popham said, If one is attainted of Forgery in an Action upon the Statute of Forgery, the Queen cannot pardon the punishment: But the Case in 15 Eliz. Dyer, 323. when one was convicted in the Star-Chamber for Forgery, and the Queen pardoned the punishment, was good Law; for the Sutes in that Court are by Information, which is properly the Queens Sute, and not the parties; and therefore the Queen may pardon it, but not when he was convicted in an Action at the parties Sute, and so he said was the Opinion of divers Justices, with whom he had conferred. But Gawdy and Fenner held, That the Queens Pardon was sufficient to discharge the burning in the hand, and to that purpose cited 3 Eliz. Dyer 202. And upon this diversity of Opinion, they moved for a composition between the parties; and the Defendant gave forty Marks, and the Plaintiff accepted thereof, and then discontinued her Sute, and the Defendant was discharged by the Pardon, the parties Sute being determined, 5 Co. 50.

Sanders versus Norwood.

Hill. 41 Eliz. rot. 747.

WAS brought in the Tenuit against the Grantee of a Term, (15)
 by the Assignee of the Reversion, in fodendo carbones. The
 Defendant pleaded, That Willoughby, the first Lessee, had dig-
 ged, and opened a Mine of Coles, and afterwards granted unto
 him all his interest in the Land, excepting to him and his assigns,
 all the benefit and profit of the Cole-mines there, and of all Trees
 there; and that afterwards Willoughby digged the Coles there.
 And upon this Plea it was demurred, and argued by Williams
 for the Defendant, that this Exception is of the Mine it self, and
 of the Land; and then the Grantee is not punishable for this wast
 done by him. But all the Court, after argument at the Bar re-
 solved for the Plaintiff, that the action is well brought by the As-
 signee; for this Exception is void, because he hath excepted that
 which he had not to except; for, although he hath opened the
 Mine, he hath no more interest therein, then he had before, nor
 any interest in the Mine, which is but a profit a prendre out of the
 Soyl; and therefore the Exception void: And thereupon Kingmil
 said, If the Lessee sells the Trees growing upon the Land, and af-
 terwards; assigned the Term, and the Assignee cuts down the
 Trees, an action lies against the Assignee: For the Grant is void
 against him. Glanville, If the Exception had been of the Mine
 it self, I conceive that there the Soyl had been excepted, and
 it had been good, and he should have had it against the Lessee
 thereof. But, when the Exception is of the profits of the Mine,
 that is void, the Term being granted in the Land: And a Case
 28 Eliz. rot. 820. in this Court was cited to be adjudged, where
 Lessee for years granted all his Estate, excepting the Trees, and
 the first Lessee cuts down the Trees, Wast was brought against
 the Assignee, and adjudged maintainable; for the Exception was
 adjudged void, for the Trees were not lett at first, but the Soyl;
 so as he excepted a thing which he had not to except, and there-
 fore the Exception void. And the Court said, There was not
 any difference betwixt these Cases; wherefore here, the Ex-
 ception being of a thing wherewith he had not any power to med-
 dle, it is void. And therefore it was adjudged for the Plaintiff.
 5 Co. 12.

Post. 690.

Brocks versus Phillips. Pasch. 41 Eliz. rot. 1704.

DEbt as Administrator of one Box upon an Obligation. The (16)
 Defendant pleaded, That the Plaintiff was an Alien nee Co.Littl. 129.
 under the obedience of Philip King of Spain, Enemies to our So- 1 Cr. 9.
 vereign the Queen, and demands Judgment, whether he should Ant. 242.
 be answered, and it was demurred thereupon, and adjudged, that Moor. 431.
 he should answer.

Eaton *versus* Allen.(17)
Co. 4. 16. b.

Action for these words, He is a Brabler, and a Quarreller, For he gave his Champion counsel to make a Deed of Gift of his Goods to kill me, and then flie out of the Countrey; but God hath preserved me. The Defendant pleaded Not guilty, and found against him, and now alledged in Arrest of Judgment, that an Action lies not for these words. And all the Justices (besides Glanville) held, that the words were not actionable: For these words, He is a Brabler and a Quarreller, will not bear an action: And the words subsequent For, &c. be but to confirm them, or to shew the reason why he spake so; because For is not any affirmative Slander, nor an express Affirmation, but rather qualifies the force of the words subsequent, and they relate to the first. But, if the words touch a mans Profession, that which comes after the For, that may aggravate the matter, and maintain the action; as Anderson said; As if a man should say of a Lawyer, He is a Knave, For he hath dealt on both sides. So if one saith of a Chirurgion, He is a Knave; for he hath murdered such a man with his Plaisters. In these Cases an action lies, for they touch them in their Profession and Reputation, and expound what he intended by the first words. And Walmesley said, He had conferred with the Justices of the Queens Bench, and they were of Opinion also, that the action lay not. Wherefore it was adjudged for the Defendant.
4 Co. 16.

Norwoods Case.

(18)
Co. 5. 51. b.

Prohibition was brought to stay a Sute in Court-Christian for Defamation upon these words, if Master William Norwood had not gone out of Town, he should have answered for the two Bastards he begot upon two such women. He there pleaded the General Pardon, which would not be allowed. And thereupon the Prohibition was brought, furnizing this matter, and now Consultation was prayed. And all the Court besides Glanville held, That it is well grantable: For they all resolved, That a General Pardon doth not aid him for the staying a Sute in Court-Christian, which is for & ad instantiam partis: But, if it were sued there ex officio Judicis, the General Pardon would then discharge him. But Glanville held, That for this Slander an action lies at the Common Law: for the begetting of Bastards is punishable by the Statute of 18 Eliz. And the Statute having given a remedy, takes away from the Spiritual Court its power. But all the other Justices against him herein; for, where a remedy for a punishment is given by a Statute, that shall not take away the punishment that was before. And questionless there is not any punishment by the Common Law, where one is injuriously slandered in this Case. Wherefore a Consultation was awarded.

Anonymus

Anonymus, Hill. 41 Eliz. rot. 358.

Covenant. The Breach assigned was in two Covenants, and it appeared, That for the one he had no cause of action, and for the other a good cause; and issue was joyned upon both, and found for the Plaintiff in both, and Damages intirely assessed. The Plaintiff could not have Judgment. (19)
Co. 10. 130. b.

Anonymus.

Prohibition, To stay a Sute in the Admirals Court, The Case was, That a Frenchman had his Goods taken from him (viz. Salt) upon the Sea, which was afterwards sold to the Plaintiff, being Owner of the Ship (the Party incharged in the journey, but not present at the taking) at Plymouth. And he sued him for the Salt in the Admirals Court, and had Sentence against him, who brought the Prohibition; because the Contract for the Salt was upon the Land, and suable at the Common Law: And there ought not to have been a Sute for it in the Court of the Admiralty: But all the Court resolved: That the Sute in the Admirals Court was well brought; for when the Good are tortiously taken upon the Sea by Piracy, it gaineth not any property in them against the Owner. And being sold upon the Land, unless it were in a Market-overt, doth not alter the property: And when the Owner found them in his possession, he may well sue in the Admirals Court; for, although the Court of Admiralty hath no authority to meddle with things upon the Land, yet when the original cause ariseth upon the Sea, and other matters happen upon the Land, depending upon the original cause, those Matters, although done upon the Land, shall be tryed in the Admirals Court: As 19 H. 6. 7. So an Obligation to appear, and answer in the Admirals Court, or to stand to a Sentence in that Court, is suable there; Especially in this Case, this Sale, although it were in a Market overt, being void, because it was made to the Owner of the Ship, and Party to the Charge thereof, and so to be intended to be Party to the Tort. Wherefore a Consultation was awarded. (20)
Hob. 78.
Hob. 79.
Rol. 533.
Yelv. 135.
1 Wmsl. 173.

Smith *versus* Shelbourn.

Pasch. 41 Eliz. rot. 1001.

Prohibition. The Case was, a Parson being sick, the Father of Smith came with his Son to the Patron, and contracted with the Patron in the presence of his Son, for the next avoidance of the Church, and agreed to give unto him for it 100 l. who thereupon made a Grant unto him of the next Avoidance accordingly. The Parson dies, the Father presents his Son, who was admitted, instituted, and inducted, and now was sued in the Spiritual Court, to be deprived for Simony upon this Cause, and Smith brought a Prohibition, alledging therein the General Pardon of 35 Eliz. which was after his presentation, admission, institution, and induction, wherein Simony is not excepted; and it was thereupon demurred, and, after argument at the (21)

Roff. 789.
1 Cr. 353.

Post. 789.

1 Cr. 353.

Post. 789.

the Bar resolved, that the Prohibition well lay; and first the whole Court resolved, that, although the General Pardon discharge the Punishment for Simony, yet, if the Parson comes in by Simony, it is examinable by the Ordinary; for he ought to provide, that the Church be not served with corrupt persons; and if he finds Simony in any, he may well deprive him for that cause. And that made, that the Church was never full of him, and made him no Parson ab initio; and the Pardon doth not enable him to retain it. But all the Justices, besides Anderson, held, that in this Case there is not any Simony: For the Father might buy the advowson, and present his Son: And it is not Simony in any to buy an advowson. And, although the Son here was privy thereto, yet it is not material; for it being no offence in the Father, who was the principal, it cannot be an offence in the Son, who was but accessory; for there cannot be a particeps criminis, where there was not any Crime committed. But if the Parson himself had contracted for a Benefice, to the intent another should present him, that is Simony. But the Father is bound by nature to provide for his Son, and therefore his buying an advowson, with an intent to provide for him, is not any Simony; therefore the Prohibition is well granted: Otherwise, under colour hereof, every Presentment might be drawn into Question in the Spiritual Court. But Anderson held, that a Consultation should be granted in this Case, because this Contract by the Father, with an intent to present his Son, being in presence, and with the Sons privy, made it Simony in him, and he is deprivable: And, although the Law is, that if such a Simoniackal Contract be proved, and the Incumbent be deprived, that the Church is quasi always void, and that there shall be a Presentment by Lapse to the Queen; yet that doth not make the Right of Patronage to come into Question; because the Deprivation ariseth from the Patrons offence: Wherefore, &c. But if in this Case the Father had bought the Benefice, with an intent to present the Son, if it were without the privy and consent of the Son, it had not been any Simony. Wherefore, as the Case here is, he held it to be Simony, and the Consultation grantable. But, notwithstanding, the other three Justices being against him, it was adjudged, that the Prohibition should stand.

Windsor *versus* the Arch. Bishop of Canterbury, Loveday
and Fletcher, Pasch. 41 Eliz. rot. 513.

(22)
Moor. 558.
Co. 5. 102. a.

Quare Impedit. For the Church of Buscot in the County of Berks, and County, Now Loveday the Defendant was seised in Fee of the Mannor of Buscot, whereunto the Advowson of two parts of the Church of Buscot (viz. to present to the said Church at two Turns together) was appendant; And, that one Stonechurch was seised in Fee of the Mannor of S. whereto the advowson of the third part of the said Church (viz. to present at every third Turn) was appendant; And shews how the said Stonehurst presented one Parry to that Church in his Turn: And that afterwards Parry, in the time of Queen Mary

Mary was deprived; and then Loveday presented in his first Turn one Akres; and, that Akres died: And, that afterwards Loveday presented in his second Turn one Pullen, who died; and, that he, who had the Grant of the next Avoidance, by Grant from Stonehurst, was to present: And, that the Defendant had disturbed him, &c. The Arch-Bishop pleads, that he claims nothing but as Ordinary. Loveday the Patron pleads, that Stonehurst presented Parry, who died Incumbent; and, that afterwards he presented Pullen in his first Term, and he died; and then he presented the Defendant in the second Turn, Absque hoc, That the Church became void by the Deprivation of Parry. Fletcher the Incumbent, pleaded, confessing the Presentment of Parry; and shews how he was deprived in Queen Maries Reign, Quia Conjugatus, and because he was a favorer of the Religion professed in the time of Edward 6. and, that Loveday the then Patron presented Akres, as is before alledged: And, that in 1 Eliz. this Sentence of Deprivation of Parry was by the high Commissioners repealed, and Parry restored, who afterwards died Incumbent, and then Loveday presented Pullen, &c. And, that after his death he presented the Defendant, as in his second Turn, and traverseth, Absque hoc, that the Church was void by the death of Akres. And it was thereupon demurred in Law. And, after argument at the Bar, the Court resolved for the Defendant. The point in Law was, Whether this Presentment of Akres, upon the Deprivation of Parry (this Deprivation being afterwards repealed, and Parry restored) shall be said to be a sufficient Presentment for one Turn; so as he afterwards may not have his second Turn? And all the Court resolved, That it was not: For when the Sentence of the Deprivation was repealed, and Parry restored, it is as if he never had been deprived, and the Presentation in the interim meerly void, and as none, and as if a Presentment had been when the Church was full. And now A. is adjudged, as if he never had been Incumbent, but an Intruder. And such illegal Presentment can never make a Turn in the Patron. But, if the Incumbent presented be afterwards deprived for incontinency, or other such cause, it is otherwise. And as to the Travers, which was alledged to be a principal cause of the Demurrer, for that the Presentment ought to have been traversed, and not the manner of the Avoidance, it being unusual in a Quare Impedit, all the Court held it to be well enough; for it is the substance of the matter, as this Case is, and not the Presentation, and therefore it is traversable. And if the Presentment of A. in this Case had been traversed, it should have been found against the Defendant: And therefore of necessity the Defendant ought to traverse the manner of the Avoidance. And the difference is betwixt an Assise of Darraigne Presentment and a Quare Impedit. For in an Assise of Darraigne Presentment the last Presentation is traversable: But in a Quare Impedit the Traverse shall only be upon the matter, as appears in 6 Ed. 3. Wherefore, &c. But the whole Court held the Declaration to be ill; in that he declares, that one had the Advowson of the third part of the Church, and another two parts thereof: For it appears, That the one had the entire Church for the time, when he was to present Sole: And then when he declares, that one had the Advowson of two parts of the

Co. 5. 102. b.

Co. 5. 102. a.

the Church, viz. to present to two Turns, it is repugnant in it self; for, by his own shewing, it is to two parts of the Advowson, and not to the Church: For the moyety, or third part of the Church is, where Parcenary, or Joynt-tenants present jointly; every one hath a part of the Church: But where two Churches are united, and consolidate, and the Patrons agree to present the one two Turns, the other a third Turn, as this Case is, there either of them hath the entire Church for that time. And, as Walmsley said, the difference is well expressed in 31 Ed. 3. Droit 68, and 69. Wherefore it was adjudged for the Defendant. 5 Co. 102.

Smith *versus* Warren. Hill. 41 Eliz. rot. 417.

(23)

DEbt upon an Obligation, conditioned for the performance of certain Covenants in an Indenture, wherein W. had lett Land to S. for years, and covenanted, That he should enjoy it during the Term. Upon Demurrer, the Case was; That Tenant for Life levied a Fine to him in Reversion in Fee Sur conuſance de droit come ceo, &c. and the Uses of that Fine were limited to the Conuſee, and his Heirs, upon Condition, that he should pay to the Tenant for Life annually, during his Life, 4l. per annum. And, if there were any Default of payment thereof, that it should be to the use of the Conuſor for his life, and for one year over. The Conuſee made a Feoffment to W. who made that Lease for years to the Plaintiff. The 4l. was not paid, nor demanded, the Tenant for Life entred upon the Plaintiff. And, Whether this were a Breach of the Covenant? was the Question: First, Whether this Fine levied be a Surrender? And if so, Whether Surrender may be to an Use? And it was held, that it was not any Surrender: for the Fine implies a Gift in Fee-simple: And every one, who is Party to a Fine, shall be estopped to say the contrary. But it was said; that if it were a Surrender, yet it well may be to an use: for it is a Conveyance, tried, and charged with this limitation of an Use. Secondly, Whether there was any Breach of the Condition, without Demand of the Rent? And it was held, that it was: For it is not properly Rent; but quasi a Sum in Gross, and is not issuing out of the Land. For there is not any place appointed for the payment thereof; and therefore the Conuſee is bound to seek out the Conuſor, to pay him. Thirdly, In regard it being a thing, wherewith the Estate is charged, and the Lessee might have paid it (although he be not Tenant of the Free-hold) because it is in salvation of his Estate (as it was agreed by all the Justices, that he might) this default of payment being quasi in him, he being Tenant in possession; Whether it be a Breach of the Covenant, whereof he himself may take advantage? And all the Justices (besides Glanville) held, that it was: Because there is not any Covenant, nor, apparent intent, that the Lessee should discharge it. And the Covenant is absolutely, that he shall enjoy it: And this Condition is properly to be performed by him, who hath the Free-hold. Fourthly, Whether this Feoffment hath destroyed the future Use, which is to arise for Non-performance of the Condition? For, if so, the Entry of the Tenant for Life

Life is not Congeable. And it was resolved, that it had not; for it is a Charge or Burthen upon the Land, which goes along with the Land, in whose soever hands it comes. And, being limited to the Conusor himself, Glanville conceived it to be a Condition unto him; But if it had been to a Stranger, to have arisen upon such a Condition, the Non-performance thereof had been a springing Use unto him; for now it is meerly a Cye and Charge upon the Land, which is not destroyed by the Feoffment: and, although it be a future Use, it may be well raised upon Non-performance of the Condition; as it was adjudged in Plowden, Bracebridges Case. Wherefore it was adjudged for the Plaintiff.

Deans Case.

DEan Citizen and Merchant of London, had called one Garret Alderman of London, Fool and Knave upon the Royal Exchange, in the presence of divers, and was therefore committed, by the Mayor unto Newgate, because he would not find Sureties for his good behavior. And he, by an Habeas corpus cum causâ, procured himself to be removed into the Common Bench; and there all this Cause was certified; and, that the Custom was, upon such a Misdemeanor, to commit any Citizen to prison, &c. Walmley; The Justices of Peace use, under colour of their Authority, to require the good Behaviour of every one at their pleasure, and, if they refuse, to commit them to prison. But, I conceive, if they have not good Cause to require Sureties for the good behavior, and the party refuse, and is committed to prison, Faux Imprisonment lies; for the Statutes of 34, & 35 Ed. 3. which gave unto them that Authority, is principally for vagrant persons, and such like; and it is not intended for every private abuse. Anderson; There be divers Statutes, That for private discourtesies one shall not be imprisoned; and therefore I see not how this Custom can be maintained. A man may be imprisoned for a Contempt done in Court, but not for a Contempt out of Court: add therefore he ought not to have been committed for such a private abuse. And, by Assent of the whole Court, he was discharged.

(24)

St 35. E. 3. c. 1

Ant. 78.

Piper *versus* Wyder. Pasch. 36 Eliz. rot. 83.

FOrmedon. The Tenant vouches the Heir of one John Godfrey within age, and prayed, That the Parol Demurrera. The Demandant counterpleads, that neither the said John Godfrey, nor any of his Ancestors, ever had any thing in Tenementis prædictis, &c. And hereupon they were at issue. And the Jury found, That the said John Godfrey was joyntly seised in Fee with another, who infeoffed the Father of the Tenant, &c. And it was clearly holden by the whole Court, That this Verdict was found for the Tenant. For, if this Joynt-tenancy had been pleaded by way of Counterplea, it had not been a Counterplea; as appears 8 H. 7. 5. wherefore a fortiori being found by Verdict: For there shall not be any Counter-plea, but where it is thereby proved, that he, who is vouched, had not such an Estate, whereof he could make a Feoffment: but a Joynt-tenant may make

(25)

Ant. 506.

C t t t

a Fe-

o. Litt. 186. a. a Feoffment of the Entirety with Warrant; for he is leased per my & per tout. And, although it be a Disselin of the Hoyety, yet the Feoffment is good, and the Warrant well annered; and when they joyn in a Feoffment with Warrant, every one warrants the Entire; and that may here be a Counterplea to the Warrant, but not to the Voucher. Wherefore it was ruled accordingly.

Lushford *versus* Sanders. Pasch. 41 Eliz. rot. 2592.

(26) **W**ASTE by the Heir against the Defendant, Executor of a Lessee for years. The Case, upon Demurrer, was; One made a Lease for years by Indenture, wherein was this Proviso, Provided always, and it is agreed between the Parties *Quod licitum foret, & esset* to the Lessor, and his Heirs, at any, and every time, during the term, to Fell, Sell, Shrub, Cut down, and carry away all the Wood, and Trees, and all the Timber, Growing, Standing, or Being upon any of the Premises. And, Whether this were any Exception out of the Lease of the Trees, or but a Covenant? was the Question: for if it were an Exception, they never were lett; and then Waste lies not. And, after Argument at the Bar, all the Court resolved, That it was not an Exception of the Trees, but a Covenant only. Wherefore it was adjudged for the Plaintiff. Vid. 3 H. 6. 45.

Armiger *versus* The Bishop of Norwich and Holland.

Pasch. 41 Eliz. rot. 619.

(27) **Q**UARE Impedit for the Abbowlson of North-creek in the County of Norfolk. Upon Demurrer, the Case was, That the Bishop of Norwich, after the Statute of primo Eliz. cap. which made Leases and Grants by Bishops of their Possessions void (unless Leases for Twenty one years, where the Ancient Rent was reserved) granted that Abbowlson to the Plaintiff for Twenty one years, which was confirmed by the Dean and Chapter: The Abbowlson being appendant to the Mannor, which he had in right of his Bishoprick. The said Bishop was afterwards translated; and, during the time that the Temporalities were in the Queens hands, the Church became void; another Bishop was afterwards elected: the Deen presented Holland the Defendant, who was admitted, instituted, and inducted: against whom, and the Bishop, the Plaintiff brought a Quare Impedit. And they pleaded the Statute of primo Eliz. And, Whether this Grant of the Abbowlson be within the Statute of primo Eliz. (because it is not such an Hereditament, whereof there can be any annual profit, nor any Rent reserved) was the Question. Secondly, Whether this Grant be void against the Queen as well as against the Bishops Successor? And, after Argument at the Barr, it was resolved by the Court, That this Grant was void by the Statute; because it is parcel of the Possessions and Hereditaments of the Bishoprick; and therefore void, as well against the Queen as against the Successor; for the Statute made it void to all purposes: but yet it is not so made void, but that it is good during the time, that, he who granted it, continues Bishop; and it shall bind

bind himself, so as he shall not avoid it. Wherefore it was adjudged accordingly for the Defendant.

Humphrey *versus* Barns. Pasch. 41 Eliz. rot. 752.

DEbt upon a Bill Obligatory of 13 l. 13 s. 4 d. The Defendant (28)
pleaded a Forain Attachment in Barr, made in London by one Moulton, to whom Humphreys was indebted, of 13 l. in his hands, after the Original Writ purchased, and before the Return of the Exigent, or Appearance thereupon, and before he had any notice of the Sute in the Common Bench. And it was thereupon demurred, and adjudged to be no Plea. First, Because it appeareth not, that the 13 l. attached was parcel of the said 13 l. 13 s. 4 d. now in demand. Secondly, Because this Attachment was made, whilst the Sute was depending in the Common Bench; and the Queens Court being possessed of a Cause, it is insufficient, and cannot be: for, as Walmley said, The Sute depending in the Queens Court, the said Court is interested therein; and it is against the dignity thereof to have an inferior Court meddle with it: also, whilst the Sute is depending, it is quasi in custodia legis, and cannot be meddled with by another: As the Law is, where one is to be attached by his Goods at the Common Law, if the Goods be distrained and impounded, they cannot be attached. Wherefore it was adjudged for the Plaintiff.

Ante. 157.

Cropwel *versus* Peachy. Pasch. 41 Eliz. rot. 947.

DEbt upon an Obligation, conditioned for the performance of (29)
Covenants within a certain Indenture, whereof some of the Post. 749.
Covenants were in the affirmative, and some in the negative. Co. Litt. 303. b.
He pleaded the Indenture, & performance of all the Covenants therein generally. And it was thereupon demurred, and without argument adjudged for the Plaintiff.



Termino Michaelis,
Quadragesimo primo & Quadragesimo secundo
ELIZABETHÆ, in Banco Reginae.

Barker versus Bourn. Hill. 41 Eliz. rot. 487.

(1)



Rror; for that in Debt against the Heir, upon an Obligation made by his Father, the Judgment being against him by nihil dicit, execution was awarded by a Capias ad satisfaciendū, whereas the Lands only descended unto him, ought to have been put in Execution, and not his body, nor his other Lands. And Error for this Cause was brought, Tam in redditione Judicii, quam in redditione Executionis. And now Towse moved, that is was Error; for the difference is where the Heir pleads a false Plea, there his body, and all his Lands are liable to the Execution, as for his own Debts; but if he be condemned by default, or acknowledgeth the action, the Execution shall only be of the Lands descended unto him; as so is 6, & 7 Ed. 6. Dyer 81. Gawdy held it not to be Error; for the Judgment and Execution shall be general, unless the Heir acknowledgeth the action, and shews that he hath so much by descent; as it was in Trewinnions Case, Plowd, 440 & Dyer 344. But when the Heir will not shew, that he hath so much by descent, and so loseth the benefit, which the Law gives unto him, it shall be intended, that he hath Assets to satisfy. Clinch agreed with him. Popham and Fenner were absent. Wherefore Rule was given, that Judgment should be affirmed, unless other Cause was shewn by such a day. And Tanfield said to the Court, that in 19 Eliz. in the Common Bench, in one Lyons Case, upon search of all the Books and Presidents, it was resolved, That in this Case Execution shall be awarded against the Heir, as for his proper Debt. And Gawdy said, That, in this Case, the Error is well assigned in the Judgment; for, if it be Error, it is in the Judgment.

Wakefield versus Hodgeson and others.

(2)

ERror to reverse a Fine. The first Error assigned was, That the Fine was levied of a Reversion of divers Tenements in London in Golden-Lane. The Conuſee brought a Quid juris clama, and, hanging that, died. The Heir brings a new Quid juris clamat. And the Defendant in part claimed fee; and, for the other, was

was ready to attorn; and the Plaintiff accepted thereof, And, to the Remainder it was awarded, that the Defendant eat inde fine die; and the Fine was engrossed, and the Proclamations made. The first Error assigned was, for that the Conusee only is to have the Election, whether he will levy the Fine with Proclamations or not; and, he being dead, the Fine ought not to be with Proclamations at the Heirs Sute; as 8 Eliz. 254. is. But all the Court resolved to the contrary; for the Heir hath as well Election to have it with Proclamations, as the Ancestor; for it is for his benefit, and the Statute doth not restrain it. And the reason of 8 Eliz. 254. is, why the Proclamations there made were stayed, was, because a Formedon was depending; and that was only in the discretion of the Court. A second Error assigned was, because the Judgment in the Quid Juris clamat is, That the Fine be engrossed for part onely. But here it is engrossed, for the whole. But the Court resolved, it was well enough; for the bringing of the Quid Juris clamat is not material; for the Conusee might have had the Fine engrossed, without suing a Quid Juris clamat; and the suing thereof is only for his advantage; for without suing thereof he could not have had any Attornment: Wherefore although the Judgment thereby is, that the Fine shall be engrossed for part; yet the party, if he will, may have all the Fine engrossed; and the Proclamations in the time of the Heir, after the engrossing, are well enough. A third Error assigned, ore tenus, was; for that the Fine is levied of Tenements in Golden-Lane in London; and there is not any Mill, Hamlet, or Parish mentioned. Sed non allocatur: for the Court said, that it appeared not unto them, but that might be a Mill, or Hamlet; and it may well be so intended, unless it had been so alledged, that the party might have answered thereto. Wherefore the Judgment was affirmed.

Co. 3. 86. b.

F. N. B. 147. 2.

Foxley *versus* Annesley.

ACTION for Trover, and Conversion of twenty Sheep. The Defendant pleaded, That the Queen was, and yet is seised of the Mannor of Newport-pannell in the County of Bucks; and that malefactores ignoti stole those Sheep from the Plaintiff, and brought them within the same Mannor, and there waved them; whereupon the Defendant, as Bailiff to the Queen of his said Mannor, seised them as the Queens Goods, to the Queens use, which is the same Trover, and Conversion, and prays in Aid of the Queen. Whereupon the Plaintiff demurred specially. Crew for the Plaintiff moved, That the Plea was not good. First, Because it concludes with an Ayde prier in this Action, which being personal, and possessory, and for a Chattle only, is not good, and herein Ayd is not grantable. Vide 11 H. 4. 14 H. 6. 5. Secondly. He justifies for a Seisure, and answers not to the Conversion, which is the chief matter in this Action: And the Seisure is not any Conversion; and therefore he ought to have answered or traversed it; as 7 H. 6. 13. in conspiracy he justifies, that he gave Evidence to the Jury by command of the Justices, and it was ruled to be no Plea; for that is not any Conspiracy. Thirdly, the Plea is not good; For, when one justifies a Seisure of Goods, as waved, he ought to

(3)

Co. 5. 109. 2.

Yelv. 199.

to shew, That pursuit was made after the Felon, and that he waved them; for otherwise they be not waved. Brook Elstrays 9. 29 Ed. 3. 29. 44 Ed. 3. 19. and so is 37 H. 8. Wherefore, &c. Gawdy and Popham held, that the plea was not good; for that the Conversion was not answered: He also ought not to have Aid, because it is but a Chattel; and he hath not alledged, that he hath answered for them to the Queen; but, that he needed not to have alledged any pursuit of the Felon. For Popham said, it ought to be alledged, that the Felon fled, for that he was in fear to be apprehended, and for that Cause waved them. For, if a Felon carries away Goods which he stole within a Manor, and leave them there, and at another times goes away, the Goods are not waved; for waving shall be, where he hath the Goods, when he flies for fear to be apprehended for them; and the reason of the forfeiture is, because there was a default in the Party robbed; that he did not pursue him, to have taken the Goods from him; and therefore the Law gives them to the Queen. But it is not necessary, that he be pursued for the Felony, when he leaves the Goods, so that he flies for this cause. But afterwards, because the Plea was not in Bar, but concludes, Si Regina inconsulta, &c. They all resolved, that the Judgment could not be in matter of Bar: and, because Aid was not grantable in this Case, it was awarded, that he should answer without Aid. And so it was adjudged. 5 Co. 105.

• Blandford *versus* Andrews.

(4)

Co. Litt. 206.

Co. 8. 91. b. 2.
Ante 361. 672.

DEbt upon an Obligation of 80 l. conditioned, that if the Defendant procured a Marriage to be had between the Plaintiff, and one Bridget Palmer, at or before the Feast of St. Bartholomew then next following; that then &c. The Defendant pleaded, that the Plaintiff, before that Feast, came to the said B. P. and called her Whore; and told her, that if he married her, he would tie her to a Post; and used other opprobrious words unto her; by reason whereof the Defendant could not procure the said Marriage before the said Feast. Whereupon the Plaintiff demurred. Williams Serjeant moved, That this was not any Plea; for he hath not shewn, that he used his endeavor to procure the Marriage, for it may be, that, notwithstanding these words, they would have entermarried. And of that Opinion was all the Court; for the Defendant ought to shew, that there was not any default in him; and, that he did as much as in him lay to procure it; otherwise he doth not save his Obligation; and these words spoken before the day, at one time only, be not such an impediment, but that the Marriage might have taken effect. Wherefore it was adjudged for the Plaintiff.

• Watts *versus* Brayns.

(5)

Yelv. 13.
Jones 425.
1 Rol. 536.
2 Rol 596. 7.

APpeal of the Murder of her Husband at Feversham (which is within the Cinque-Ports) the Writ was directed to the Lord Cobham, Warden of the Cinque-Ports; who returned the Writ, which was filed, and the Body of the Defendant brought to the Bar. The Plaintiff declares against him. And

And Godfrey for the Defendant, demanded Oyer of the Writ, and Return, which was read; and then he excepted unto it, in regard it should have been directed to the Sheriff of Kent, who is the immediate Officer to the Court, and not to the Warden of the Cinque-Ports. Tanfield moved, That if the Writ were not well directed, all was void, as if it had been directed to J. S. Wherefore because he is informed, that the Murder was apparent, and the Prisoner at the Bar, he prayed, that he might be committed to the Marshalsey, and that he might declare against him in custodia Marefchalli; for this Writ is as none, and void; and therefore differs from the Case of the Writ of Appeal against the Servants of Sir George Fearmor, directed to the Sheriff of the County of N. which was ill, for a defect therein. But, the Writ being such as it was, the Parties appearing thereupon, it was held; that they should not be committed, nor a Declaration against them in custodia Marefchalli; but here this is not a Writ at all: wherefore the Justices would advise hereupon. And the next day, Tanfield, at his peril, declared against him in custodia Marefchalli. And the Defendant maintenanant pleaded in Abatement of the Writ, that the Plaintiff had a Writ of Appeal depending against him; and pleaded it in hæc verba. And, by the Opinion of the Court, he was compelled to plead over to the Felony; for so are all the Presidents of the Court. And, upon this Plea, it was demurred in Law. Resid. post. 778.

Post. 910.

2 Inst. 557.

Ant. 605.

2 Inst. 557.

1 Rol. 536.

Lewen *versus* Cox. Ante, Mich. 37, & 38 C. B. Pl. 62.

Pasch. 41 Eliz. rot. 270.

UPON a Special Verdict, The Case was; Lewen devised Lands to his two Sons equally, and their Heirs; Whether it were a joynt Estate in the Sons, or, That they were Tenants in common? was the Question. Coke Attorney General, shewed That they were Joynt-tenants. For first, It is to be agreed, That a Devise to two and their Heirs, is a joynt Estate in them, notwithstanding the Opinion in 30 H. 8. and so it hath been oftentimes agreed: And it is as clear, that this word equally, by the Rule of the Common Law, unless it be in a Will; alters not the Estate; but the intent of the Devisor is to be searched: and, as to that, he conceived, that it cannot make a Tenancy in Common in the Devisors intent; for it signifies only an Unity, and Identity of Estate, and there cannot be a more equal Estate, then to them joyntly: and when the words of a Devise do not shew any apparent intent to change the Estate, which the Law limits, it would be violence to the words to extort them to another sense. The manner also of placing the word equally is to be observed: but, if it had been to them, and their Heirs equally, so as the intent might have been collected, that their Heirs should have it equally, it would peradventure have been stronger: for then their Heirs might not both have had it, if it were a joynt Estate. And therefore 29 Eliz. betwixt Pettywade and Coke in this Court, where one had three Houses, and three Sons, and devised to every of his three Sons an House in tail; and if any of them died without Issue, that the two Survivors should have his part, equally to be divided betwixt

(6)

Ante. 443.

2 Rol. 89.

Ant. 443. 4.

Ant. 431.

Co. 6. 16. b.

Ant. 52.

Ant. 53.
Post. 729.
Co. 3. 39. b.

Ante 330.

1 Cr 75.

Co. 6. 16. b.
Post, 743.

Ante 330.

Co. 3. 39. b.

betwixt them : It was doubted what Estate the two should have in that part, after the decease of one of them without issue: and it was ruled, for Life. For the word part doth not enlarge the Estate; and that by these words, equally to be divided, they were Tenants in Common, and not Joynt-tenants. But there the words shewed the Devisors intent, that they should be several, and divided Estates. And it was ruled there, that equally divided and equally to be divided, are all one. And so it was ruled here, in a Case betwixt Dickons and Marsh. And so also in 17 Eliz. where a Devise was made to two equally, it was held to be a joynt Estate. But Shepheards Case in 18 Eliz. is good Law, that a Devise to two equally, and to the Heirs of their Bodies, made a Tenancy in common: for, as the Inheritance is in common, so his intent shall be collected for the particular Estate (*Quod Fenner concessit*) but it is not so here. Wherefore, &c. *Alham e contra*; for, if they be not Tenants in common, this word equally should be vain; and no word in a Devise or Grant shall be void, if it may have any good Exposition. And in 2, 3, & 3 Philip. and Mar. Bendlose; it is ruled, that a Devise to two, part and part like, made a Tenancy in common; for there be no parts betwixt Joynt-tenants; and therefore his intent appears, that they should be Tenants in common: for there is not any word in a Deed or Will, which shall be idle, if it may be taken to any reasonable intent: and to that purpose cited Bolds Case 28 H. 8. Dyer. 14. Wherefore, &c. Fenner held, That they were Joynt-tenants; for Joynt-tenants have an equal Estate, and equal Profit. And a Will is to be expounded after the Judgment of the Common Law, when the intent appears not to the contrary. And therefore a Devise to Baron and Feme, and a third Person *æqualiter*, they be Joynt-tenants, as by Purchase, during the Coverture, and the Baron and Feme have but a Unity. Wherefore, &c. *Popham e contra*; for the word equally hath two significations; in the one it refers to the Estate, in the other to the Quantity of the Land: And here, to which of them this shall be referred? was the Question. If one devise his Goods equally to two, there is not any Joynt-tenancy; for equally shews his intention to give to either of them an equal proportion. So of a Devise of a Term to two equally, they be Tenants in common; for otherwise there should not be any equality in property, if all should go to the Survivor. But a Devise of Land to two equally, they are Joynt-tenants; for there is not any inequality, or loss, although the Survivor should have all: for the other can have it but during his life. But if a Devise were to two and their Heirs equally, or part and part like, there is a Tenancy in common; for every one of their Heirs shall have it: And, if the one should have all by the Survivorship, it is not equal, as to their Heir. And so here, they be Tenants in common; and there is not any difference between this and Shepheards Case. Wherefore Clinch agreed with him in omnibus. And afterwards, it was adjudged accordingly, that it was but a Tenancy in common, and affirmed in a Writ of Error in the Exchequer, upon the Opinion of four versus three.

Bold *versus* Steers. Mich. 40, & 41 Eliz. rot. 508.

Ejectione firmæ. And declareth of a Lease, to begin Post Mortem of Thomanline Chapman, and of Thomas Chapman, and alledges Quod prædict. Thomanline Chapman, and Thomas Champman were dead, and so mistakes Champman for Chapman: And for this cause Error was assigned: For the Lease is not then begun. But the Court held, Quod prædictus Thomas was sufficient, and the addition of his Surname was vain. And it shall be intended to be the same person. Wherefore it was affirmed.

(7)

Hayford *versus* Andrews.

Debt upon an Obligation, Conditioned for the payment of 20l. at a day certain. The Defendant pleads, that before the day, the Plaintiff, in respect of a Trespass made by his Beasts in the Defendants Land, gave unto him a longer day of payment, which is not yet come. And it was thereupon demurred, and argued at the Bar, that in regard it was before the day, the Plaintiff might well by word defer it, and in proof thereof were cited 31 Aff. 17. 12. R. 2. Barr. 243. 26 H. 8. 9. But all the Court without Argument held it to be no Plea. For an Agreement by Parol cannot dispence with an Obligation. But the Case of 12 R. 2. is good Law. For there the Agreement at the day to retain, is as a payment, and thereby the Obligation is discharged. Wherefore it was adjudged for the Plaintiff.

(8)

Ant. 455. 672.
Co. Lit. 213. b.

Hunts Case.

Hunt and others were endicted before the Mayor and Aldermen of Hereford, being Justices of Peace and Goal Delivery, upon the Statute of 5 Eliz. of Forgery, for forging the Will of one Davies. Exception was taken, because by the Statute they had not any power to take such Endictment. But the power of inquiring thereof is given to the Justices of Oyer and Terminer, and of Goal-delivery only. And so it was ruled in 31 Eliz. in Smiths Case. Wherefore, for this cause he was discharged.

(9)

Ante 87.

Edens Case.

Eden and others were endicted upon the Statute of 8 H. 6. cap. 9. of Forcible entry. For that he, and divers others in the Endictment named, forcibly entred, and disseised Alice Knotford. First, Exception was taken, for that the Statute is recited, That if any be Expelled or Disseised; whereas it ought to have been Expelled and Disseised. But it was said, That the Printed Books, and also the Parliament Roll, is in the Disjunctive; and therefore Non allocatur. Another Exception was, Because the Statute is, If any Feoffment or discontinuance thereof be made, &c. And the Statute, reciting this word Thereof, was left out: And for this cause held to be ill: For there is not any such Statute. And the misrecital of a Statute is cause to avoid it. It was then moved, That it was a good Endictment for Riot, although it were void upon the Statute of 8 H. 6. Sed non allocatur.

(10)

Ant. 307.

Ant. 231.
Ante 307.

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For

For, being void for the Principal, it cannot be good for the residue. Wherefore they were discharged. 2 H. 7. 10. 6 H. 7. 5. 11 H. 4. 41. 18 Ed. 4. 10. 11 H. 7. 22.

Steverton *versus* Scrogs.

Trin. 40 Eliz. rot. 1139, vel 1132.

(11)

R Eplevin. The Defendant made Conusance, as Bayliff of Oliver Scrog; for that the place, where, &c. is within the Jurisdiction of the Leet of the Mannor of Renold, whereof the said O. S. is, and tempore quo, was Lord, and shews, that at a Leet holden there, such a day, and year, it was presented by the Jury, that there was not within the Vill any Pillory or Cumbrel to punish Offenders; and therefore the Vill was amerced to 20 s. and shews, that the Plaintiff, at the time of the taking, was an Inhabitant there; and because he did not pay that amercement, but utterly refused to pay the 20 s. therefore the Defendant, as Bayliff of the Mannor, distrained, &c. And it was hereupon demurred. Winch for the Plaintiff. This Plea is not good, neither for the matter, nor manner thereof; for the Inhabitants of a Vill are not bound to provide either Pillory or Cumbrel; but the Lord of the Leet only; for they are necessary for the Execution of Justice, which the Lord is to see to be executed. And, if he doth not provide them, it is cause of seizure: As 8 H. 4. 17. the Abbot of St. Albons was to procure a Gaol-delivery of the prisoners within the Liberty; otherwise, it was a forfeiture. And the Statute of 18 Ed. 2. which sets down what things shall be inquired in Leets, doth not appoint this to be inquired of there; and it is inquirable only in the Eyre. It is not good for the mannor also: First, Because it is alledged, that the Plaintiff did not pay the amercement; and he doth not aver, that any other of the Vill had not paid it. Secondly, He doth not alledge, that the Plaintiff was an Inhabitant there at the time of the amercement; but at the time of the taking, &c. Wherefore, &c. And for these defaults, the Court held clearly the Plea to be ill, and adjudged it for the Plaintiff. But Popham, Gawdy, and Fenner (Clinch absent) held, that it was not good for the matter: For, the Pillory and Cumbrel ought to be provided by the Lord of the Liberty, and not by the Vill, unless there be a Prescription to the contrary, which ought to be specially alledged; for they being for the Execution of Justice within the Liberty, he ought to see it to be done. And Popham said, that the Defendant as Bayliff of the Mannor cannot distrain for an amercement by reason of his Office without an Especial Warrant from the Steward or Lord, no more than a Sheriff may levy amercements of this Court without Warrant. But Gawdy e contra; that he may distrain for lawful amercements, by reason of the Office; but he cannot enter for a Condition broken: As 5 Eliz. 222. is. But for the principal matter it was adjudged ut supra for the Plaintiff.

Post. 748.

Luffer versus Legar.

Error of a Judgment in Lyme. The Error assigned was, because that in Debt the Defendant was acquitted for part, and for the residue the Plaintiff recovered, and there was not any Judgment, *Quod querens sit in misericordia, &c.* and for this cause it was reversed. And at the same time another Judgment in Worcester between Cheshold and Wyot was reversed for this cause.

(12)

Ante 257. b.

Harris versus Jays.

Trespas. Upon a special Verdict, the Case was; That the Queens Auditor and Surveyor for the County of Northampton, appointed a Steward for one of the Mannors pro illa vice. He kept the Court, & in plena Curia granted by Copy Land, which anciently had been Coppyhold, and escheated to the Queen for felony, to the Defendant and his Heirs, and received a Fine for it, which was answered to the Queen. And, Whether this were a good Grant by Copy? Was the Question. First, it was resolved, that a Copyhold escheated, and which hath been kept in the Lords hands for divers years, may be granted over by Copy by the Lord himself: But, whether it may be granted by the Steward? was the doubt: And it was resolved, that it well may be granted: For he is in place of the Lord, if he be Very Steward. Secondly, Whether this appointment of a Steward by the Auditor and Surveyor be good or not? And resolved, that it was not: For they have not any authority to appoint Stewards, the one being to take the Accompts, the other to survey the Land. Thirdly, Admitting he is not Steward in right, yet he sitting in Court, and granting this Copy, and admitting him, and the Fine being answered to the Queen, whether it be good or not? Bacon moved, that it was good: For acts done by an Officer in fact, and not de Jure are good; as 9 Ed. 4. 1. Acts done by a King an Usurper are good: so if one being created Bishop, the former Bishop not being deprived nor removed, admits one to a Benefice upon a Presentation, or collates by Lapse, these are good, and not avoidable: *Quod Curia concessit.* For the Law favours acts of one in a reputed authority, and the inferior shall never inquire if his authority be lawful: and 2 Ed. 6. Br. Copy 26. it was held, that Grant by Copy by one in Court who hath no authority to hold Court, is good. Gawdy, The Grant is void; for it is not a thing of necessity: But things of necessity done by one, who is but in a reputed authority, is good. And here this new Grant is in prejudice to the Queen, who is Lady of the Mannor: And relied upon 4 H. 7. Popham, Acts done by one, who keeps Court as Steward, without authority, if they come in by Presentment from the Jury, or of necessity, are good: As an admittance of the Heir upon a Presentment, or Admittance by a Surrender to an use, and a Presentation of Rulances before him are good: But Acts Voluntary, as the Grant of a Copyhold, is not good. And if a Lord commands his Steward, that he shall not grant such Lands by Copy; if he grants it, it is void. So if he diminish the Ancient Rents and

(13)

Co. 4. 30. a.

Post. 755.

U u u 2

Services

Services, it is a void Copy. Fenner agreed with them in omnibus. Wherefore it was adjudged for the Plaintiff. 4 Co. 30.

Morning versus Knop.

(14)
1 Rol. 18.

Ante 126.

Assumpsit. The Case was; An Infant being bound in a Bond for the payment of 17 l. at his fullage, in consideration that the Plaintiff the Obligee will stay the Sute, which he hath begun against him by Original; and not cause him to be arrested thereupon; He assumed, that he would pay the 17 l. at a certain day after. Upon Non-Assumpsit pleaded, it was found for the Plaintiff, and alledged in Arrest of Judgment, that this was not any Consideration to ground an Assumpsit, and in proof thereof the Case of *Stone versus Withipole*, Anno 31 Eliz. was cited; for the Bond not being sufficient to bind him, there is not any cause for him to make this Assumpsit. And of that Opinion was Fenner; but Clinche contra, Et, cæteris Justiciariis absentibus, adjournatur.

Sherwood versus Woodward.

(15)
1 Rol. 12.

Assumpsit. Whereas he sold to the Defendants Son certain weights of Cheese; The Defendant, in consideration the Plaintiff would deliver the said Cheese to his said Son, assumed, that if the Son did not pay for them, then he would. And for Non-payment the Action was brought. Upon Non-Assumpsit pleaded, and found for the Plaintiff, it was moved by Godsrey in Arrest of Judgment, that this was not any Consideration: For it is no more than what the Law appoints, to deliver that which he sold; the property whereof is in the Son by the sale. But Gawdy and Fenner held it to be a good Consideration; for it is an ease to the Bargainee to have them without sute, which per-adventure, otherwise he could not have had. And although the Bargainee may take them in this Case, the Bargainor is not bound to deliver them. And there is a new act done by him upon this agreement, and it is an ease to the Vendee, and 12 H. 7. is, that to deliver the Goods of the party himself at another place, is a good Accord. Wherefore, cæteris Justiciariis absentibus, they adjudged it for the Plaintiff.

Brereton versus Evans. Mich. 41 & 42 Eliz.

(16)
1 Rol. 294.
1 Rol. 872. 7.
1 Rol. 877.
1 Rol. 872.

Debt by Brereton and his Wife against the Defendant for Arrearages of a Rent upon a Lease for years made by the Feme and her first Husband, to the Defendant by Indenture. The Defendant pleaded, that the Ancestor of the first Baron was seised in Fees and that it descended to the first Baron, and he was sole seised, and so the Feme had nothing at the time of the Lease made. And thereupon the Plaintiff demurred in Law. Warberton Serjeant, for the Plaintiff moved, that this was not any Plea: For the Lease being by Indenture, the Feme hath the Reversion by Estoppel against the Lessee, and the Defendant cannot contradict it, and say, that she hath nothing; and in proof thereof was cited 11 H. 4. 1. and 2 H. 5. 7. but all the Justices Resolved, that it was a good Plea; for they said, there was a difference betwixt 11 H. 4. 1. and this Case: For when two joyn in a fine, or matter

matter of Record : He, who accepts of them, is concluded to say, but that both gave it ; but where it is by Deed, it is otherwise : for that cannot enure from one by way of Interest, and from the other by way of Estoppel, for one Deed cannot so enure to two intents : Also when two joyn in a Deed, and the one only hath the Interest, it enures by way of Confirmation from the other, and not by way of Estoppel. But here, this can neither be an Estoppel, nor a Confirmation; for the Deed is utterly void, as to the Feme, she being Covert, as 45 Ed. 3. 11. 48 Ed. 3. 12. and 29 H. 8. Br. Faits enrolled 14. And it cannot be an Estoppel, because an Estoppel ought to be mutual on both parts; and a Deed of a Feme Covert cannot estop her, and the Deed cannot bind her to any effect. Wherefore it was adjudged for the Defendant.

Co.Lit.45.a.

Hogobert *versus* Hokeley, and Spike.

A Compt against two. The one of the Defendants acknowledged the Action. The other pleaded Nunques son Receiver, &c. And Judgment was presently given against him, who acknowledged the Action. And Issue joyned upon the other, and found against the Defendant, and Judgment was also given against him. And Kemp said, that in the time of Wray, it was adjudged, that where one of the Defendants acknowledged the Action, that it should bind his companion, and the entire Judgment should be given against both. Then Daniel, Serjeant moved, That one of the Defendants was dead, and so the whole Bill should abate, although it were after the Judgment: And to that purpose cited 21 Ed. 3. 32. and 22. Ed. 3. 8. But Gawdy conceived, it should not abate the Writ, but against that Defendant only, who was dead. Vid. 1 H. 7. 2. 22 Ed. 3. 87. 1. 4 H. 4. 1. Et adjournatur.

(17)

Marsh *versus* Vauhan and Veal.

Conspiracy. The Defendants pleaded Not Guilty, and the one was found Guilty, and the other not. And it was hereupon moved, that the Bill should abate; for it ought to be against two, and the one cannot conspire alone : And the one being acquitted, the other sole cannot be attainted: And so is 11 H. 4. 2. 8 H. 4. 6. 22 Rich. 2. Bre. 888. 22 Aff. 77. 28 Aff. 12. Br. 115. And of that Opinion was the whole Court here; that a Writ of Conspiracy lies not, nor is maintainable upon this Verdict: But an Action upon the Case in nature of a Conspiracy might have been brought in this Case. Wherefore it was adjudged for the Defendant.

(18)

1. Lol. 111.

Williams *versus* Whytney.

Ejectione firmæ of a Lease of Henry Vaughan at Mockas of Lands in Lower Mockas. The Defendant pleaded Not Guilty, and found against him; and it was moved to be a Nil-trial : For the Ven. fac. was awarded from Mockas, where it ought to have been from Lower Mockas; the Issue being Not Nulity. But, if the Lease had been

(19)

been traversed, it had been otherwise. And of that Opinion was the whole Court. Wherefore the Judgment was stayed.

Umble *versus* Fisher.

(20)
2 Rol. 520.1.

DEbt. for Rent, upon a Lease for years payable at four Terms, viz. the Annunciation, Midsomer, Michaelmas, and the Nativity; and shews, that the Rent was arrear pro uno Anno integro, scilicet a Festo Annuntiationis 40. usque Festum Annuntiat. 41. a retro suit, & adhuc existit. The Defendant pleaded Non debet, and found against him. And it was now moved in Arrest of Judgment, that it appears by the Declaration, that there are but three Rent Days arrear, for A. excludes the first Feast of the Annuntiat. and Usq; excludes the last. But Foster moved, that the viz. should be void, because it is declared, that it is arrear pro uno Anno integro. But the Court held the Declaration to be ill: For if the viz. should be void, it would not appear when the year should begin. But Gawdy said, If it had been, that it was arrear a Festo Annuntiationis 40. pro uno Anno viz. Usq; ad Festum Annuntiat. 41. There the viz. should be void; but not here. Wherefore it was adjudged for the Defendant.

Green *versus* Hun.

(21)
Moor. 278. 910.
1 Rol. 645.

Prohibition for suing for Tithes of the Rakings of Barley. And alledgeth a Prescription to make the Barley into Cocks, and to pay the Tenth Cock in satisfaction of the Tithes of the Barley, and of the Rakings minus voluntarie dispersed. And it was hereupon demurred, because he doth not aver, that those Rakings were minus voluntarie dispersed. For Bacon, who moved it, said, that in 31 Eliz. it was ruled in the Common Bench in one Adams Case; that a Prescription to pay the Tenth Cock generally, in satisfaction of all Rakings, was not good. For he might leave the greater part of the Corn in Rakings: But all the Court held, that the Prescription was good, and there needed not any Averment: But that ought to come on the other part, if he would. Secondly, he sued for Tithe of Wooll, and alledgeth a custome to pay it every year at Lammass-Day; and that he let it out, &c. And it was thereupon moved, that it was not good; for this is not a Modus Decimandi: But for the time only, which is to be tried in the Spiritual-Court. But the Court held it to be good; for it is due de jure, when it is clipped: But by Prescription it may be set out altogether at another day, and that is good. And if the Spiritual-Court will not allow thereof, as it is here alledged, that they will not, it is fit to prohibit them. Thirdly, he prescribed, that for young Cattle reared for the Day to be Milch-Kine, or for the Plough, no Tithes have been accustomed to be paid: And it was thereupon demurred, and adjudged a good Prescription. For they be for the Publick Weal; and the Parson is to have benefit of them in another kind: And it was held, that for Pastures of such Cattle no Tithes are due for the reason aforesaid. Fourthly, he prescribed, that for all Wood combustible he used to pay a penny, called an Hearth-penny, in satisfaction for all Tithes thereof: And it was thereupon demurred. And it was adjudged to be a good Prescription. For other kind of Tithes he alledged also other such payments of the

Moor. 278.

Moor. 910.
1 Rol. 645. 660.
Ant. 475. 5.

Moor. 910.

Moor. 910.

Moor. 910.

the like Sums, &c. Et quod omnes, & singulæ Personæ, Rectores de, &c. have used to accept thereof, &c. And the Defendant traverseth; Quod omnes, & singulæ, &c. had not accepted. And it was thereupon demurred; for he ought to have traversed the Custome alledged: and not, Quod omnes, & singulæ, &c. did not accept. For then, if any of them did not accept, he overthrowes the Prescription, which is not reasonable. And so was the Opinion of the Court. Wherefore it was adjudged, Quod Prohibitio stet.

Wichals *versus* Johns. Pasch. 41. rot. 528.

Assumpsit and declares; That in consideration that the Plaintiff at the instance of the Defendant had promised to pay 120 l. to one Rogers; wherein the Defendant was indebted to the said Rogers, that the Defendant assumed he would pay to the Plaintiff this 120 l. when he should be required. After Verdict for the Plaintiff, it was moved, that this is not any Consideration: For it is not any benefit to the Defendant, because he is not thereby discharged of his debt. And it is not alledged, that he paid it to Rogers, nor is the promise alledged to be made to Rogers. And, if it had been made to Rogers, he could not thereupon have maintained an action against the Plaintiff: For there was not any Consideration between them. And of that Opinion were Gawdy and Fenner upon the first Motion: For Gawdy said, If one be indebted unto me, and another comes unto me, and promiseth, that he will pay it; this is void, and nothing to purpose. But if he promise in Consideration, that I will forbear my debt, that he will pay it at such a day, if the Debtor doth not pay it, this is good. Wherefore, &c. But it was moved again at another day, and Popham and Clinch held it to be well enough; for there is a mutual promise, the one to the other: So that if the Plaintiff doth not pay it to Rogers, the Defendant may have his action against him: And so also the Defendant shall be charged as to him; and a promise against a promise is a good consideration. But it was moved, That the Declaration is not, that the Plaintiff promised to any, to the Defendant, or any other, and therefore it is not good. But that was not well apprehended by the Court as it seemeth. But Judgment was given for the Plaintiff.

(22)
Moor. 574.
1 Rol. 29.

1 Rol. 29.
Ante 543.
Post. 848. 889.

Scrogs *versus* Sir John Spencer.

Error of a Judgment in Debt in the Common Bench. The Error assigned was; for that upon a Habeas corpora Juratorum directed to the Coroners, they returned the Writ and endorsed the Writ, writing their proper names, but added not their name of Office (viz. Coronatorum) but the Ven. fac. was returned by them, and their names writ, viz. A. and B. Coronatores, and upon the Hab. corpora the names of A. B. were written; but not the name of Coroners. And after the Verdict and Judgment for the Plaintiff, Error was brought, and it was the sole Error assigned. Yelverton, Serjeant moved, that it was not any Error. For before the Statute of York, cap. 5. which was made 12 Ed. 2. The Sheriff needed not to have put his proper name, nor of his Office to his return. And this Statute extends only to the Sheriffs

(23)
Moor. 548.

Ant. 310.

R. 756.

Ante 310.

Ant. 310.

riffs, and Bayliffs of Franchesses. So the Coroners to this day are out of the Statute. And at the Common Law it is well enough, for it was not usual to put the Sheriffs name to Returns: And, in proof thereof, divers Presidents were shewn by Agar, Deputy-Chamberlain of the Exchequer, many of which were Writs of Assise. The one was in 5 Ed. 2. Assise against the Abbot of Abington, and one J.S. his Commoigne. And in none of the Writs the Sheriffs proper name, or Office was returned. And upon these Presidents shewn, the Court conceived it to be well enough, and no Error: For when a Writ is returned, it is intended to be by the Very Officer of the Court, who ought to do it; which is the reason, that at the Common Law the Sheriffs name needed not to be put to any return: And this reason holds here. But they all held, that if their names ought to have been here, then it is not aided by the Statutes 32 H. 8. nor 18 Eliz. And they held, that the Statute of 12 Ed. 2. did not extend to Coroners. But they would advise.

Yates *versus* Clincard.(24)
Ant. 16.

Ejectione firmæ. For certain Lands in Aston Clinton in the County of Bucks. Upon Evidence to a Jury, a Devise was shewn of an House with the appurtenances: And thereby Land in the field was claimed. And Popham doubted, Whether it should pass. But Fenner said, that it well might pass. And that upon Demurrer in 28 Eliz. it was adjudged accordingly. The Defendant then to make it clear shewed, that the House was Copy-hold, and the Land free-hold: And the whole Court thereupon conceived, that it could not be said appurtenant, although it had been used with it. Wherefore the Plaintiff was Non-suited.

Crouch's Case.

(25)

Ante 512.

Post. 785.

Crouch, Copyholder of Inheritance of the B. of Winton, sues a Prohibition for staying of a Sute for Tithes, surmising, that he, and all the Copyholders of such a Mannor, of the Bishops, from time, whereof, &c. had held their Lands discharged of Tithes. Tanfield moved, that this Prescription was too general, and it could not be good to prescribe in non decimando by the Tenants. Godfrey; it is as good, as for the Farmors of a Bishop to prescribe to be discharged. And that was ruled in a Case in this Court, between Wright and Wright, Popham: It was allowed only for his Demesnes. And that was in regard, It is to be intended; That the Bishop at first retained the Tithes to himself of his own Demesnes; but it would be mischievous to allow it to all his Copyholders. Clinch and Fenner agreed with him. Wherefore without permitting any Declaration or Demurrer thereupon they awarded a Consultation. Unless other Cause be shewn by such a day. (Gawdy absente.)

Dobson versus Crew.

DEbt upon an Obligation conditioned, That the Obligor should be always ready to give Evidence, and to testify the truth in any of the Queens Courts in all things, which should be demanded of him, on the part of the Obligee, upon reasonable request, and his Charges born: and that he should not hurt, or endanger, or molest the Obligee in his Lands or Goods, *ratione alicujus rei cujuscunque*. And hereupon the Defendant demurred, supposing the Condition to have been against Law: but all the Court held it to be good, and not against Law: for, as to the first part, if he had not been obliged thereto, he is compellable by the Law; and the last part shall be intended, that he shall not hurt, &c. tortiously, but not to restrain him from pursuing the Obligee for Felony, or upon any other just cause. Wherefore, without Argument, it was adjudged for the Plaintiff. (26)

Peacock versus Peacock. Trin. 41.

TRespass of Assault and Battery in London. The Defendant pleaded, That the Plaintiff entred into his house in Waltham, in the County of Essex, and he *molliter manus imposuit* upon him to put him out of his house, *Quæ est eadem Assault, Battery, and Hale-Tractation*, whereof the Plaintiff complains: and Travers *abique hoc*, that he is *culpabilis extra Waltham*; and it was thereupon demurred. Towse for the Plaintiff moved, that this was not any plea; for this Trespass being transitory, the place is not traversable: and admitting the place to be traversable, yet he ought not to conclude his Plea, *Quæ est eadem, &c.* But all the Court held the contrary: for the cause of the Justification being local, viz. the maintaining of the possession of his house, he may well justify there, and he cannot justify in another place; and he may traverse every other place: as where one justifies as Constable, or by force of a Warrant: And therefore Popham said, the difference is betwixt this Case and the Case of Patridge, which was adjudged in this Court, That where one justifies by reason of an assault in another County, and traverseth the County in the Declaration; that is not good, because the Justification is personal and transitory: and might be alledged in any place, as well as the Battery. But where it is local, as here, it is otherwise, and the conclusion, *Quæ est eadem Transgressio, &c.* is good enough; for it concludes, that it is the same cause of Action, but with a Travers, as it ought to be of necessity: but if the Averment, *Quæ est eadem Transgressio*, had been omitted, it had been good enough. Wherefore, upon the first Argument, it was adjudged for the Defendant. (27)

Ante 667.

Ant. 667.

Leighton *versus* Garnons. Hill. 41 Eliz. rot. 114.

1 Rol. 895. 810
Moor 366.
Co. 5. 88. 2.

Post. 850.
Ant. 467. 2.

2 Cr. 364.

Ant. 416.

Ant. 652.

Ant. 416.

DEbt upon an Escape against the Defendant, as Sheriff of Hereford, and declares, That he recovered in the Common Bench, Mich. 38 & 39 Eliz. against one Ely Walwin 308 l. and upon the 9. Octob. 38 Eliz. pursued upon this Judgment a Capias ad satisfaciendum, whereupon he was outlawed: after which, viz. 22 Junii 39 Eliz. W. brought a Writ of Error, and the Record was removed into this Court, and there he assigned not any Errors: Whereupon 13 Februarii 40 Eliz. the Plaintiff sued a Capias Utlagatum, unde convictus est, directed to the Sheriff of Hereford, which was delivered to the Defendant, being Sheriff the 2. of March following, by force whereof, upon the 30 of March following, he took W. and had him in his custody, and afterwards let him at large; the Plaintiff not being satisfied, &c. The Defendant pleaded Non debet, and all this matter was found by special Verdict. And whether, upon this matter W. was in Execution for the Plaintiff, when he was taken by the Capias Utlagatum, was the sole Question. And after Argument at the Barr, by Thomas for the Plaintiff, and by Atkinson for the Defendant; the whole Court resolved, the said W. being taken by the Capias Utlagatum; although it were after the year and day, & although the Record be removed into another Court, he shall be said to be in Execution for the Plaintiff: for there is not any default in the Plaintiff; for he pursued him, until the Process was determined, viz. until he was outlawed: and he could not have had other Process, then a Capias Utlagatum: and that had been his remedy, if the Record had remained in Court: and the removal of the Record, it being no default of the Plaintiff, shall not prejudice him, nor alter his Execution. And the common course here is, If the party be taken upon a Capias Utlagatum, and brought into Court, to commit him to the Marshalley for the Outlawry, and also in Execution for the party. But if he had not been outlawed at the Suite of the party in the Common Bench, although the Record be removed hither, within the year, at which time he might have had in the Common Bench a Capias ad satisfaciendum, yet being here, he cannot have a Capias, but only a Scire fac. per Fenner. But he agreed the Process being determined in the Common Bench by the Outlawry, he shall not here have any other Process, then a Capias Utlagatum, and the Party taken thereupon shall forthwith be in Execution: and the Sheriff at his peril ought to keep him in Execution. For the Writ gives sufficient notice unto him, that he should be in Execution by the Words, Unde convictus est. Wherefore, &c. But Atkinson for the Defendant shewed, that this could not be an Execution for the party, because the Record is removed into another Court: And it is a Rule, That a Record being removed, there never shall be Execution upon that Judgment, but by a Scire fac. For the Court cannot know whether satisfaction be made; and this appears by 6 Ed. 6. Dyer. 76, & 81. 21 Ell. 14. 14 H. 7. 15, & 19. The Party also being Outlawed, the Process is determined against him by the Party; so as the Party is put to his new Action of Debt, as 13 H. 4. 1. Kemp the Clerk said, That is true, where the party

is outlawed upon an Original, and mean Process before Judgment, if he be afterwards taken by a Capias Utlagatum, the party cannot declare against him, but he ought to have a new action of debt. But, where it is an Outlawry after Judgment, it is always used, that the party, being taken upon a Capias Utlagatum, is in Execution for the party. And the course of the Court is, If one be outlawed after Judgment in debt, if he brings error, and doth not assign his errors, to award a Capias Utlagatum, which is execution for the party. But, if he be not outlawed, to award a Scire fac. quare Executionem habere non debet. And if, he being outlawed, brings error, and comes to assign errors, Committitur. And then to find bail, body for body, for the outlawry, and to satisfy the party for the execution: so no other execution shall ever be against him. And he said, if he brings error where he is not outlawed, and the Judgment is affirmed, the course is here to award a Capias upon this Judgment, or a Fieri facias, or an Elegit, as the party will, and not to award a Scire fac. And for this cause all the Justices held here, that this is a good execution for the party. And Wingate, Clerk, said, that he was acquainted with two Cases, which were adjudged, that if a Sheriff takes one by a Capias Utlagatum after Judgment, and suffers him to escape; although he returns not the Writ, yet he was charged in debt upon the escape: and the one was 17 Eliz. Austreys Case, who was Sheriff of Bedford. And it was said by the Court, that if a Capias be erroneously awarded, yet the Sheriff shall not avoid it for this cause. And so it was said to be ruled in 30 Eliz. in Sir Clement Pastons Case in the Common Bench. Vide 3 Ed. 6. Dyer, 67. & 14 Ed. 3. Elcheat 6. Wherefore they resolved, ut supra, for the Plaintiff. But the matter was referred to Compromise. And this Rule given, that if it were not finished before the next Term, that Judgment should be Tunc pro nunc, 5 Co. 88.

Ante 416.

Post. 910.

Ante 165.

Mallet *versus* Mallet.

F Error of a Judgment in the Common Bench in Replevin. The Defendant avows for Rent, for that Hugh Mallet was Tenant in tail, and lett that Land for three Lives, rendering rent; and, that this Reversion descended unto him, as heir in tail; wherefore he avows and avers, that at the time of the Demise, & diu antea, this Land was demised, &c. And, that this Rent reserved is verus, & antiquus redditus, &c. The Plaintiff replies, Quod bene & verum est, that Hugh Mallet was Tenant in tail, and made the Lease prout, &c. and that by force thereof he was seised of the Reversion in Tail. But he pleaded a Fine of those Lands, by the name of the Mannor of North-peverton. The Issue was Nient comprise, and thereupon a Special Verdict found, that this was Land lately purchased, which with other Land was given in tail, and reserved Sute to the Court of North-peverton; and that this was known by the the name of the Mannor of North-peverton, and afterwards a Fine was levied thereof, by the name of a Mannor. And, whether these Lands passed, or not, by the Fine? was the Question. And it was adjudged in the Common Bench for the Avowant, that it was

(29)

Post. 874.

Ante 524.

Co. 6.64. b.

32 H. 8. c. 28.

Co. Litt. 44. b.
R 42. 103.

Ant. 438.

not a Mannor, and that those Lands were not comprized within the Fine: for it was there held, that by a Fine levied of a Mannor nothing but a Mannor in truth shall pass, and not a Mannor in reputation; and this not being a Mannor in truth, nothing passed thereby. And Error being brought thereof, the matter in Law was moved for Error: but the Court here clearly held, that this making of the Leases cannot gain it a name to be a Mannor, much less shall make it to be so: and therefore the Land cannot be comprized within the Fine. Secondly, It was assigned for Error, for that it is alledged, that the Land in tail was left for three Lives: and, if it were not according to the Statute, it is a discontinuance; so as the reversion descended to the Heir at the Common Law, and not to the issue in tail: for the averment, that it was demised formerly, is not sufficient: but it ought to have been averred, that it had been so demised for eleven years at the least, next before the making of this Lease. The averring also, that this Rent was verus & antiquus redditus, is not sufficient: for it may be the ancient Rent, which was twenty, or an hundred years since, but it ought to have been averred, that it was the ancient Rent which had been reserved for the greater part of twenty years, next before the Lease. And of that Opinion were all the Justices, that these averments were insufficient for these reasons: for these averments might be true, and yet the circumstances of the Statute be not observed: and that this had been good cause to have demurred upon the abowry: but on the other side it was moved, that the Barr to the abowry is a Confession, that this Lease was made for three Lives, and that the Reversion thereof was intailed, and descended in tail, and it shall help these imperfections: for it shall be then intended to be a Lease, according to the Statute, and that all Circumstances were observed; otherwise, the Reversion could not be in tail: and of that opinion was Gawdy, and relied upon Dyer 352. and therefore said, that if partition be pleaded between Joynt-tenants, and it is not pleaded to be by Deed, or, if a Lease be pleaded by Baron and Feme, and acceptance of the rent by the Feme, and no Deed pleaded, which is not good, if the Plaintiff, in the Replication confesses them, and pleads other matter in avoidance of them; this makes the Barr to be good: for, it shall be intended to be a lawful partition, and Lease. Popham agreed to those Cases; but he conceived otherwise in the principal Case: for the Lease here pleaded appears not to be warranted by the Statute, and then the confession of the party shall not help it. As where he pleads a Feoffment to the use of himself, and his Heirs, by force whereof he was seised in tail: although the other will confess, that he is seised in tail, it is a void confession; and the acknowledgment of the party shall never help a matter, which appears in Law to be contrary to his confession. And of that Opinion was Fenner. Et adjournatur.

Sir Andrew

Sir Andrew Nowel *versus* Smith.

TRRESPASS. The Defendant pleaded an Exchange betwixt him, and the Plaintiff, of certain Lands, which were adjoining; and, that upon the Exchange concordatum suit between the Plaintiff and Defendant, that the Plaintiff should make the Fences betwixt them, and should always maintain it; and, that the Fence of Long Gosclofe, which was assigned unto the Defendant, against the Plaintiffs Close, called Thirty-leas-Close, was in decay, whereby his Beasts escaped through the said Plaintiffs Close; &c. And thereupon the Plaintiff demurred. Gawdy, Clinch, and Fenner held, that the Plea was ill for the matter thereof: for his agreement cannot be a Barr in this action: but the Defendant is put to his action upon the Case, upon the promise, if he performs is not. And, if the Agreement had been by Deed, it had not been a Barr: but he only should have been put to his action of Covenant. But Popham *e contra*; for by this agreement, he is bound in Right to make the Fence, as much as by Prescription: for every Prescription to make a Fence is intended to begin by Grant, or Consent of those, who ought to do it. And if, upon Partition between Co-partners, it be agreed betwixt them that the one shall make the Fence, it is good. But all the other three Justices against him for this cause; as also for a default in pleading: for that the Fensure is supposed to be in decay in a Close of the Defendants, which was not the agreement, that he should make up. And this was held to be ill by the whole Court; and it was adjudged for the Plaintiff. (30)

Sir Rich. Lewson *versus* Riddleston.

ERROR of a Judgment in the Common Bench in Trespass of Battery. The first Error assigned was; for that the Writ of Inquiry of Damages, directed to the Sheriff of London, was Inquirat, when it should have been Inquirant, there being two Sheriffs. But it was ordered to be amended. Secondly, Because the Entry was, Quod Inquirant per Sacrament. probor, & Legalium hominum de civitate prædicta. And there is not any City mentioned before. Sed non allocatur: for it was certified by the Prothonotaries of the Common Bench, that their course was to make their Entries, that it should be inquired, &c. de Comitatu tuo, sometimes de balliva tua, sometimes de civitate. And Kemp said, the Common Course is to award, to be inquired de balliva tua. The Court thereupon held it to be well enough, and the Judgment was affirmed. (31) Ante. 677.

Spencer *versus* Shory.

ACTION for these words, Thou art a Perjured Knave; For thou swarest this day at the Leet, That I bake Bread in my House, where I did not. After Verdict for the Plaintiff, upon Not guilty pleaded, it was moved, that an action lay not for these words: for perjury cannot be in a Leet, whereof the Law takes any notice: but all the Court held, that the words were actionable: for, although it be not a Perjury punishable by the Statute of 5 Eliz.

(32)
Post. 720.

5 Eliz. yet it is a discredit, for which an action lies. Wherefore it was adjudged for the Plaintiff.

Leverage versus Smith.

(33) **A**ction for these words, John Leverage (*innuendo* the Plaintiff) would have robbed the House of *J. S.* if *J. D.* would have consented unto it: He perswaded *J. D.* unto it, and told him he would bring him, where he should have Money enough: After Verdict for the Plaintiff, it was moved, that these words were not actionable: for there is not any act done by the Plaintiff, whereby he can be called in Question: nor is it such a Slander, whereby he can have any prejudice. But all the Court held them to be words of great discredit, and slander, and concern him much in his Credit, and that the action well lay. And it was adjudged for the Plaintiff.

Post. 747.

Smith versus Shephard.

(34) **T**respas for the taking of one hundred Sheep apud Melton-Mowbray, in Regia via ibidem. The Defendant to all, besides one, pleaded Not guilty, and Quoad that he pleaded, that the Lord Berkeley was seised of the Manor of Melton-Mowbray in Melton-M. aforesaid; and, that he, and all those, &c. had used from time, whereof, &c. to have Toll, viz. two pence for every twenty Sheep of any Estrangers brought, or driven per, & trans the said Mill by any Estranger. And, if he were denied by any such Stranger driving them per & trans the said Mill, then they had used time whereof, &c. to distrain for the said Toll one Sheep so driven; and alledgeth in fact, that two hundred and twenty Sheep of the Plaintiffs, being a Stranger, and not inhabiting there, were driven by one Ludfield, per, & trans the said Mill, by the Plaintiffs command. And because he refused to pay this Toll, he that one Sheep cepit & abduxit, and detained untill the Toll was paid. Et hoc, &c. And it was hereupon demurred in Law, and it was moved, first, That this plea was not good for the Matter: for this Toll is claimed as a Toll-Through, which cannot be claimed by any Prescription; for it is against Law, and in oppression to the people, and to that purpose was cited 22 Aff. 38. Secondly, Although he might prescribe to have this Toll, yet he cannot prescribe to distrain for it in via Regia: for that is against the Statute of Marlbridge, cap. 15. and in proof thereof vouched, 17 Ed. 3. 1. 43 Ed. 3. 40. 11 R. 2. Avowry 87. 17 Ed. 3. 43. That, where a Lord distrained in an High-way, the Tenant might have Trespass, or might make Rescous. And against a Statute one cannot prescribe; as 9 H. 6. 56. & Dyer 233, & 273. But this exception was not allowed: for it was holden, that this Statute did not intend but for distresses for Rents or Services; and not for those things, whereof no Distress can be, but in the High-way. Thirdly, It was moved, that this plea was not good for the Manner of the pleading: first, Because the Custom is alledged to be, That if the Sheep of any Foreigner be driven through, a Toll shall be paid. And, if it be denied by any Foreigner, who drives them through, that a Distress may be taken. And it is not averred, that he, who drove them through, was a Foreigner,

2 Rol. 522.
Moor 574.

2 Inst. 131.

Foreigner, but only that the Master was a Foreigner. Sed non allocatur: for the driving of the Servant is the driving of the Master, and if he be a Foreigner, that sufficeth. Secondly, Because he justifies, Quod cepit, & abduxit, and doth not say by Distress, nomine Distractionis: for otherwise he cannot justify. And this was held by the whole Court, to be a material Exception: For otherwise it meets not with the Prescription: For the Master, it was moved for the Defendant, that Toll-Through may be well taken by Prescription: for it is one of the Tolls which the Law allows. And as a Toll-travers is where Toll is claimed for going over the proper Soil of another man; so Through-Toll is for passage through a Mill, and both are by Prescription. And, notwithstanding the Opinion of Thorpe, in 22 Aff. It hath been always allowed to be good, as appears 50 Ed. 3. & 20 Ed. 3. Toll 2, & 3. 5 H. 7. 10. & Bro. Quo warranto 3. It is held, That Turn-Toll is allowable, and 21 H. 7. 16 Toll was taken by those of Gloucester, for passage by the River, and this was by Prescription, and allowed; and, that a Distress might be taken for it: wherefore, &c. Popham. One may have Toll-travers by Prescription, and so he may have Toll-through; but it ought to be for some reasonable cause, which must be shewn, viz. That he is to maintain a Causeway, or to repair a Way, or a Bridge, or such like. And the Queen at this day may grant such Toll, being but a petite thing, in respect it shall be a greater benefit, or ease to the people, for the repairing of a dangerous way, or the like. So a Prescription to have a Toll for Murage is good; because it is to repair the Walls of a Mill, whereto the people may flee in time of War. But here for that there was not any cause alledged, so as it might appear to the Court to have a lawful Commencement, he conceived the Plea to be ill. Gawdy and Clinch held the Plea to be well enough, notwithstanding: For, being by Prescription, the cause thereof cannot by Intendment be known why it began: But in respect it might have a lawful beginning, it is well enough without shewing it. But Gawdy doubted, upon the reason of the Book of 22 Aff. 58. whether such a Toll may be claimed by Prescription. Fenner delivered not any Opinion herein. But, for the Default in the pleading, it was adjudged for the Plaintiff.

2 Rol. 522.

2 Rol. 522.

Ante 559.

2 Rol. 522.

Body versus Hargrave.

Pasch 41 Eliz. rot. 425.

DEbt against the Defendant, Administratrix of Thomas Hargrave her Husband, upon a Lease to the said Thomas Hargrave by Indenture for years, and how the Defendant is Administratrix unto him. And for Rent Arrear after his death the Action was brought in the Debet & detinet; upon Not guilty pleaded, it was found for the Plaintiff: And now moved in Arrest of Judgment, that the Declaration was not good: For that he declared upon an Indenture, and doth not say, Hic in curia prolata. For, although he might have declared, without mentioning any Deed, yet when he mentions it, and grounds his Action thereon, he ought to shew it. But Gawdy and Fenner (being only

(35)

1 Rol. 603.

Moor 566.

Co. 5. 31. b.

1 Rol. 603.

Co. 5. 36. 2.

2 Cr. 238.

Co. 5. 31. b.

1 Cr. 226.

2 Cr. 546.

only in Court) held, that it was good: for the Lease is the the Effect of the Declaration, and not the Indenture, and a variance between them is not material; as 44 Ed. 3. 402. 13. Wherefore Non allocatur. At another day it was moved again, that this Declaration ought to have been in the Detinet, and not in the Debet and Detinet, because she hath the Term as Administratrix, and is not charged by her own Contract, but by an act of the Testator; and to that purpose was cited, 19 H. 8. 8. 10 H. 7. 5. And a President was shewn in the Common Bench, between Barker and Kelsay, where the action was brought in the Detinet only. And Godfrey affirmed, that in one Fenns Case in this Court, it was ruled, that the action ought to be brought in the Detinet. Gawdy, The action is well brought in the Debet: for this Rent, though arrear after the death of the Intestate, began, first, in the Administratrix, and therefore the action well lies against her in the Debet; for the reason why the action against an Executor shall be in the Detinet is, for that the debt grew due by the Testator; and therefore it cannot be said, that the Executor Debet. But in an action against the Heir, it shall be in the Debet and Detinet, because he is bound by special words in the Obligation. And here the debt, which incurred in the time of the Administratrix, is her debt. And in Dyer 6 Ed. 6. 81. the action is brought in the Debet and Detinet, for Rent arrear in the time of the Executor, and admitted to be good. Popham accord, for she being charged with the Rent in her time, it accrues by reason of the profits of the Land, which she her self received, and therefore she is charged, having Quid pro quo; for if an Executor hath a Lease for years of Land of the value of 20 l. per annum, rendering 10 l. per annum Rent, it is assets in his hands only for 10 l. over and above the Rent. Fenner agreed to this Opinion, and to that purpose cited 10 H. 6. 11. That the Husband shall be charged after the death of the feme, for Rent arrear in his own time, because he received the profits of the Land: so as the Rent grew due in respect of the Occupation and taking of the profits. And therefore she is chargeable, and not merely as Administratrix. Clinch agreed with them. Wherefore it was then adjudged for the Plaintiff. Note, That afterwards this Judgment was reversed in the Exchequer-Chamber for the point in Law: for all the Justices of the Common Bench, and Barons of the Exchequer held, That she ought to be charged in the Detinet; because she is charged only by the Contract of the Intestate. 5 Co. 31.

Leuknor versus Huntley.

Ante, Mich, 39, & 40 Placito 34.

(36)
Ante 593.

Error of a Judgment in the Common Bench, The Case was, that Lewknor brought debt against the said Huntley, who pleaded how one Joh. Jaques affirmed a plaint of debt in London against the said Lewknor; and by the Custom there attached that debt now demanded in the hands of the said Huntley, and pleaded the Recovery and Judgment there. Whereto the Plaintiff replied, that, before the attachment, Jaques brought debt in the

Queens

Queens Bench against the said Leuknor, for the same Debt : Whereupon he made an Attachment, whilst that Sute was depending. Et hoc, &c. And upon this Plea Huntley there demurred in Law, and it was adjudged there for Huntley : whereupon Leuknor brought Error. The first Error assigned was, because the Custome is alledged, That the Plaintiff did swear his Debt by Attorney : And Popham held, That it was against Law, that one should swear his debt by Attorney. Secondly, because the debt is attached in Huntleys hand, before the day of payment upon the condition, and so before it was due. And Popham said, That it could not be a good Custom: But it was moved, that herein the Custom should be reasonable, because it is not to be paid before the day of payment. But in regard that the lesser sum in the condition is a present duty; it might be attached presently; and by the Judgment in the Attachment, the Debtor is discharged against his Creditor, and become chargeable to the Plaintiff in London; so, that after the day of payment he shall have his Execution against the Debtor, and not before, Vide 22 Ed. 4. 30. But Popham said, That the Judgment herein was unreasonable; for the Creditor hath not above one year districtionare Debitum. And if the debt might be attached a full year, or more, before the day of payment, he may never hear of it before the year be past, and so be defrauded of his debt. But Daniel Serjeant, said, That the time districtionare Debitum, is a year after the Execution sued, and not forthwith after the Judgment. And Execution cannot be had until after the day of payment. Popham demanded, Whether this Question were moved in the Common Bench. Daniel answered, That it was not. But the sole Question there was, In regard Jaques had begun a Sute in the Queens Bench against L. for his debt, whether, whilst this Sute was depending, he might make an Attachment in London, by the Custom there of another debt due to Leuknor? And it was adjudged, That notwithstanding this, the debt in the hands of Huntley might be attached : For there was not any Sute commenced for it in any Court. Popham and Clinch, and Fenner, absente Gawdy, agreed, that this attachment was good notwithstanding, but they all held, that the attachment of this debt before the day of payment cannot be; although it were moved, that the Custom in this point is good, and reasonable, and so it hath been always allowed : And this is to be intended betwixt Citizens and Merchants : And if it be not there allowable, there shall never be an Attachment. For if it cannot be before the day of payment, the Defendant before that time may be out of the City, or elsewhere, against whom there cannot be any attachment. Wherefore, &c. And afterward, at another time, another Error was moved, that the Custom is alledged, that the Plaintiff should swear his debt, and John Jaques was Plaintiff, and the Record is, That Tho. Jaques sware the debt, who was a Stranger, and not the Plaintiff. And that was held to be incurable, and could not be amended. Wherefore the Judgment was reversed.

Ant. 157.

Ante 184.

Skelhorn *versus* Harrison.(37)
2 Rol. 102.

2 Cr. 602.

Ant. 629.

Ant. 629.
2 Cr. 602.

Action upon the Case, and declares, how he brought a Plaint of Debt in London against one Ridly; and that the Custom of London is, that if any be arrested there upon such a Plaint, that he should remain in prison until he found two Mainpernors for his appearance *de die in diem quousq; placitum determinetur*. And that if he were condemned, he should render his body, or pay the Condemnation: Or, otherwise the Plaintiff might take his Execution against the Mainpernors, and alledgeth, that the Defendant and one Peter Houghton became Bayl for this action in London; and, that the Defendant with an intent to defraud and hinder the Plaintiff in the said Sute, procured an Habeas Corpus out of the Erchequer to remove the Cause thither: and that he procured and hired one Price and one Pit whom he knew to be insufficient, for 20 s. given unto them, to be bayl there: and, that he informed the Court, that they were sufficient: whereupon Price, and Pit were received as bayl in the Erchequer: and thereby the defendant, and Huntley were discharged of the bayl in London; and that afterwards the Plaintiff procured a *Procedendo*, and had Judgment in London; and, that the said Ridley, upon a *Capias ad satisfaciendum*, was returned *Non est Inventus*, and that Ridley went beyond Seas. So that by this Fraud he could not have Execution against him, nor against his Mainpernors; whereupon he brought this action. The Defendant pleaded Not guilty, and was found Not guilty, quoad the procurement of the Habeas Corpus. Et quoad Residuum, that he was Guilty. And it was moved by Tanfield, and Doderidge, That upon this Verdict the action is not maintainable: for the hiring of the bayl is not material; nor is any prejudice to the Plaintiff. But the allowing thereof in Court, which is the act of the Court. Wherefore an action lies not: as 21 Ed. 4. 22. is. And here, the Information of the Defendant is no cause to accept them. But the Court useth to examine them upon Oath, which was the Cause of allowance: and therefore the Defendant is not punishable. And what is done judicially cannot be punished; as 9 H. 6. 60. 12 H. 6. 3. 2 R. 3. 10. And Tanfield moved, that of some things put in the Declaration nothing is found at all, and therefore all is ill. But because it appeared upon the Dorle of the Writ, that the Jury had found him Guilty of all, besides the suing of the Hab. Corpus; it was held, that the Record was mis-certified, and, that it should be amended, and it was so ordered accordingly. Altham for the Plaintiff, moved that the action well lay; for although the bayl was allowed by the Court, that proceeded upon mis-information of the party, who is punishable for that false Suggestion, because he had deceived the Court. For the Statute of Westm. 1. cap. 29 provides, that deceits to Courts shall be punished, by whomsoever they be, by Imprisonment, yet that doth not hinder, but that an action upon the Case may well lie; as 11 H. 6. 8. and 21 Ed. 4. 22. So where a Protection is cast *Quia profecturus*, and he doth not go beyond Sea, action of deceit lies, as 20 H. 6. 10. and 44 Ed. 3. 27. Wherefore, &c. Gawdy and Popham held, that this action well lay for this falsity. But, because the Verdict was not fully certified they ordered that it should be amended.

ed: and then they would dispute the matter. Et adjournatur. And afterwards it was fully certified and adjudged for the Plaintiff.

Riggs versus Bullingham.

Assumpfit. Whereas he was seised in Fee of the Advowson of Beckingham in the County of Lincoln, In consideration, that he, at the Defendants request, by his Deed, dedisset & concessisset to the Defendant the first, and next Avoidance of the said Church, the Defendant 22 August 37 Eliz. assumed to pay to the Plaintiff 100 l. &c. Upon Non Assumpfit pleaded, it was found for the Plaintiff, and damages assessed to an 100 l. and, after Verdict, it was moved in arrest of Judgment, that this Consideration is past, and therefore not sufficient to ground an Assumpfit: for there is not any time of the Grant alledged: and it might have been divers years before the Assumpfit made. And being a thing executed, and past, no Assumpfit afterwards can be good, and in proof thereof Dyer 272. Hunt and Bates Case was cited: but all the Court resolved to the contrary: for, the Grant being made at his request, it is a sufficient Consideration, although it were divers years before, especially being to the Defendant himself, the Consideration shall be taken to continue. But, if the Grant had been to a Stranger, and not at the Defendants request, it had peradventure been otherwise. Secondly, The Declaration is not good, because there is not any time, or place alledged, where the Grant was made. Sed non allocatur. For it is but an Inducement to the Action, and therefore needs not to be so precisely alledged. Wherefore it was adjudged for the Plaintiff. Vide 29 Eliz. Marth and Rainsfords Case. (38) 1 Rol. 13. Post. 885. Post. 880. 1 Cr. 409. 2 Cr. 18. Ante 59. Ant. 59.

Marrow versus Turpin.

Pasch. 41 Eliz. rot. 2485.

Debt against the Defendant, as Administrator of George Turpin for Kent arrear upon a Lease to the Intestate, incurred after his death. The Defendant pleads, that before the Rent incurred, for which the action is brought, he assigned over the Estate, and Term to a Stranger, who entred. And the Plaintiff, knowing of that Grant, had afterwards accepted of the Rent from the Stranger, he being then possessed, &c. And demanded Judgment, &c. And it was thereupon demurred. The Sole Question was, Whether an Administrator shall be charged for the Rent Arrear after the Grant? and it was clearly resolved, that he should not. For, if he sells the Term for the payment of debts, it is not reason, that afterwards he should be charged with the Rent also: especially in this Case, where the Lessor had knowledge of the Grant, and accepted the Rent from the Grantee. And the Case adjudged in the Queens Bench Anno 29 Eliz. betwen Walker and Harris, was denied by Anderson, Walmsley, and Glanville to be Law. For the Lessee himself is not chargeable with the Rent after the granting over his Estate. And they held it to be unreasonable, that the Grantor should be always charged for the Grants insufficiency. Wherefore it was adjudged for the Defendant. 3 Co. 24. (39) Moor 600. Co. 3. 22. b. Anlr. 556.

Manhood *versus* Crick. Trin. 41 Eliz. rot. 1209.

(40)
Post. 727.

1 Cr. 86.
Co. 6. 44. b.
Ant. 455.

DEbt upon an Obligation of 8 l. being a single Obligation. The Defendant pleaded in Barr, that, after the Obligation made, He entred into another Obligation of 14 l. unto the Plaintiff for the payment of 7. l. at such a place, and day, as was yet to come, which the Plaintiff accepted in discharge of the said Bond of 8 l. And it was thereupon demurred. And without Argument adjudged for the Plaintiff, that the Plea was ill, and not any Barr.

Lamb, Executor of Drables, *versus* Brownwent.

Trin. 41 Eliz. rot. 3252.

(41)
Co. 5. 23. b.

Co. Litt. 209. a
Co. 6. 31. 2.

Post. 864.

DEbt upon an Obligation, conditioned, That if the Defendant in Mich. Term then next ensuing, in the Prerogative Court of the Arch-bishop of Canterbury at London, should give to the said Drables his Executor, or Administrator, such a Release, and Discharge from, and against him and his Children, for Receipt of an 100 Marks, as by the Judge of the Court should be thought meet; that then, &c. The Defendant pleaded, that the same Term one Such was Judge there, and that the said Judge did not devise, or appoint any Release or Discharge, &c. And it was thereupon demurred, and adjudged to be no Plea: for that it is not alledged, that he caused a Release to be drawn, and tendered to the Judge to be allowed: for it is on his part in discharge of his Obligation, to draw such a Release as the Judge should allow. Wherefore it was adjudged for the Plaintiff 5 Co. 23. b. Mich. 43 & 44. C. B. Pl. 42.

Brownlow *versus* Lambert.

Trin. 41 Eliz. rot. 1630.

(42)

Ante 99.

Action sur Trover, and Conversion of a Cow apud Salop. The Defendant pleaded, That the Queen was seised in Fee of such a Mannor, and demised it, and all Estrays therein, &c. to J. S. for Life, and conveys it by mean Conveyances to himself; and, that this Cow came thither as an Estray. Whereupon he seised her, and caused her to be proclaimed in two Market-Towns next adjoyning. And the Plaintiff claimed property, and the Defendant demanding of him to pay for her Feeding, that he refused, and thereupon he denied to deliver the Cow, and traverses, that he is Guilty of the Conderfion apud Salop. And it was thereupon demurred. First, because he alledged not the Letters Patents. Secondly, because he alledged not, that the Proclamations were made in the Parish Church. Thirdly, because he traverseth the Vill. And it was adjudged for the Plaintiff.

Erish versus Rives.

Ejection Firmæ, for Copy hold Land; Parcel of the Mannor of Thissleworth. Not Guilty being pleaded upon Evidence, these Questions were debated: First, Whether there may be a tenancy in tail of Copy-hold Land, without a Special Custome. And all the Justices agreed, that there could not, unless it had been so used there from time, whereof, &c. And to that purpose Walmsley cited, that in Hasting and Greys Case, in the Dutchy-Chamber, it was debated before all the Justices, and resolved by them, that there should not be an Estate-tail of Copy-hold Land, unless there be an especial Custom within the Mannor to warrant it: Secondly, They all agreed, admitting it were an Estate-tail, that a Surrender thereof is a discontinuance to put the issue to his action: for he ought to take it subject to all the inconveniences which an Estate-tail at the Common Law is subject unto. For that is the Customary Conveyance, and there is not any other means to discontinue it, and it is as strong as a Libery by Tenant in tail. And the Alienee is in by the Tenant in tail, although he come in by Grant of the Lord. And there is no Question, but that a Formedon may be brought, supposing the Entry by the Tenant in tail, and not by the Lord; and so a Feme shall have a Cui in vita: where one is also in by the Lord by his Admittance, his Estate shall not be avoided without a Recovery in the Lords Court; for the Lord ought to have Conusance of his Tenant. And therefore an Estate given by Surrender in the Lords Court cannot be avoided without a Recovery there, and not by Entry. Thirdly, admitting, that the Surrender of a Feme Covert, being sole examined, should bind her by the Custome, whether such a Surrender upon her examination made before two Tenants of the Mannor, such Surrenders before them being used to be made, be good. And all the Court agreed, that by Especial Custom to warrant it, it may be good, otherwise not. Because it is a Judicial Act more proper to be done in Court. And so it was adjudged, as Walmsley said, upon a Demurrer, in a Lancashire Case, where such a Custome was pleaded, and adjudged good. Fourthly, whether a Surrender made to the Steward, to the use of the Steward himself be good? And all the Justices held, that it was. For the Entry is Quod sursum reddidit in manus Domini. And the Steward is but the Lords Servant, and the Surrender is to the Lord, and not unto him. And therefore Glanville said, If one makes a Recognisance to J. S. to my use, it may be well acknowledged before my self. So if an Obligation be made to J. S. to my use, it may be delivered unto me to the use of J. S. And although it was here offered to prove by Witnesses, that by the Custom of the Mannor, a Surrender could not be made to the Steward himself to his own use. The Court rejected it; for it is against Law. Fifthly, where a Copy-holder makes a Lease for years according to the Custom of the Mannor, whether such a Lessee upon Ouster may maintain an Ejectione Firmæ at the Common Law? Glanville said, that it had been so resolved in this Court, that an Ejectione Firmæ lies, making mention in the Declaration of the Custom to demise, &c. But Walmsley seemed to doubt thereof.

(43)

God. 368.

Ant. 391.

Post. 907.

Co. Litt. 60.b.

Post. 907.

Co. Litt. 60.b.

Pl. C. 233. a.

Post. 907.

Co. Litt. 60.b.

Anse 459. 2.

Mills versus Wood. Trin. 41 Eliz. rot. 3002.

- (44) **A**udita Querela. The Case was, That Edward Mills and Thomas were obliged in a Statute of 700 l. to W. The Defeasance was, That if Edw. M. and his Wife, before the first of May next following, should make such good assurance of an House to W. with such Covenants, which he should accept, and signifie under his hand to be reasonable; or should pay unto him upon the first of August ensuing 350 l. That then the Statute should be void; and he surmiseeth, that he, and his Feme were always ready to have made the Assurance; and, that W. the Conusee had not signified what assurance he would accept, nor required any; and yet had sued Execution, &c. And it was thereupon demurred; and, after argument adjudged for the Defendant. For he is not bound to devise any Assurance, or Estate, but it is at his Election to accept an Estate tendered, or the Mony. And there cannot be an acceptance, but where there is a tender on the other party; and therefore the Conusor ought to have devised the Estate, and to have procured the Conusee to accept thereof; otherwise he ought to pay the Mony. Wherefore it was adjudged accordingly.

Post. 804.
Ant 539.
Moor 545.

Pledgard versus Lake.

- (45) **T**enant for Life, remainder in tail, He in remainder letts for years, to begin after the death of the Tenant for Life; the Tenant for Life afterwards suffers a recovery with Voucher of him in remainder in tail, and dies; whether this Lease were destroyed, and gone? was the Question. And all the Justices held, that it was not: but that the Lessee might well falsifie this recovery by the Common Law, and also by the Statutes. But if the Tenant in Tail, who had the Inheritance, had suffered a Common Recovery, that should have destroyed all the remainders, and reversions thereupon depending, and all the Estates derived out of such a remainder. But Tenant for Life hath not any such power: and the recovery is had against Tenant for Life with the Voucher of the Tenant in Tail. And it would be very inconvenient, if, by such recoveries of reversions, Leases for years should be destroyed. Wherefore, &c.

Ant 284.
2 Co. 62. b.

Price versus Simpson. Hill. 41 Eliz. rot. 1097.

- (46) **T**respas. Upon a Special Verdict, The Case was, Jackson Lessee for years by several Leases of divers Lands, some of them in the Diocess of York, some in another Peculiar within the same Diocess, devised all those Leases to his Son, and made his Daughter within age his Executrix; the Mother takes administration, durante minore etate of the executrix in (F. the peculiar, where the Testator died) ad commodum, & proficuum Executricis, the Administratrix granted this Term, durante min. etate of the Executrix, to the Plaintiff; Whether this Grant was good, or not? was the principal

Co. 5. 29. 30.
2 And. 132.

Principal Question. And the Court resolved, that it was not good. For such an Administration hath but a special property *ad proficuum Executoris*, but not a general property, as another Executor or Administrator hath. And therefore his sale of Goods, unless they be *bona peritura*, or it be for necessity for the payment of debts, which he is chargeable to pay, it shall not bind. But he may sue, and be sued, and yet his authority is but a limited authority; and therefore like as if Letters *ad colligendum bona defuncti* were granted to one: there he may sell *bona peritura*, as fruit, or the like. Secondly, it was moved, whether the assent of an Administrator, *durante minore ætate*, to the Devise of a term, or the assent of the Executor himself during his Minority to such a Devise be good. Anderson said, that an Executor at the age of eighteen years may assent. But whether the assent by such an administration be good, or not, they doubted. Thirdly, it was moved, whether administration should in this Case be granted at two places, viz. The one within the peculiar, the other by the Arch-bishop of York, Ordinary of the Diocess: or, whether he should have the Prerogative in both, as he had where *bona notabilia* were in divers Diocesses, And it was resolved, that there should be two Letters of administration granted: for the Arch-bishop shall not have any Prerogative here: Because this peculiar was first derived out of his Jurisdiction. Wherefore, &c. 5 Co. 29.

1 Cr. 490.
Ant. 602.

The Queen against Page, and the Bishop of *London*.

Quare Impedit. And made her Title by Lapse, by the Statute 21 H. 8. For that the Incumbent had taken a second Benefice. The Defendant pleads, that he is, and was Chaplain to the Lord Morley, and pleads a Dispensation from the Arch-bishop of Canterbury, according to the Statute, and the Confirmation, &c. And upon Oyer demanded thereof, and entred in *hæc verba*, it was demurred in Law, because that in the Letters of Dispensation the words were, mentioning the two Benefices to be of small value, *Unimus, anneximus, & incorporamus* the second Benefice to the first, without the words of *Dispensamus* for the taking thereof. And whether these words shall enure to a Dispensation? was the Question. And, after Argument by the Serjeants, it was argued by Doctors, Steward, Day, and Farrington, that it cannot enure to be a Dispensation, For the purpose of him, who made it, was to make an Union; and, that this should enure as an Union: and it cannot be an Union. For that ought to be always by the Ordinary of the Diocess, and the Patron. And when it fails in the Principal intent, it is void in all. And the purpose to make it an Union appears: for that the words are *incorporamus*, &c. which is not used in a Dispensation: and, that he should hold it *sine licentia Diocesana*. And that, after the Incumbents death, it should revert to his proper nature: which are not the words of a Dispensation. And although he hath power to make a Dispensation; that will not enure thereto: for *voluntate, & potestate, repugnantis*, all is void; and an Union, and Dispensation are of divers natures: for an Union makes of two Churches

(47)

Hob. 159.

Ant. 500.

Churches one : but a Dispensation leaves them as before. And such Dispensation of Pluralities are called in the Civil Law *Gratæ & stricti Juris*, *Quia odiosæ sunt*. And therefore, where a Dispensation was to retain a second Benefice de donatione, dispositione, seu præsentatione cujuscunque; and a Colledge had an Advowson, which became void, and they used by Election to make a Nomination thereto, and they chose him, who had this Dispensation: who being presented was instituted and inducted; this Dispensation was not sufficient to retain, because he had not the word Election therein. But on the other side, it was argued by Doctors, Crompton and Fountain, that this is a good Dispensation; for there is difference between a perpetual Union, and a Temporary pro vita Incumbentis. For, in the First, It cannot be without the Patron, and Ordinary, because thereby a loss accrues unto them. But in the Second, it may be without them by the Hertropolitan: for there they be not at any loss; for the one had his Presentation, the other his Admission before that Union: And after his death, it shall revert to the first Estate. And such an Union in their Law is called *Pall ata Dispensatio*. And, that such an Union may be, appears by the express words of the Statute of 21 H. 8. That one shall not retain a second Benefice, Any Licence, Union, or Dispensation to the contrary, &c. And there it is not intended a perpetual Union. For by such an Union two Churches are but one; and in such a Case he may take a Second Benefice without a Dispensation, &c. And afterwards, All the Justices, besides Anderson, Resolved, That it was a sufficient Dispensation. For it is not of necessity, to have the word Dispensation. But the matter is, Whether it be in effect a Dispensation: And if the Circumstances prove it, it is sufficient. And although Union is properly where there is an annexion of one Benefice to another perpetually; yet it is also when there is an Unity of them in one person, which is temporary, & that is here, although not so properly as the other. Wherefore it was adjudged for the Defendant.

Marshal versus Dean.

(48)
Ant. 709.

Action upon the Case for these words, That the Plaintiff was a Forsworn Knave. The Plaintiff demanding of him, where he was forsworn; He answered, In Uston Court (innuendo a Court Leet there holden) and it was moved, That an action lies not for these words: For the calling one Forsworn Knave, unless he saith in Court, is not actionable, which was agreed per Curiam. Then the Court here cannot know that Uston Court was any Court of Record, and the innuendo cannot help that which was imperfect. And therefore Williams said, It was adjudged That for saying, Thou wert Forsworn in White-Church-Court, an Action lay not. But Note, This Case was shewn to the Court in writing 28 Eliz. between Hern and Hix, and the Opinion of the Court there was, That the Action lay, and the Defendant

Defendant gave to the Plaintiff 3l. and he released his Sute, and no Judgment was given. And all the Court here held, That the Action well lay; for this Action is given by reason of the discredit of such words amongst the neighbors, and when he said, That he was forsworn in such a Court, it cannot be intended, but that it was a Court of Justice. And a President was shewn Pasch. 37 Eliz. rot. 370. in the Queens Bench, between Wildam and Copman, that for these words Thou art a false forsworn man, and wert forsworn in such a Court adjudged, that the Action lay. Ant. 492.

Thomson *versus* Butler.

IN a Writ of Annuity, the Case was. That one granted an Annuity, to be paid at the house of the Grantor, upon Request, at the four usual Feasts; the Grantee brings a Writ of Annuity for Rent due at such a Feast. The Defendant pleaded Non Requisite at the Feast; and it was thereupon demurred. The sole question was, whether the Annuity be lost for that time, because there was not any request made? And all the Court held, that it was not: For, by the granting of the Annuity, it is a duty, and the limitation to be paid at four Terms of the year, is a Limitation of the payment, and if it were not a duty, the Request is not material; as in the case between Lancaster and Capps, where a single Bond was made solvendum upon Request, the Defendant pleaded Non requisitus, and adjudged to be no plea; for it was a duty without request. So here. (49)
Ant. 548.

Crawleys Case.

REplevin. The Case was, A Rent was granted to two during the Life of J. S. to his use: Whether, if the two die, living J. S. the Rent were gone, or no? Was the question; for it was agreed, that there cannot be an Occupancy of a Rent Dy. 186. And it was held that it was not gone, especially in this Case, the Rent being granted to the use of J. S. vested in him by the Statute 27 H. 8. so as he had an absolute Estate, during his life: And the lives of the Grantees is not material, the Estate being transferred from them, otherwise it had been of a Grant to an use before the Statute. (50)
2 And. 130.
Owen 126.
Post. 901.
Dy. 67. a.

Coward *versus* Marshal.

TRespass. Upon a special Verdict, the Case was, One by his Will devised his Lands to J. his youngest Son, and his Heirs, and afterwards remarried, and by another Will in writing devised the Land to his Feme for life, paying annually to J. his youngest Son, and to his Heirs, such a Rent: Whether this second Will was a revocation of the former? Was the question. And Anderson and Glanville held it to be no revocation, but that both may stand, although they be by several writings, unless it be manifestly contrary to the first Will, or that there be an express revocation therein; but they ought to stand together, if they may, as made by, and in one, and the same writing: And here his intention appears, That he had not any purpose to alter it as to his Son, but only to provide for his Feme, whom he afterwards espoused. (51)
1 Cr. 24.
2 Cr. 49. 691.

espoused; and by the appointing of the Rent to his Son, It appears, that his intent was, that the Reversion should be to his Son; the matter was afterwards ended by Arbitrament.

Greenfield *versus* Walter Dennis, and his Wife.

(52)
2 And 131.

WAsT by Rich. Greenfield against Walter Dennis, and his Wife, late wife of G. Greenfield. The Writ was general, That the said wife held the Lands ex dimissione G. G. and the Count was special, that G. G. infeoffed divers, to the intent a Recovery should be suffered against them, wherein they should vouch G. G. who should vouch the common vouchee, which should be to the use of G. G. for life, and after to the use of Alice his Feme, (the now Defendant) and after to the use of G. G. in tail, remainder to his right Heirs, which was executed accordingly. After Nul wast pleaded, and found for the Plaintiff, this Matter was alledged in arrest of Judgment, that this Writ did not warrant the Count: For the Writ ought to be specially, and to have recited all the matter, or it ought to have supposed the demise of the Feoffees; for, as this case is, the Land, and the Use are in the Feoffees, until the Recovery, which is as a limitation of the Use by them, and not by the vouchee; it being also his own Feoffment, (wherein his Feme cannot take by an immediate Conveyance from her Baron) it ought always to suppose the Gift and Demise to be from the Feoffees. Vid. Dy. 93. And although it was moved, That this, being after Verdict, is holpen by the Statute of 18 Eliz. which helps, where there is not any Writ; and this is as if there were not any Writ. Yet all the Court held, That this was not aided, but where there is not any Writ at all, but where there is a good Writ, as here, but it warrants not the Declaration; Or if it be an ill Writ, they be not holpen by the Statute.

2 Cr. 185.

Bushwood *versus* Pond. Mich. 40, & 41 Eliz. rot. 1043.

(53)

TRespals of his Beasts taking 22 Nov. 39 Eliz. The Defendant justifies for damage Fesant in his Free-hold. The Plaintiff replies, That long time before the Trespals, the Parson of D. was seised of such Land in Fee, and of Common for one hundred sheep thereto appertaining, and 4 Nov. 39 Eliz. Lett that Land, and Common to the Plaintiff for years, and therefore put in his Beasts, &c. The Defendant traverseth the Prescription to the Common alledged, and found for the Plaintiff. And it was moved in arrest of Judgment, that this replication was not good; for the Plaintiff entitles himself by a Lease 4 Nov. 39 Eliz. which was long time after the Trespals supposed in the Declaration: (Queen Elizabeth beginneth her Reign upon the 17 Nov.) and so a departure from it, and no title: And the whole Court held it to be ill, for which the Defendant might have demurred: but in regard he had passed that advantage, and had taken Issue, which is found for the Plaintiff it is now helped by the Statute of Jeofails; for it is but a mis-pleading, and therefore adjudged for the Plaintiff. Note, the Jury found here, That the Parson had Common for one hundred sheep, and six Cows; and yet it was held *per Curiam*, That the Plaintiff had not failed in his Prescription alledged.

But

But it was said by *Walmley*, If the Jury had found, that he had Common for one hundred and twenty Sheep, and so more of the same kind, then he had alledged, he had failed.

Watson versus Smith.

Action for Trover, and conversion of an Obligation. *Walmley*, (54)
Glanvil, and *Kingsmil* held, that it lies not; for if he finds ^{1 Cr. 262.}
 the Obligation, and cancels it, Trespass, Vi, & Armis, lies; for
 he destroys the thing found; and if he receive the money, and de-
 liver the Obligation to the Obligor, Accompt lies, and not this
 Action. Vid. Regist. 106.

Cardinal versus Heskett. Pasch. 41. El 2. rot. 251.

Debt Upon an Obligation Conditioned, If Robert Heskett (55)
 (who was bound Apprentice to the Plaintiff) should embe-
 sel any of his Masters Goods, and if within twenty days after
 notice thereof given to the Defendant, and one Thomas Heskett,
 and proof thereof made unto them, the Defendant should pay to
 the Plaintiff such sums of Money, as the Goods embevelled
 were worth, that then, &c. The Defendant protestando, That
 there were not any of the Plaintiffs Goods embevelled, pro pla-
 cito dicit, there was not any notice given to the Defendant,
 and Thomas Heskett. The Plaintiff replies, That such a day Ro-
 bert Heskett became bound his Apprentice, and that he cepit extra
 possessionem of the Plaintiff such Goods: And sold them to persons
 unknown; and that he gave notice thereof unto them, shewing
 that Paper unto them under the Apprentices own hand, where-
 in he confesseth it, and thereupon the Defendant demurred.
 First, Because he doth not shew, in what place he became an
 Apprentice, which is material, and it was held to be a good ex-
 ception per totam Curiam. Secondly, Because he shews not,
 that he was such a person, who might be an Apprentice by the
 Statute of 5 Eliz. and this was also held to be a material Excep-
 tion, and although the Statute is not pleaded, yet he shall take
 advantage thereof; because it is a general Statute. Thirdly,
 That this notice and proof were not sufficient; for it ought to
 have been given to them both together, and being given to one at
 one time, and to the other at another time, it is not sufficient;
 and this proof also is not sufficient in it self, being only upon ^{2 Cr. 381.}
 the Apprentices own confession, who is not Fide dignus. Where-
 fore, for these, and other exceptions, it was adjudged for the
 Defendant. Vid. 7. R. 2. Barr. 241. 33. Aff. 14. 10 H. 4. how proof
 shall be made.

The Queen versus Drury.

Upon demurrer, The Case was. The Countess of Kent had re- (66)
 tained two Chaplains, and afterwards took a third Chaplain, ^{Co. 4. 89. b.}
 and the third obtained a Licence, and dispensation to retain a se- ^{Moor. 561.}
 cond Benefice, and took it accordingly; and, whether he were ^{Post. 839.}
 such a Chaplain, as might obtain a plurality by the Statute of
 21 H. 8. cap. 13. because the other two Chaplains were not advanced?
 was the question. And *Walmley* held, That he was, because the
 Statute

Statute restrains not the number of Chaplains, which a Countess may have, but the number who are to have Qualifications; So he, who first obtains the Qualification to a Benefice, shall retain it; and the Arch-Bishop, when he makes a dispensation, examines not, who is first retained, but who is most worthy, and he will dispense but with two: So they, who first obtain a Benefice by dispensation, shall retain it, and the retaining of his Lord, or Countess, confers nothing upon him, but enables him only to the obtaining of a dispensation; and so is 14 Eliz. Dy. 312. And Hearn Serjeant, said, That it was so resolved in the Queens Bench, in the Case of the Lady Bridges, in an Information. Wherefore, &c. And to that opinion Anderson and Kingsmil first inclined. But Glanville e contra: Because the Statute of 21 H. 8. shews what persons shall be enabled to take Benefices by dispensation, viz. the Kings children, or those of his Counsel, or the children of Noble men, &c. which is by reason of the Dignity of their persons; so of Doctors or Batchelors of Divinity, &c. which is by reason of their Dignities; and then follows, That Countesses, &c. shall have two Chaplains, who may obtain dispensations, &c. which is as much as to say, that they are persons dignified to have this privilege, being Chaplains to such Noble persons. Whereby it is necessarily to be intended, That none, but they two, are to have that Dignity, and when she hath advanced two, who have that privilege to take a second Benefice when they will by dispensation, that privilege cannot be taken from them, as long as they remain her Chaplains; and the retaining of a third is more then the Statute allows, and therefore he shall not have the benefit of that Statute. And a President of one Skiffings Pasch. 34. Eliz. rot. 728. which was adjudged in the point: And another 34 Eliz. rot. 804. where issue was taken by rule of Court, that he was the first Chaplain retained; and Pasch. 35 Eliz. rot. 1508. between Archer and Conquest, where the same issue was taken. Whereupon Anderson and Kingsmil changed their opinion, and agreed with Glanville, that this third Chaplain was not to have benefit of this Statute, to obtain a dispensation, Wherefore it was adjudged for the Queen. 4 Co. 89. b. Vide postea. Trin. 43. Pl. 15.

Sherington versus Ward. Trin. 41. Eliz. rot. 454.

- (57) **A**ction Upon the Case, in Nature of a Conspiracy, for procuring him to be indicted for perjury, pro eo quod, in an Action of debt in London betwixt one Johns, and the Defendant, and recites the Action, and issue (but the Action in London was an Action upon the Case) the said Plaintiff was produced, as a witness, and swear falsely, and shews his Oath, but he shewed not, that it was coram Iudice, nor that it was coram Jurator, &c. The Defendant pleaded, That he was an illiterate Man, and delivered all the pleading in London to the Clerk to draw the Endicement, who, drew it, and therein mistook the Plaint in London, alledging it to be an action of debt, whereas it was an Action upon the Case, and delivered it to the Defendant, and read it unto him, as truly drawn, and he, believing the same, delivered it to the Grand Jury, and took his Oath, Quod Billa fuit vera, And, because it was false by reason of this Mis-prision, The

The Plaintiff was found Not-guilty; and thereupon the Plaintiff demurred: And the barr was held to be ill. But, notwithstanding, it was adjudged against the Plaintiff, That the Declaration was not good; because he doth not shew, that the Oath was taken before some Judge. And, then the Endicment was vitious, and an Action lay not: For this Action is not maintainable, but where a conspiracy lies upon a conspiracy between two. Secondly, they held, That this Action lies not against any, who prefers an Endicment, and swears it to be true; for it is for the Queen, and the Commonwealth: And, if it should be allowed, no Endicment would be preferred: So one shall not be punished for preferring any Bill into the Star-chamber, by an Action upon the Case, although the matter be false, and contains great slander; as it was ruled in the Earl of Lincoln's Case. The Endicment also was not sufficient by reason of this Dil-puision of the Action: So, as the Defendant might have pleaded Nul tiel Record, and he needed not to have said Not-guilty, so he never was legitimo modo acquietatus, any perjury supposed. Wherefore it was Adjudged of any for the Defendant.

Anst. 248.

Parker *versus* Combleford. Trin. 41 Eliz. rot. 1849.

TRespafs for the taking of an Horse. The Defendant justifies, as Lord of the Mannor of D. by reason of a custom there, That the Lords of the said Mannor had used from time, whereof, &c. to have after the death of every one dying within his Mannor the best Beast of such a person so dying, in name of an Heriot, which is found within the Mannor, and to seise, and retain them, as his proper Goods; and alledgeth, That the Testator of the Plaintiff dyed, within his Mannor, possessed of that Horse, and therefore he seised them, and it was hereupon demurred, and, after argument at the Bar, resolved by Anderson, Glanvil, and Kingsmil for the Plaintiff, That this custom was not good to bind a stranger; for consuetudo est ex certa causa rationabili, &c. And, if it be not grounded upon such a reasonable cause, it is void: And here to have the best beast of any one, who dies within his Mannor, cannot have a lawful or reasonable beginning betwixt the Lord and a Stranger: But betwixt the Lord and his Tenants, it is good; for it may be intended to begin with their Tenures, by their agreement, and by reason thereof, they had their Lands upon reasonable Fines: But between Lord and Stranger it cannot be, or be intended, upon what cause, or when, it should begin: But it is meerly by Extortion, and therefore like to the Case 11 H. 7. 14. and 21 H. 7. 40. where the Lord prescribes to have 3 l. of every stranger, who breaks his Pound, and ruled to be void, but to bind his Tenants only: And so is the reason of the Case in Doctor and Student, where a Lord prescribes to have any Purse lost within his Mannor, It is void; but the Case in 5 H. 7. prescription to have the Beasts of any Estranger, which are lying upon his Land all the day, to fold upon his Land in the night, is good; because the Estranger hath a Quid pro quo. So the Case of 2 R. 3. 15. Custom for Swans, That the owner of the Land shall have a Ground-bird, is good, for the ease, which they have to make their nests there. So here, It

(58)

Mo. 16.
Dy. 200. a.
1 Ro. 561.

Co. 7. 17. a.

It is not grounded upon any reasonable cause, nor hath the stranger any recompense. Wherefore, &c. But *Walmley c contra*; for, it being a custome, and used from time, whereof, &c. It ought to be maintained, if by any wit, or cause to be imagined, it may be intended to have any lawful beginning; for it is a custome, which hath been allowed, and used in many places; and it may be upon this reason, for that he had his Residence within the Mannor, at the time of his death, and had the help, and comfort of the Lords Tenants in his sickness, and after his death had their attendance to his funeral; and therefore for the time, which the Lord lost in the service of his Tenants, as also for that he had a place to rest his bones; therefore it is reasonable, and like to the Case of Swans, and a Portuary allowed by Custom: For they be not due of Common Right, and he hath a *Quid pro quo* by his Residence within the Mannor at the time of his death. Wherefore, &c. *Glanvil*, If this be a general custom, which goes to the whole County, it might be so intended, and peradventure would be maintainable; but not as a private custom within the Mannor. Wherefore, notwithstanding, by the assent of *Walmley*, it was adjudged for the Plaintiff. And in *Trin. 42 Eliz. rot. 446* in the Queens Bench Error was brought of this Judgment, and the Error assigned in point of Law. And the Judgment was affirmed.

Emery versus Emery.

(59)

DEbt upon an Obligation conditioned for the performance of an award to be made, &c. The Defendant pleaded, *Quod nullum fecit Arbitrium*. The Plaintiff sheweth an award, that the Defendant should release all Actions, &c. *ut talis adviseret*, &c. And adjudged to be a void Arbitrament to refer it to the act of another, and that the Defendant is not bound to perform it.

Ant. 432

Brook versus Wheeler.

Hill 41. Eliz. rot. 2041. Trin. 41. Eliz. rot. 1764.

(60)

DEbt upon an Obligation. The Defendant pleaded a Release of all Actions, and Demands in Barr. The Plaintiff demands Oyer thereof, and an exception of one Bond was therein contained. And the Plaintiff replies, That that was the Bond in Sute, and that the sum excepted, and the person mentioned to be excepted, were all one. And thereupon the Defendant demurred: For Actions and Suites being released, although he excepts the Obligations, yet it serves to no purpose. But the Court resolved. That, the Obligation it self being excepted, all Suites, and Actions concerning it, are also excepted; and, that the Defendant having pleaded a release generally, without any exception, and upon Oyer demanded, a Deed is shewn without an Exception. The Plaintiff might have pleaded *Non est factum* generally. *Vid. 39. H. 6. 15.*

Norwood *versus* Grype. Trin. 41 Eliz. rot. 1209.

Debt upon a single Obligation for the payment of 8 l. The Defendant pleaded, That after this Obligation, he, and one J. S. made an Obligation unto the Plaintiff of 14 l. for the payment of 7 l. at a day to come, in discharge of the said Bond of 8 l. which the Plaintiff accepted in discharge thereof. Whereupon the Plaintiff demurred: And, without argument, it was adjudged for the Plaintiff; for one Deed cannot determine a Duty upon another Deed.

(61)
Ant. 706.

Whyte *versus* Gerish. Pasch. 41 Eliz. rot. 1557.

Replevin. Upon demurrer, the Case was, That Whyte, and Gerish levied a Fine of the place, where, &c. sur Conu-
fance de Droit come ceo, &c. and the Conusee rendered Tenementa prædicta to W. in tail, reserving a Rent, and by the same Fine concessit, Quod Tenementa prædicta integre remanebunt to G. in Fee, if W. died without Issue of his body; and, whether the reversion, and Rent hereby passed, being all by one Fine without naming them? Was the question. And it was resolved, that the Reversion and Rent passed, being by Fine, and that it should enure, as several Fines. But if one makes a Gift in tail rendering Rent, remainder over in Fee: This, being by Deed, is a good reservation of the Rent to the Donor, and the remainder only shall go to the stranger; but it was said to be otherwise in a Fine, and that so is the course of Fines. Wherefore it was adjudged for the Abowant. Vide postea, Mich. 42, & 43. C. B. Pl. 36.

(62)
Co. 1. 76. b.
Owen 126.
Moor. 575.
2 And. 131.

Lane *versus* Golman. Trin. 41. Eliz. rot. 1417.

Debt upon an Obligation conditioned; That if C. payed to L. at such a place, within a moneth after demand, 20 l. when, and at such a time as the said L. had a Son, that shall, or can speak the Lords Prayer in English, that then, &c. The Defendant pleaded, that the said L. the Plaintiff had not, after the Obligation made, any Son, qui loquutus fuit, aut loqui potuit, the Lords Prayer, &c. The Plaintiff replies, that such a day he had one H. filium suum, qui potuit loqui the Lords Prayer in English, &c. & alledgeth a demand of the 20 l. &c. The Defendant demurs, because this allegation, quod habuit filium, qui loqui potuit, &c. is not sufficient for an issue to be taken, and tryed upon it; for that it is but a power, and not reduced to an Act, and it is not triable: In regard the power is secret, and cannot be known, if it never were reduced to Act. But the whole Court held it to be a good replication, and a good issue, and well triable; for the condition being in the disjunctive, he may alledge the one, or the other at his election; and his power of speaking &c. shall be proved upon the evidence by those who had heard him recite it: but the most apt, and proper issue had been; that he had a Son, qui loquutus fuit and so have tryed a thing actually done. And a Case was cited, That in a Quare impedit, a Bishop pleaded a refusal; for that the Presentee to a Church in Wales (where all the Parishioners were Welsh-men) could not speak any Welsh, and Issue

(63)
Post. 792.
Owen 127.

sue was taken, that the Presentee could speak Welsh; and upon demurrer, it was adjudged to be a good issue. And another Presentee was cited in an information by Broughton against Price; upon maintenance in pleading of a Cause, he pleaded, that he was *peritus legibus*, &c. and so justifies; and adjudged upon demurrer to be no plea; for the Jury cannot try whether he be *peritus legibus*, or not: But he ought to have pleaded, that he had been a Student in such an Inns of Court, and called to be an Utter Barrister,

Hampton versus Bartholomew. Trin. 41 Eliz. rot. 1514.

- (4) **D**Ebt upon an Obligation against the Defendant, as Administrator of John Bartholomew. The Defendant pleaded a Recovery in debt against him in London, *Et quod nihil, &c. præter ad satisfaciendum*, that Judgment, &c. The Plaintiff replies, confessing the Recovery, but shews, that, before this Action brought, the Plaintiff there confessed satisfaction upon Record; and thereupon the Defendant demurred: Because he doth not alledge, that the Judgment is entred upon that confession; nor that Judgment was entred, *quod defendens eat sine die*; nor that he had Goods over and besides those, which satisfied the recovery, and it was adjudged for the Plaintiff: For, satisfaction being acknowledged, he cannot plead, that he had nothing, &c. because the Judgment is discharged by this satisfaction acknowledged, without any other Judgment.

Kensley versus Richardson. Trin. 41 Eliz. rot. 140.

- (5) **E**jectione firmæ. The Defendant pleaded, that the Lessor of the Plaintiff was Copy-holder in Fee of that Land, parcel of the Manor of H. which is in the Queens possession, by reason of the Wardship of one B. and that the Lessor surrendered to the use of the Defendant in Fee, who was admitted accordingly; and that afterwards the Lessor entred upon him, and expelled him, and Let it to the Plaintiff, prout in the Declaration, and the Defendant re-entred, as lawfully he might, &c. And hereupon the Plaintiff demurred; and it was adjudged for the Plaintiff, that the plea was ill: For there is not any confession, and abeyance of the Lease alledged by the Plaintiff; for the Action is brought, as of a Lease of Land at the Common-Law: and this plea proves, that the Land is Copy-hold Land, and a Copy-holder cannot make a Lease for years, unless by custom, or by Licence of his Lord, which ought specially to be shewn; and the Defendant here hath pleaded a Lease by an intruder upon the Queens possession, which is not good: Nor any confession of the Lease alledged. Wherefore it was adjudged for the Plaintiff.

Shaw *versus* Sherwood.

Pasch. 41 Eliz. rot. 2504.

DEbt as Administrator to Rob. Shaw for 20 l. and counts, that the Defendant by his Bill Obligatory (here shewn in Court) acknowledged Se recepisse 20 l. of one Thom. Pretty, to the use of the Intestate Solvendum at such a time, Quod videretur opportunum pro proficuo R. S. the Intestate. And shews, That at such time videbatur to R. S. the Intestate opportunum to have the said Money, and he demanded it, &c. The Defendant demands Oyer of the Bill which was in this manner, viz. This Bill witnesseth, That I Rob. Sherwood have received of Th. P. 40 l. to the use of Rob. Shaw, and Jane Shaw his Sister, Children of John Shaw deceased, equally to be divided between them, which sum I confess to have received to the uses abovesaid, and the same to repay again at such a time as shall be thought best for the profit of the said R. S. & J. S. which sum of 40 l. is the full Bequest of their Father, in witness, &c. The Defendant demanded Judgment of the Wit, and Count, as not being warranted by this Bill; and it was thereupon demurred. First, Whether this should be said to be a Bill Obligatory; because the words be quasi in nature of an acquittance, testifying a receipt of Money, But the Court held it to be a good Bill, and shall be intended to be delivered to the use of the Plaintiff, for to the Plaintiff hath supposed by his Declaration; and the Defendant hath admitted it; otherwise he ought to have pleaded Non est factum, &c. As also because debt well lies for it, and not accompt upon the lending. Secondly, whether this repayment ought to be made of this 40 l. to R. S. and J. S. for whose use it was received, or to T. P. who delivered it. And it was held, that it should be to R. S. and J. S. For although the word repay is properly to him, who delivered it, yet by the words, To have received to the use, and to be repayed when shall be thought best for their profit, &c. Shews the intent to be, that it shall be paid unto themselves, when they require it. Thirdly, If so, then whether this were a joyn, or several debt of 20 l. to both of them. For, if it were joyn, it should survive, and the Administrator of R. S. could not have it. And if they were alive they ought to joyn in the Action; and it cannot be a Bill for the 20 l. only but it was resolved, that it should be several Bills to them in one Deed, and they should be divided debts, by reason of the words equally to be divided, &c. and it was afterwards adjudged for the Plaintiff, that he should recover his debt and damages. Note, this Judgment, how that the Plea is to the Wit, and Count.

(66)

Moor. 667.

Yelv. 23.

Owen 127.

1 Rol. 597.

Co. Lit. 198. a.

Ant. 14.

An. 690.

Hawkins *versus* Mildmay.

Mich. 41, & 42. El. 2. rot. 1506.

Action Upon the Case against the Defendants for that upon a Capias directed unto him against J. S. he, being Sheriff of Essex, directed his Warrant to such a Bailiff of a liberty, to Arrest the said J. S. who arrested him accordingly. And, that the Defendant well knowing thereof, had notwithstanding upon the day of return,

(67)

A a a a

return,

return, returned a Non est inventus. And upon this Count the Defendant demurred. And it was resolved by the whole Court, that the writ well lay for this matter. And Anderson said, If the Sheriff in this Case had returned, that he had sent unto the Bayliff of the Liberty, &c. who had given him answer, that he had arrested the body, it had been good, and the Sheriff should have been discharged, and Process should have issued against the Bayliff of the Liberty to bring in the body. But here in the principal case the Writ abated by the death of the Plaintiff before Judgment.

Ireland versus Goodale.

(68)

Error of a Judgment, given in the Queens Bench Hill, 42 Eliz. in an Action for words against Goodale. The Plaintiff there declared, whereas there was a Sute between Ireland, and one J. S. in the Queens Bench, which was tryed by Nisi prius, and the Plaintiff was produced, and sworn as a witness before Sir John Popham, &c. That the Defendant spake these words of the Plaintiff to Estrangers, &c. I will prove him (innuendo the Plaintiff) forsworn (innuendo before Sir John Popham Chief Justice) And it shall cost me 20 l. but I will make his ears afraid. After Verdict, it was adjudged for the Plaintiff, and now assigned for Error; that the words are not actionable. But all the Justices and Barons held, that the action was well brought, because the words are very scandalous. For to say, that he will prove him forsworn, strongly imports that he affirmed, that he was forsworn. For otherwise he cannot prove it: And in saying, That he was forsworn before such a Judge, *Tant amount*, as if he had affirmed, that he was perjured. A second Error assigned was; because the Defendant pleads justification, and the Plaintiff replies de Injuria sua propria, &c. And the Jury found, that the Defendant spake the words modo, & forma, Prout the Plaintiff had declared, which is not a good Verdict upon this issue; for the Justification is part of the issue; and a greater part of the Judges, and Barons conceived it to be an Error; but, because it was informed, that the Record was not well certified, they would advise thereof.

Ant. 222.

Cockeyn and J. S. versus Dame Hawkins.

(69)

Error. For that in debt in the Queens Bench by Dame Hawkins, against one Anton, The Plaintiffs in the Writ of Error were Mainpernors, where the said D. Hawkins recovered against Anton, and upon two Scir. facias's against the Mainpernors, had Judgment to recover against them: They brought Error, and assigned for Error; that there was not any cap. ad satisfaciendum awarded against the principal, before these Scir. fac. And it was moved by Snig, That this Writ of Error lay not by the Statute 27 Eliz. For it gives not Error upon a Judgment in a Scir. fac. For the Statute gives a Writ of Error to the parties in the Action, and not to the Mainpernors. But it was held by all the Judges, and Barons (besides Periam and Glanville) that a Writ of Error well lies for the Mainpernors. For this Sute against them is a Sute within the intent of the Statute of 27 Eliz. and is in nature of an Action of debt.

1 Cr. 464.
Post. 733.

Debt. For, as Littleton is, a release of all actions is a bayr. Wherefore being certified upon a Writ of Diminution that a capias ad satisfaciendum had been before awarded, the Judgment was affirmed. Ant. 581.
Sect. 505.

Prices Case:

Error of a Judgment in the Queens Bench. The Error assigned was; Because one of the parties were dead before the Judgment; and it was moved, Whether they had authority to examine such Errors. And it was held by all the Judges, and Barons, that they had: And if it were denied, it should be tried by a Jury in the Exchequer-Chamber. And it was moved, That the party being in execution might be Bailed. But it was held, that they had not any authority to do it. For they have authority only ad examinandum Errores. (70)
1 Cr. 514.

Harpool versus Miller. Hill. 38 Eliz. rot. 363.

Error brought, and assigned; for that an Action upon the Case, upon an Assumpsit brought against Harpool by Bill, being an Attorney in the Queens Bench, and not in Custodia Marshalli; He being an Attorney at large, and not any of the Clerks of that Court. For such an Attorney, is not upon Record there, and cannot sue, nor be sued there; and divers Presidents were shewn, that where they were sued or did sue by privilege, it was as Clerks of the chief preignotary, or other Clerks of other Offices, and not otherwise; and for that, Vide 1 H. 7. 12. And it was said, That this was not any matter concerning the jurisdiction of the Court: And divers of the Justices held it to be Error; and the second Error assigned was, because the Plaintiff declares in an Assumpsit; whereas there was a sute in the Star-Chamber, between one Coldwel, and the said Miller the Plaintiff. Wherein Harpool was Solicitor for him; that Harpool the Defendant, in consideration of a quart of Wine, assumed to save him harmless from all Costs and Charges, which should be awarded against him in the said sute: And alledgeth in Facto, That the said cause was afterwards dismissed, and that 8 l. costs were then adjudged against Miller the Plaintiff and that thereupon a Subpœna was awarded to pay these costs, which he had payd, &c. It was moved, That this is a void consideration: For it is maintenance, and therefore unlawful. And of this opinion was Walmsley, and some other of the Justices: But Anderson and Periam held, That it is not any Maintenance, for he doth not assume to expend the costs in sute, but to save him harmless from those, which shall be awarded, after that they be awarded: which may be lawful. Wherefore, &c. But the cause was afterwards compounded, in regard the privilege of the Queens Bench should not be drawn in question. (71)

William Forth *versus* Thomas Harrison.

Trin. 40 Eliz. rot. 359.

(72)

DEbt upon an Obligation of 200 l. dated the thirteenth of September 39 Eliz. conditioned for the payment of 100 l. at his house in Cheapside on the twenty first of January next ensuing the date hereof; the Defendant pleaded, That he on the twenty first of January, then next following the date of the Condition of the Obligation aforesaid, paid the said 100 l. at the Plaintiffs house in Cheapside secundum formam, & effectum Conditionis prædictæ, Et hoc, &c. And it was thereupon demurred in Law; because there is not any Parish or Ward mentioned, where the said House should be: So that, if issue be taken, there cannot be any Venue. Secondly, because he alledgeth payment upon the twenty first of January Post datum Conditionis, &c. And the Condition hath not any date; and for these causes the plea was adjudged to be ill, and the Plaintiff recovered, and Error thereof brought; and the Error was assigned in matter of Law, and argued divers times before the Judges, and Barons; and all of them besides one agreed, that the second exception was not material, For the Condition and Obligation are but one Deed, and the date of the one is the date of the other; and when he pleads, that he paid it secundum formam Conditionis; it shall be intended to be well enough post datum Obligationis, and the other is void. But for the first exception, Anderson, Savil, and Glanville held the plea to be good enough; for the payment alledged apud London, in his house at Cheapside, is good; and it is not of necessity to alledge a Parish or a Ward: No more then where a thing is alledged to be at Bristow or any other City; and all the Writ of Right, and Peacipé's are of a messuage in London, without naming any Parish or Ward. Wherefore, &c. But Periam, Clerk, Walmsley, and Kingmil, held the plea to be ill, for this cause. For it ought of necessity to be alledged in what Parish or Ward the house is, for the trial. As where payment is alledged at his house in any County; it ought to be alledged in what Wilt it is, for the Venue to have a trial: And so is 7 H. 6. 36. That a Parish and Ward in London, are as a Wilt or Hamlet in other Counties, and what hath been always used, and observed, is to be taken for Law. And of those Parishes and Wards, the Court may well take Conusance; and the Prothonotary of the Common Bench, and Kemp Secondary of the Queens Bench certified, that their course always hath been to plead any Act done in London, to be done at such a Parish and Ward, for the Venue, &c. And, for this defect, they held the plea to be ill, and that the first Judgment ought to be affirmed, and the Judgment was affirmed. And afterwards (ut audiui) Savell agreed to that opinion, &c.

Ante 160.

Price *versus* Price. Pasch. 41 Eliz. rot. 199.

ERror by the Bail; for that Judgment was given against him (63)
upon a Scir. fac. where no Capias was awarded against the Ant. 730.
Principal before the Scir. fac. awarded against him. And it was Ant. 597.
held, that the Writ of Error well lay in this Case for the Bail.
And the Judgment in the Scir. fac. was reversed; and the like
Writ was allowed between Coles and Babington.

Termino

Termino Hillarii, Anno Quadragesimo secundo

ELIZABETHÆ, in Banco Reginae.

Pigot versus Garnish, Ante, Trin. 41. Pl. 10.

(1)
Ante 678.

THe Case was now moved again, and Popham held, That if the Devise had been, that he should make Leases in the Infants name, it had been void; for it should in Law then be the Lease of the Infant, who cannot make any: And none may authorize any to make Leases in the name of another, but of him, in whose name the Leases ought to be made; but it seemeth as the Devise is in this Case, that he is but a Guardian for Nurture, and is not to make any Lease at his pleasure. For he might then make them for an hundred years: And here he cannot make but Leases at will. And of that opinion were Fenner and Clinch. Wherefore, Absente Gawdy, it was adjudged for the Plaintiff, that the Lease was void.

Bereblock versus Read.

(2)
1 Rol. 926.
Post. 822.

UPon Demurrer, the Case was: That Bereblock having recovered in debt in the Common Bench; a Writ of Error was brought, and whilst it was depending, he acknowledged a Statute, and died. Administration was committed to the Defendant, who brought a new Writ of Error, and whilst it was depending, Execution was sued upon the Statute, and afterwards the Judgment affirmed in a Scir. fac. upon that Judgment, the Defendant pleaded all this matter: And at the day of this Scir. fac. brought, he had not alia bona, then those Goods Delivered to the Conulance; and thereupon the Plaintiff demurred. Tanfield, for the Plaintiff, moved, That this was not any plea for the matter thereof; for the Judgment being first, and the Administrator having Conulance thereof, as he had by bringing the Writ of Error, it ought to be first satisfied; and although the Goods were taken in execution upon the Statute, yet the Defendant (although he could not have pleaded it, because he had not day to plead) might have remedy for it by Audita Querela, and so help himself. And the first Judgment is always to be first satisfied; as 2 H. 4. 21. 6. and 7 Eliz. Dy. 232. & Dy. 80. The plea also is not good for the Form. For he pleads an Extent of the Goods and,

and delivered to the Conusee; and he doth not say per Sacramentum, &c. As it ought to be, as Dy. 100. is. He pleads also, that he had not aliqua alia bona præter, &c. which is repugnant to the plea after, that the Sheriff had taken all the goods, so he had not any Goods at all. Vide for this 4 Ed. 4. 13. 20. H. 7. 27. Wherefore, &c. But against that was moved, that this plea was good for the matter: For both are debts upon Record, although the one be Puisne to the other: For as a Puisne Obligation may be paid before an Eigne; so it is of Records. And in 20 Eliz. between Truxton and Verney, it was ruled; that a Statute shall be paid before an Obligation, for it is a debt of Record; and here he could not have time to disturb the Execution, and therefore it is not reason, but that he should be helped by pleading it here; and it shall not be said to be a Devastavit when there is not any fault in him. And although it was said, that he might have an Audita Querela to help him: That is but a small remedy, that he should answer of his own proper Goods, and be put to seek his remedy against a stranger, who peradventure is not able to satisfie him, which would be mischievous to an Executor. Wherefore, &c. Fenner held the plea to be good; for, although where two Judgments are against a Testator, the Executor ought first to satisfie the first Judgment, for it may be pleaded in barr against the other: Yet it is not so for a Statute, for the Execution thereof is against the Executor without answer: And therefore it is not any Devastavit in him, in regard he could not have prevented it; and an Audita Querela lies not, because the Conusee hath not done any act to discharge the Execution. Wherefore, &c. Popham held, That an Audita Querela lies, because the Statute happened not to be put in execution against the Administrator. And if he will not sue it, it is his own default, and he shall be charged; and it is clear, That the Execution upon the Judgment ought to be before the Execution upon the Statute. And there is not any default in the Plaintiff, and he hath not otherwise any remedy; and if he will not help himself when he may, it is reason he should be prejudiced: As touching the exception of per Sacramentum proborum, Popham, Gawdy, and Fenner held the plea to be ill. But as to the matter. Gawdy spake not. Et adjournatur. Vid. postea, Pasc. 43. Pl. 20. Co. Entries 157.

Ant. 584.

Ant. 584.

Pomfreit versus Brownsal.

DEbt upon the Statute 32 H. 8. cap. 9. and demands 10 l. for himself, and the Queen, and alledgeth, how one Ann Reston brought an Action upon the Case in this Court, and had Judgment to recover, and a Writ of Enquiry of damages awarded, and the Sheriff empanelled a Jury to enquire: And the Defendant at Crompton in the County of Cambridge imbraced the jurors of the same Inquest, &c. The Defendant pleaded Non debet. The Jury found a special Verdict; that the Defendant in the County of Bedf. solicited the jurors to appear, and shewed unto them a president, where in such a Case great damages were given. Et si, &c. Godfrey for the Plaintiff moved, That this was direct Maintenance. For one, who is not learned in the Law, ought not to meddle to give, or shew an evidence to the jurors, as appears

(1)
32 H. 8. c. 9.

Ana 645.

pears 22 H. 6. 5. 28. H. 6. 6. And Imbracery is the labouring of a Jury to appear, as 13 H. 4. 16. is, & Vide 37 H. 6. 21. what is Imbracery. Wherefore, &c. But it was moved, in regard it appears, That this Action was not brought in the proper County, where the Fact was done, (which is found to be in the County of Bedford) The Bill ought to abate by the Statute of 31 Eliz. cap. 5. And of that opinion was the whole Court. For the Statute is in the Negative, That Actions upon penal Statutes Popular shall not be brought out of their proper County. And when it appears to the Court, That the Plaintiff had brought his Action against the Form thereof, although the Defendant did not take any advantage thereof by Plea; the Bill ought to be abated. Wherefore it was adjudged, Quod querens nihil capiat per billam.

Austen *versus* Pigot.

(4)
Moor. 911.
2 Cr. 501.

2 Cr. 501.
Yelv. 55.
Ant. 587.
Ante 307.
Yelv. 55.
Moor. 911.
Post. 819.

Sand. 142.

Prohibition for Suing for Tithes. Wherein was suggested, that P. Proprietor of the Rectory of B. wherein those Lands are, and all his predecessors have had twenty acres of Pasture, and another Close containing twenty acres of wood, in satisfaction of Tithes; and his witnesses being examined, according to the Statute of 2 Ed. 6. proved, that he had the twenty acres of Pasture, but not of Wood. And thereupon Coke, Attorney General, prayed Consultation: For the suggestion is not sufficient, that he had the Close, &c. without shewing of what Estate, or how. The suggestion also is not proved as it is alledged: But all the Court held it to be well enough: For it is sufficient that he had it, and the other cannot shew how. And so Doctor Cottons case was ruled accordingly. The proof also in a prohibition ought not to be so precise: But it appears, That the Court Christian ought not to hold plea thereof, it sufficeth; and therefore, If there be a prescription, that the Parson holds an hundred acres of Land, in satisfaction of Tithes, and the proofs be, That he holdeth sixty acres only in satisfaction of them, It is well enough. So here the substance is proved, that he held Land in satisfaction, &c. Wherefore it was agreed, That the Plaintiff should declare, and, That the Defendant should plead to issue.

Sibley *versus* Crawley.

(5)
2 Inst. 603.
Ante 277.

1 Cr. 208.
Yelv. 102.

Prohibition for Tithes. The Defendant shews, that, before that time, The Plaintiff had sued in Chancery, to stay it by English Bill, and afterwards brought a Prohibition there, & a consultation was there granted; and, that this Prohibition is for the same cause, viz. for matter of discharge: Wherefore he prayed a consultation upon the Statute of 50 Ed. 3. cap. 4. which is, That consultation being once duly granted, there shall not be another Prohibition. But the Court held, That this consultation was not duly granted according to the intent of the Statute, because the Prohibition was not duly grantable there, and so out of the Statute; for it was not duly granted upon an English Bill. And by Popham, The Statute is to be intended where the consultation is granted upon the examination of the matter; and not for the insufficiency of the proceedings. Quod fuit concessum. Whereupon it was awarded, That the Prohibition should stand.

Rudd

Rudde *versus* Tucker. Mich. 36, & 37 Eliz. rot. 136.

TRESPASS. Upon a special Verdict, The Case was, That Rudde the Plaintiff, and one Giles Tucker, were Joynt-tenants for life, Reversion in Fee to Sir John Arundel, of the Land in question. Sir John Arundel grants by Deed this Reversion in Fee to Edward Tucker the Defendant, to whom G. T. Attorned, and afterwards surrendered his Estate unto him, and died. Rudde the Plaintiff occupied all: The Defendant entred, claiming the Hoyety: The Plaintiff brought Trespass. It was argued by Clerk for the Plaintiff, That this Attornment and Surrender, by one Joynt-tenant, was void against his surviving Companion; for he cannot prejudice his Companion by taking from him the acquital, and other privileges: And in proof hereof relied upon 39 H. 6. 2. 19 H. 6. 2. 1. 32 Ed. 3. Quid Juris clamat 5. Wherefore, &c. Doderidge e contra; who agreed, That, upon a Grant of a Reversion by Fine, the one Joynt-tenant shall not be compelled to Attorn, nor shall his Attornment prejudice his companion. But, upon a grant of a Reversion by Deed, the Attornment by one of them, is good for his part, and shall bind his Companion, but not for the other Hoyety; and although it binds, yet it shall not prejudice him, as to the acquital, because it is by matter in fait. Wherefore, &c. Gawdy held, That the Attornment was not good for any part; and yet he agreed to Littletons Case of a Signiory granted, because it is entire; but a Reversion is not entire. So 32 Ed. 3. is good Law; For one Executor may prejudice his Companion; But a Reversion ought not to be made to pass in another manner, then the Statute intends. Popham accord. For, if the Attornment should be good, it would prejudice his companion, which a Joynt-tenant cannot do in things real: And a Reversion cannot be divided. Wherefore, &c. Fenner doubted thereof. Wherefore adjournatur. Vide post. Hill. 43. Pl. 1. 2 Co. 66. b.

(6)
Post. 802.

Barnabee *versus* Goodale.

ERROR of a Judgment in Bury, upon an Information upon the Statute of 5 Eliz. cap. 4. for exercising a Trade wherein he was not Apprentice for seven years. The Error assigned was; because an information upon a Penal Statute, ought to be brought within one of the principal Courts at Westminster, and not elsewhere, unless it be otherwise expressly provided by some Statute. And so it was adjudged here betwixt Gregory, and Blashford. And of that opinion were Gawdy, and Fenner, ceteris Justiciariis absentibus. Wherefore, for this cause, it was reversed. Vide Dy. 236.

Co. 6. 19. b.

Penson *versus* Hodges. Trin. 41 Eliz. rot. 1024.

ERROR of a Judgment in the Common Bench, in debt upon an Obligation. The Error assigned was; because the Plaintiff declares, That the Defendant per scriptum suum obligatorium concessisset se teneri, &c. without saying, Sigillo suo sigillat. as the course is in the Queens Bench. as Kemp said, that all their presidents

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R. 402.

2 Cr. 420.

presidents there were; but it was moved on the Defendants part, and so certified by the Prothonotaries of the Common Bench, that they were never used to mention the sealing of a Bond. And Gawdy said, that the Declaration was well enough; although it were not good by presidents (but as it is, it is clear) for when he saith, Per scriptum suum obligatorium concessit se teneri, &c. all necessary circumstances are intended to concur, viz. the sealing and delibering of the Deed; for otherwise it is not a writing Obligatory; and delivery is never alledged: Which proves, that it is not necessary to alledge the sealing; for that it is as necessary as the other. Wherefore it was adjudged accordingly, that the Judgment should be affirmed.

Alyson *versus* Byston.

- (9) **A** Capias ad satisfaciendum issued against one upon a Recovery in debt. And a Non est Inventus was returned. Whereupon a Scir. fac. was awarded against the Mainperners, which was Returned Nihil. Afterwards, upon a second Scir. fac. awarded, they brought in the principal, and prayed, that he might be in execution. And Kemp said, That antiently the Course of the Court was, (and so also in the Common Bench) That if a Capias ad satisfaciendum were returned Nihil, the Principal should not be afterwards received to render his body. But they had of late used sometimes, That, if the Mainperners upon the first Scir. fac. brought in the body, it had been received. But now the Court ordered, and appointed it to be observed for a Rule, that a Capias be awarded returnable at the next Term, whereon Nihil is returned, the principal shall not afterwards render his body. But if it be awarded returnable de die in diem, as the Course of the Court is here, that it may be so done; then if upon the first Scir. fac. the Mainperners bring in the body, he shall be received: And that there shall be fifteen days between the Tesse, and the return of the Scir. fac. so as he may have convenient time to seek the principal: And so it was appointed to be observed for a Rule. Note, Pasch. 42 Eliz. between Manning, and Pack. It was ruled accordingly.

Ante 618.

Ludlows Case.

- (10) **L**udlow was Endicted upon the Statute of 8 H. 6. cap. 9. Exception was taken, because the Endictment was, Ad sessionem pacis tent. apud B. and shews not in what County B. was; but the County was in the Margent. Secondly, Because it was not shewn before what Justices of Peace it was taken. And, for these Causes, it was ruled to be ill: And he was discharged.

Cottons Case.

- (11) **C**otton, Attorney of the Queens Bench, was Endicted, for that he such a day, year, and place, having an Ar covertly in his hand, feloniously struck one Margaret Spencer whereof she the same day, and year died. Exception was taken to the Endictment; because there was not any place alledged, where he

He struck her, nor where she died. Popham; for the first, it is all one with Lewis Case, in this Court, which was ruled to be ill for this cause; for there it was, that he, such a day, year, and place, having such a weapon in his hand, feloniously struck the party, *danse i unam plagam mortalem* so there was not any place alledged where he struck; but only where he had the weapon in his hand. Wherefore it was resolved to be ill. It is also ill for the other reason, because it is not shewn where she died.

Wingfields Case.

Wingfield was Endicted, for that he 22 January 40 Eliz. percussit *J. S. ex malitia, &c.* at *B.* *danse ei plagam mortalem*, of which wound he languished until the 23 Feb. 40 Eliz. at which day, at *B.* aforesaid, he died; and so the said *W.* *die & loco prædict.* murdered him, Erception was taken, because it doth not shew at what day he murdered him, there being two days mentioned before. Popham; It hath been resolved here lately in a Brecknockshire Case, by advice of the Justices, That if it be said, that he murdered him, the day of the stroke, or the day of the death, both ways are good: For it is true, that he killed him, the day that he stroke him, and the other day also: But here *die & loco prædict.* is uncertain, to which it shall refer; wherefore I doubt thereof. But Gawdy held it to be well enough; and that it shall refer to the day of the death, which is last mentioned.

(12)

Ant. 196.

Ant. 101.

Holland *versus* Dauntzey, and others.

Error to reverse a common recovery in Lancashire. The Error assigned was; for that the Vouchee was within age, and appeared by Attorney, where it ought to have been by Guardian; and, he being dead, the Writ of Error was brought by those in remainder. And all the Court held, That it well might be assigned for Error after his death; for it is not like to Error brought to avoid a fine; for here it shall not be tried by Inspection: For the point of Error is, That, he being within age, appeared by Attorney. And the Plaintiff had a *Scir. fac.* against the Heir of the Recoverer, and the Terr-Tenants; and the Heir appeared & *nihil dicit*; and four Terr-Tenants being returned warned, they pleaded, That two of them were Tenants of such Land jointly with A. and B. who were not warned, nor named; and demanded Judgment of the Writ, &c. And thereupon the Plaintiff demurred. And this plea, being pleaded in Mich. Term last, the Entry is *Dies datus est partibus prædictis*, until this Term. And it was now moved by Coke, Attorney-General, That this joint-Tenancy is no plea. First, That joint-Tenancy of parcel shall not abate all the Writ, but only of that parcel; As 22 Ed. 3. 10. 7 R. 2. joint-Tenancy, 8. 11 H. 4. 16. 14. Aff. 7. 19 Aff. 14. Dy. 291. Copleys Case. But Non-Tenure of part, at the Common Law, had abated all the Writ, for that the Demandant ought to have Conuſance, who occupies the Land, and another Writ ought to be brought: But of joint-Tenure he cannot know; for the one joint-Tenant may occupy the whole. Secondly, The plea is not good for them all, but for him only, who is

(13)

Post. 774.
Bridg. 52.

B b b b 2

Tenant

Moor. 524.

Tenant for that parcel; as 5 Ed. 4. 36. & 29 Aff. Pl. 70. one cannot plead Milnolmer of another. Thirdly, this plea of Joynt-tenancy in this Scir. fac. is no plea; for it is not to the Writ: For there is not any Tenant specially named, but they are only named in the Sheriffs return, And when a Scir. fac. names Terr-tenants, there peradventure, he, who is named, and comes in by garnishment, shall plead his plea; but not where the Writ doth not name any specially. Vide 46 Ed. 3. 29. 20 Ed. 3. Scir. fac. 121. 8 H. 4. 18. where in a Scir. fac. the Tenants ought to be named; And there is not any reason the Writ should abate through the Sheriffs default, where the party himself is blameless. And 11 H. 4. 16. is good Law, where in a Scir. fac. Joynt-tenancy was pleaded, and adjudged, that it should abate the Writ, for the Writ was not general. Tanfield moved, That this Plea was good, and should abate all the Writ; For it is not like to a Præcipe quod reddat: For there the Writ is several; but the Writ is here founded upon a Record, which is entire. And it was adjudged in Chancery between Cavendish and Morgan, that in a Scir. fac. upon a Reconuſance; Joynt-tenancy was pleaded; and it was adjudged, That it should abate the Writ; and so is 17 Ed. 3. 27. But it was thereto answered, That the reason there is, because all shall be contributory to the Execution: And afterwards, all the Justices held, That Joynt-tenancy is a plea in this Writ, but only to that parcel. And Gawdy held; That the joyning in plea by the other two doth not make all the plea vitious, but it is only of those two, who could not take advantage of the Joynt-tenancy with the other two. But Popham, Clinch, and Fenner held, That all the plea was vitious for this cause. It was then moved, That here was a discontinuance of the whole; for the Heir here Nihil dicit; So Nihil ought to have been entred against him, and not any continuance: But the day, which is given partibus prædictis, is intended only to those Tenants, upon whose plea it was demurred, and not to the Heir, so all is discontinued. But Coke shewed, that it was continued as well to the Heir, as to those, who pleaded; for it is partibus prædictis inde, &c. which is, That day is given of advising to all, whether they shall answer to the Error: And, if it be not a continuance, it is amendable, because it is the default of the Clerk; And all besides Gawdy held, that the continuance was well enough, and needed not to be amended. But Gawdy held it to be a discontinuance, and not amendable, because there ought to have been several continuances; but if it had been a continuance given to all, and the Clerk had entred it for one, and not for the others, it should be amended; as 22 Ed. 4. 3. is. But, the three others being against him, they awarded the plea to be ill, and that they all should answer to the Error. Wherefore, &c.

Goburn *versus* Wright.

(14)
Ant. 275.

ERror to reverse a Fine in Chester. The Error assigned was; because the Writ of Covenant bore Teste after the Teste of the Dedimus potestatem; and it was held to be a manifest Error. And the Fine was reversed for this Cause.

Termino Hillarii, Anno 42. Eliz. in Communi Banco.

Bedingsfield versus Ashley.

Covenant. Upon Evidence, The Case was; One Gower delivered to Ashley, Anno 26. Eliz. 100 l. who, by Indenture, Covenanted with Gower, that he would pay to every of the Children of Gower, which were then alive, and should be alive at the end of ten years, 80 l. Gower having then five Daughters. And, for assurance hereof, Mortgaged his Manor of Wimbourn, and was bound in a Statute of 500 l. And, whether this were Usury, or not? Was the question. And all the Justices resolved, That it was not; for it is a meer casual bargain; and a great hazard but that in ten years, all the Daughters, or some of them will be dead; and, if any of them be not alive, he shall save thereby 80 l. But if it were, that he should pay 400 l. at the end of ten years, if any of them were alive, it were a greater doubt: For if it had been, that he should pay at the end of one or two years, 300 l. if any of the said Children were alive, that had been Usury; for, in probability, one of them would continue alive for so short a time: But in ten years are many alterations.

(15)

Ante 643.

Barker versus Halifax. Trin. 41. Eliz. rot. 1234.

Assumpsit. Whereas the Defendant, such a day and year, in consideration that the Plaintiff, by the Defendants appointment, and for his debt, paulo ante tunc solvisset to R. S. 60 l. That the Defendant assumed to repay it upon request, &c. The Defendant pleaded Non Assumpsit, and it was found against him; and, after Verdict, upon a motion in arrest of Judgment, the Judgment was stayed, because the payment of the 60 l. being a consideration past, was not sufficient to maintain the Action. But Walmsley said, that an Assumpsit in consideration, that you had married my Daughter, to give unto you 40 l. was good; for the affection and consideration always continues.

(16)

Ant. 442.

Tho. Smith versus Smith.

Prohibition. The Case was; That the Wife of one Stock was excommunicated for Adultery before the High Commissioners, whereupon they sent out a Pursivant with Letters Writive to apprehend her, and bring her before them: By color whereof he, with the Constable, in the night, brake open the House where the Woman was; and, whether, it were justifiable? was the question. And all the Court held clearly, That it was not; for neither upon a Capias Excommunicat. nor for any other cause, unless for Felony or Treason, is it lawful for any to break an House in the night. As also for another cause the whole Court held, that it was not justifiable; for they of the Spiritual Court, by reason of Excommunication, or by reason of any other matter, are not to meddle with the person of any man, or to send any Process to have the body before them: And therefore, if any, for any cause whatsoever, be Excommunicated, and so continues in contumacy for forty days, they ought to certify

(17)

4 Inst. 331.

certified it into the Chancery, and from thence to have an Excommunicato capiendo but they of themselves cannot award any process to take him; and, if they might, the Writ of Excommunicato capiendo should be vain. And the Statute of primo Eliz. which gives the Authority to the High Commissioners, doth not alter the Law in this point; for that ordains only, that their proceeding shall be according to the Spiritual Law, which is no otherwife, then as before is expressed. Wherefore, &c.

Wotton *versus* Shirt. Hill. 41 Eliz. rot. 625.

(18)

Replevin. The Defendant avows for a Rent-Charge, and shews how the Plaintiffs Father was seised in Fee of the place, where, &c. And granted a Rent-charge to Sir John Wotton, younger Brother to the Plaintiff, of 100 Marks per annum in Fee; & that Sir John Wotton granted it in Fee to Luke Cobham, whereto the Tenant Attorned; and that L. C. was indebted to the Avowant by Judgment, and two parts of that Rent was extended by a Fieri fac. and delivered unto him in Execution; and so avows for two parts of the Rent. The Plaintiff replies, That at the time of the Extent L. C. was possessed of the Entire Rent, which might have been extended; and thereupon the Avowant demurs: The sole question was, Whether an Extent of two parts of the Rent were good? And all the Court held, That it was; For, although by the Act of the party, the Tenant shall not be liable to two distresses; yet by Act in Law he may: And this Act of the Sheriffs is an Act in Law; and his delivery of two parts was good.

Co. Lit. 164. b.

Taylor, and Joan his Wife *versus* George Sayer.

Trin. 41. Eliz. rot. 522.

(19)

Partition. Upon Issue Non tenuit in simul, & pro indiviso, a special Verdict was found. The Case was; Thomas Seyer, seised in Fee of the Lands in question, holden in Socage, Devised them to his Wife for life; And, that after her death, the same shall remain to my Issue. And it was found, That at the same time he had issue two Sons, (viz.) Robert and George the now Defendant; and two Daughters (viz.) Alice and Joan the now Plaintiff: And devised to his two Daughters, to either of them 10 l. solvend. at their age of eighteen years; and that one of them should be heir to the other of their Legacies, and died. Robert, the eldest Son, died without Issue; Alice, the Daughter, died without issue; the Wife of the Devisor died: And George the now Defendant, and Taylor, who married Joan, entred with him, and brought partition, Et si super totam, &c. And, after argument, it was adjudged for the Defendant, That he did not hold in simul, & pro indiviso; for they held; That this Devise of the remainder to his Issue, is certain what issue he intended, he having divers issues; and it shall not be extended to all his issue; for a Will shall be construed according to the intent of the Devisor, where a certain intent may be collected; but where it is uncertain, it is void, And therefore a Devise to his Son, where he hath two Sons, is void; because it appeareth not which of them

This Case is found to be
Case 74 Hale 106. 229

them he intended; and it shall not be construed to be to the eldest; more then to the other. But Chapmans Case in 16 Eliz. may have a good construction, because it is to the most worthy of blood; and the intent of the deviser ought to be collected upon plain words, and not upon words, which engender confusion; and, if it may not be collected by the words, it is void. As a devise to two & hæredibus, so a Devise melloribus hominibus in D. is void, for it cannot be known whom he intended to be the best men. And, as Walmesley said, it is a good way, when the words in a Will are imbiguous, so as the intent may not be collected, to expound the Will according to the Law, so there shall not be any prejudice. And here they all held, If by the Devise to the issue it should be extended to all the issues, they should have it for life only; and when the Reversion descended to one Joynt-tenant for life; or the one Joynt-tenant for life purchased the Reversion; the Joynture is levered, and the Estate for life drowned: And not like where two purchase to them, and the Heirs of one of them; for there the agreement at the beginning was, that the Estate for life should continue; and it was cited to be so ruled 33 Eliz. in the Lady Morgans Case, in the Court of Wards; and in 37 Eliz. to be so adjudged in this Court. And between Portley and Portley, it was ruled, that it was all one, where the one purchaseth the Reversion, and where the Reversion descends to the one Joynt-tenant. And an Exception was taken to the Writ, because it was general against the Defendant as Joynt-tenant, which is intended a Joynt-tenancy in Fee; whereas it ought to have been specially framed upon the Statute of 32 H. 8. and to have shewn the special matter, how it was a Joynt-tenancy for life. Sed non allocatur: Because the pre-
 sidents are, That always in such Case, the Writ is general. Wherefore it was adjudged for the Defendant.

Ante 696.

Co. 6. 16. b. 17. b.

Ante 53. 696

Co. Lit. 182. a.

Ante 470.

Ant. 470.

Post. 760.

Baldry *versus* Johnson. Trin. 41. Eliz. rot. 1702.

Action upon the Case, against the Defendant, Goaler of the prison in Bury. For that a Plaint being before the Bayliffs of the same Will, according to the Custome there, they directed a Warrant to the under-Bayliffs, to take the party; Ita quod habeant corpus ejus coram Ballivis ad proximam curiam ibid. tenend. viz. such a day; and the under-Bayliffs arrested him, and committed him to prison, sub custodia of the Defendant; and, after Verdict for the Plaintiff, it was moved in arrest of Judgment, that this Action lies not against the Defendant; for the prisoner was not committed unto him by any lawful authority: For the under-Bayliffs had authority to take him Ita Quod; but not to commit him to any other prison, for that it is on their own heads: And into whatsoever place they shall commit him, they shall retain him, but as the servants to the under-Bayliffs; and it is as the under-Bayliffs house, and an Action lies against them, if they have him not at the day, &c. and not against any other.

(20)

Ant. 26.

(21)

Southcoat versus Manory.

Mich. 40, & 41 Eliz. rot. 3329.

(21)

T Respass. Upon a special Verdict, the Case was; That one White and his Wife, were seised of those Lands, to them, and the Heirs of White; They, by Indenture, bargain, and sell it to Paston in Fee: Wherein was a Proviso, That if White, or his wife, or the Heirs of W. paid 100 l. to P. at such a day; that then it should be lawful to them, and to the Heirs of W. to enter, and to re-have, and enjoy, as in their former Estate, this Indenture notwithstanding; and that then, after such a payment, this Indenture, and all other Fines, and Assurances, to be passed between the said parties, should be to the use of White, and his Heirs, (leaving out there the wife) And lastly it is agreed, That all Fines, and Assurances, to be made between the parties within seven years following, should be to the Uses, Intents, Conditions, Grants, and Agreements, before here expressed, and to no other Use, Intent, or Purpose, &c. The Deed was not Enrolled: White, and his wife, within seven years, levied a Fine, according to that Indenture, to P. afterwards White died, and his wife, at the day paid the 100 l. and entred, and took the Plaintiff to Husband. The Defendant entred, by command of the Heir, pretending, that by the payment of the 100 l. the Fine was to the use of the Heirs of White, and not to the Feme, Et si, &c. And all the Court, after argument at the Barr, Resolved for the Plaintiff; that the Feme should have an Estate for life: For so is the Condition, and the first part of the Clause; and, that the other part of the Clause, or middle Clause, is not repugnant, but stands well with it, that it shall be to the use of the Baron, and his Heirs, and doth not control the limitation to the Feme for her life; and when both Clauses may by any construction stand together, it is to be construed accordingly; and the last Clause expounds this fully, That all assurances shall be to all the uses contained in the Indenture, whereof this is one; and that, if all the Clauses cannot stand together, the first shall stand, rather than the last. And they held, that an use cannot be raised by bargain and sale, by it self; but upon the Fine it might well be limited. Wherefore it was adjudged for the Plaintiff.

Shailard versus Baker, and his Wife.

Pasch. 41 Eliz. rot. 1043.

(22)

E Jectione firmæ of a Lease of Bearcroft. Upon a special Verdict, the case was; That one Robert Hunt was seised in Fee of the Land, where, &c. and had issue three Sons, viz. William, the eldest Son,

Son, by one *Wenter*, and *James*, and *Francis*, and a Daughter *Amie* (who was the Wife of *Baker* the Defendant) by another *Wenter*, and devised those Lands to *James* and *Francis* his sons; And if either of them, or their Heirs do sell the same, the gift of it shall stand void, and so return to the whole Heirs again. And in another part of his Will he willed, that *James* and *Francis*, his Sons, should pay, annually to *William Hunt* his eldest Son, and his Heirs 3 l. *Robert* the Devisee died: *James* and *Francis* enter, and died without issue. And, whether this were an Estate Tail in them, which determined by their death without issue, or were a Fee, which shall go to their Sister of the entire blood? Or, whether it were an Estate for life only in them? Was the question. And all the Court after argument at the Barr, resolved, That it was an Estate in Fee; because it appears, that the intent of the Devisor was, That the Heirs of the Devisee should have it by the words, If he, or his Heirs alien; also by the Words, reserving Rent of 3 l. to his eldest Son, and his Heirs: So as they gave a consideration for it: So of necessity it is to be intended, that he gave more than an Estate for life, and it cannot be an Estate-Tail: For, first, it is a Fee-simple by the intent of the Will; for so the Will shall be construed, according to the intent of the Devisor, if it may be collected, when the words are Satis apta, although they be not Consultat. And the intent also plainly appears, That he purposed, the Heirs of the Devisee should have it, which makes a Fee; and to have it an Estate tail cannot be: For his intent appears not by any express words; and as *Walmley* said, a Will shall not be construed by intent upon an intent; for then it should be usque Infinitum: And although the words be, Provided, that if they, or their Heirs alien, &c. that their Estate shall be void, and that the Land shall Revert; That is a void Condition, being annexed to a Fee: And a Fee cannot be limited upon another Fee. And the word Revert shall not be construed, that it should be an Estate tail, when it doth not appear, that his intent was to make it an Estate tail, but a Condition: For otherwise, by the alienation of the one the Estate of the other shall not be determined; and this was his intent: And such a Condition cannot be annexed to an Estate in Fee by the Law. And therefore it is void, and thereupon Adjudged for the Defendant.

Aut. 378.

Brown versus Adams. Trin. 4th Eliz. rot. 1125.

DEbt upon an Obligation conditioned, that if one *Tovie* appeared before the Justices of the Common Bench, &c. that then, &c. the Defendant pleaded, That one *Whytler* pursued a Capias out of the Common Bench, which was delivered to the Plaintiff, being Sheriff of Oxford, who made a Warrant to the Bayliff of the hundred of H. to arrest the said T. and one J. S. put in his own name, as a special Bayliff to arrest the said T. And that the said J. S. by colour of that Warrant arrested the said T. at D. in the County of Oxon, and carried him to W. in the County of Berks, and there detained him until the Defendant, and the said T. entred a Bond to the Plaintiff, as Sheriff of the County of Oxon, for the appearance of T. So the Bond is void by the Statute of 23 H. 6. and hereupon the Plaintiff demurred, and it was adjudged, that the plea was ill: For although this Bond

(23)

C c c c

was

2 Cr. 187.

was made by Durels, as all the Court agreed, and that the Defendant might well have pleaded it, and relied upon it, yet it is not within the Statute. And the Defendant is not aided thereby: For T. was never in the Sheriffs custody after the arrest: And the Bond taken out of the County is by Durels, but not within the Statute. Wherefore it was adjudged accordingly.

Hillarii 42 Eliz. in Camera Scaccarij.

Ball *versus* Bridges. Hill. 41 Eliz. rot. 1100.

(24)

Ant. 52.

Error of a Judgment in an Action upon the Case for these words of Bridges, He is a maintainer of Thieves, & keepeth none but Thieves in his house, and I will prove it, &c. The Error assigned was, That the words were not actionable: For he doth not say, and averr, that he knew them to be Thieves, whom he maintained. And one may have Thieves in his house and maintain them, and not know them to be Thieves, and then it is not any offence, And so was the opinion of all the Justices and Barons, and the Judgment was reversed.

Higgs *versus* Holiday. Ante Pasch. 41. Plac. 9.

(25)

Post. 781.

Error was brought of a Judgment, and assigned in the point of Law. Anderson, The property of the Money was never in the Master, but in the Servant: For if a man delivers Money to another, the property thereof is in the Bailee, because it cannot be known, and he can maintain accompt only: Quod omnes alii præter Clerk, & Walmsey concesserunt: For the Wit of Accompt proves the property of the Money to be in him: For it supposeth, that he is Receptor denariorum of the Plaintiff. But here the Plaintiffs Declaration is not good, for it is alledged, That he casualiter perdidit the Money. And when he had lost the possession thereof he had lost the property also, because it cannot be known. And hereto all the Justices and Barons agreed, and that it should be reversed.

Winchcomb *versus* Shephard.

(26)

Error of a Judgment in the Queens Bench in an Action upon the Case for cutting down the bank of a River, whereby his Meadow, adjoining, was surrounded. The Defendant justifies by prescription, for the reparation of his (the Defendants) Mill; and thereupon the Plaintiff demurred, and adjudged against him, that the prescription was good, and the manner of pleading. And now Error thereof brought, and the Error assigned for the manner, viz. because he prescribes to cut down the banks between the River, which runs to the Defendants Mill, and the River called Old Charwel, and saith, That he cut down the banks of the said River, and saith not between the Old Charwel; and so not pursuant the prescription, & it was holden to be an incurable fault. But it was moved, That the Declaration was not good: For that he declares, that he is Lessee at Will of Lands, & averreth not the life of the Lessor. Sed non allocatur. Because the Declaration is, that by vertue of the said Lease, at the time of the

the cutting, and of the action brought, he was possessed, whereby ^{Post. 751.} is necessarily to be implied, that the Lessor was alive. Wherefore the first Judgment was reversed, and the Record remanded. And the Court of Queens Bench, against their former judgment, awarded a Writ of inquiry of damages.

Passie versus Mondford. Trin. 41 Eliz. rot. 1088.

Error of a Judgment in an action for these words, Mrs. Margaret *Passie* (innuendo the Plaintiff) sent a Letter to my Mr. and therein willed him to poison his wife. The error assigned was, That the words were not actionable: For there is not any act done, and so not like to the Case, where one said, That J. S. lay in wait to commit such a Murder, &c. But all the Justices and Barons, besides King's Counsel, resolved, that the Action lay; for it is a great slander to will one to do such an Act, which is so odious. Wherefore it was adjudged accordingly, and the first Judgment was affirmed. ⁽²⁷⁾ ^{Ant. 710.} ^{Ant. 49.}

Glascock versus Duffield. Mich. 40, 41 Eliz. rot. 60.

A Sumpsit, in consideration he would sell to the Defendant three Cows for 10 l. that the Defendant promised to pay the 10 l. at the Feast of Easter following. And if he failed, that he would pay unto him 100 l. cum requisitus esset. And alledged in fact, That he sold the Cows unto him accordingly: And that the 10 l. was not paid at the said Feast; whereupon he brought this action for the 100 l. wherein he recovered. And in a Writ of Error it was alledged, That it was not a sufficient consideration for the 100 l. But all the Court held it to be good, and affirmed the Judgment. ⁽²⁸⁾

Ccccc2

Termino

Termino Paschæ, Anno Quadregesimo secundo

ELIZABETHÆ, in Banco Regina.

Rowleston *versus* Alman. Pasch. 42. Eliz. rot.

(1)

T Respals for the taking of a Gelding, and two Spoons of the Plaintiffs in Rowleston: The Defendant pleaded, that he was the Queens Bayliff of her Mannor of Burton extra, and that at such a Court holden before one J. Stanford Steward there, it was presented, That the Plaintiff being Tenant of the said Mannor, had surcharged the Common, for which he was amerced to 6s. 8d. which was affirmed by J. N. and J. D. Tenants there; whereupon he, as the Queens Bayliff, distrained that Gelding in Burton, for that amercement: And, that the Plaintiff himself delivered unto him those two spoons, in redemption of the said Gelding, which he detained until the amercement was paid unto him: And traverseth the taking in Rowleston: And hereupon the Plaintiff demurred in Law, and it was argued by Coventry for the Plaintiff, and by Godfrey for the Defendant. First, Because it is pleaded, Quod præsentatum fuit, that he surcharged the Common, &c. And doth not alledge in fact, that he surcharged: But the Court held it to be well enough pleaded by the Bayliff, to whom it sufficeth to take Consuance of the presentment, and no more, & non refert, as to him, whether it be true, or not; 41 Ed. 3. 27. 24 Ed. 3. 26. Secondly, Because the amercement ought to be by the Suitors, being in a Court Baron, they being Judges there, and not by the Steward: A distress also cannot be taken for it, unless there had been a special Custom alledged: But the Court resolved, that it was well enough: For it is the common course throughout the Realm, that the amercements are assessed by the Steward; and the distress in such case is incident, and lawful. Thirdly, it was moved, That this distress by a Bayliff, not having any Warrant to do it by Estreat, or otherwise, is not lawful: for he cannot distrain ex officio. And of that opinion was Popham, but the other Justices conceived otherwise; 9 Ed. 4. 40. 28 H. 6. 4. 33 H. 6. 2. Book of Entries, 507. Wherefore they would advise, and afterwards, for this last cause principally, it was adjudged for the Plaintiff. Note, It was held, that a common person cannot distrain for such Amercements, in a Court Baron, without prescription. But the Queen here by her prerogative might, as Popham held.

Ant. 698.
Co. II. 45. a.

Hill versus Langley.

DEbt upon the Statute of 1 R. 3 cap. 3. For that the Plaintiff being imprisoned upon suspicion of Felony, the Defendant took his Goods, before he was convicted or attainted, contra formam Statuti, &c. and demanded the double value: Upon the issue, Non debet, it was found for the Plaintiff, and moved in arrest of Judgment, that the Declaration was not good: For that it is not alledged, that they were seized for this cause: For if he took them as Trespass, an action lies not upon this Statute. Sed non allocatur: Because it shall be intended, that he seized them for this Cause, when no other cause is shewn: And the addition, contra formam Statuti, explains it and makes it good, if it had been before ambiguous: As in 14 Eliz. Dyer 312. in an Action for distaining averia caruæ contra formam Statuti, although it be not averred, that he had other Goods sufficient for the distress, it is well enough: For contra formam Statuti, implies as much. Wherefore it was adjudged for the Plaintiff.

(2)
1 R. 3. cap. 3.*Mints versus Bethil. Hill. 42 Eliz. rot. 777.*

DEbt upon an Obligation conditioned, That, if the Defendant at all times, upon request, delivered to the Plaintiff all the Fat, and Tallow of all Beasts, which he, his Servants, or assigns should kill, or dyels before such a day, that then the obligation should be void. The Defendant pleaded, That, upon every request made unto him, he delivered unto the Plaintiff all the Fat and Tallow of all Beasts, which were killed by him, or any of his Servants, or assigns before the said day. And hereupon the Plaintiff demurred. Stephens for the Plaintiff moved, that this plea was not good in such a generality. But he ought to have said, that he had delivered so much Fat, or Tallow which was all, &c. or, that he had killed so many Beasts, whereof he had delivered all the Fat. So as the Plaintiff might have assigned a breach certain: For it lies in his proper Conscience, and therefore he ought specially to have pleaded it; as 12 H. 8. 7, & 9 Ed. 4. 4. are. And Hillar. 37 Eliz. between Sands and Maleverer in this Court, where the Condition of an Obligation was, that the obligor who was Baylist of the Mannor of the Obligee, should render a just accompt, before such a day, of all the Rents of the Mannor, which he had received: In debt upon this Obligation he pleaded, that before the said day he had made an accompt of all the Rents, which he had received. And because he did not shew what sums he received it was adjudged to be ill. Wherefore, &c. Popham, and all the Court held here, that the plea was good, For when the matters to be pleaded tend to infiniteness, and multiplicity, whereby the Rolls shall be encombred with the length thereof, the Law allows of a general pleading in the affirmative, and by that reason allows of the Rule, that he who pleads in the affirmative, shall alledge performance of Covenants generally. And it hath been resolved by all the Justices of England, That in debt upon an Obligation to perform the Covenants in an Indenture, it sufficeth to alledge performance generally. So where one is ob-

Post. 916.

Ant. 691.

liged

liged to deliver all his evidences, or to assure all his Lands : it sufficeth to alledge, that he had delivered all, &c. or assured all his Lands. And it ought to come on the other side, to shew the contrary in some particular. And Popham said, that he doubted of the Case of Maleverer before cited: But it may stand with reason, because the Rents of the Mannor are certain, and may be collected into a short Sum. Wherefore they all resolved for the Defendant. Whereupon the Plaintiff by the Defendants assent, gave 40s. for costs, and waved his demurrer, and assigned a breach. Vide 13 H. 7. 19. 6 Ed. 4. 2. 39 H. 6. 21.

Ann Lasingtons Case.

- (4) **A**Nn Lasington was endicted by the name of the wife of J.L. of D. Peoman; and Execution was taken, because she had not any addition. Sed non allocatur. Vide 31 H. 8. Dyer, 46. and she was Endicted of Petit Larceny, and another was Endicted as accessory. And because one cannot be accessory in this Case, no more then in Trepass, the accessory was thereupon discharged.

Miller *versus* Eastcrowe.

- (5) **D**Ebt for Honey upon sale of Land: the Defendant tendered his Law. Gawdy held, That he should not be admitted there-to: For it is a real contract, but all the other Justices e contra: Whereupon it was ruled, That he should make his Law, &c. Vide 22 H. 6. 44. 34 Ed. 1. 18 Ed. 2. 31 Ed. 3. 34 H. 6. tit. Ley. 28. 45. 72. 73.

Dingley *versus* Moor.

- (6) **I**Nformation upon the Statute 33 H. 8. cap. 16. for buying of Woad-sted-Parn, within the County of Norfolk, not being a Weaver, and recites the Statute of 33 H. 8. and the Statute of 1 Ed. 6. cap. 6. whereby it is made perpetual; and that this offence was contra formam Statuti 33 H. 8. &c. Fenner held, that for this cause the Information was not good: For the Statute of 33 H. 8. is not now as an Act by it self; but it is a Noun Adjective, and it ought to be coupled with the Statute of Prince Ed. 6. and the information ought to conclude contra formam Statutorum, &c. As it was in Sheltons Case, where one was endicted for recusancy, contra formam Statuti, it was awarded to be ill: For it ought to have been contra formam Statutorum of 1 Eliz. & 33 Eliz. Popham; true it is, that it was so ruled, because the Statute of 23 Eliz. depends upon 1 Eliz. For it is, that every one, who refuseth to go to Church against the form of the Statute of 1 Eliz. shall forfeit so much, &c. But the Case in question differs from it; and therefore there ought to be a difference observed, when a Statute is made to endure for a certain time, and is afterwards made perpetual by a new act, or made perpetual in part, and where it is continued with a new addition: For where a Statute is made perpetual in part, or in whole, without any new addition or alteration, the offence may well be supposed against the form of the first Statute: For that Act is made to continue: and here in this Case, this Statute of 33 H. 8. is made to continue for Parn spun upon Rocks, but not for other Parn; and the Information might

might well be contra formam Statuti of 33 H. 8. But Popham held, That this Information was not good; because he did not shew, that it was Parn spun upon the Rock, for otherwise it was not any offence, as they all held. Wherefore, &c.

Hamond versus Dominam Reginam.

Error to reverse a Judgment given upon an an Enditment. (7)
The first Error assigned was, because the Record is, Quod per Sacramentum J.S. &c. it was presented, and these words, proborum & legalium hominum, were left out, And for this cause the Court held it to be ill; and, to that purpose, Gawdy cited 11 H. 4. 2 Cr. 47. 41. where an Enditment was discharged, because that some of the Enditers were Outlawed of Felony: So they were not probi & legales homines. Another Error assigned was, because it appears not in what County the place was, where the Enditment was taken. But a County was named in the Margent of the Record. And therefore it was held also to be ill, and Rule was given for the Reversal thereof, unless, &c.

Leeds versus Shakerley.

Action upon the Case, supposing, whereas he was seised in Fee of a Mill in Snodeland, and that he, and all those, whose Estate, &c. from time, whereof, &c. had had a Water-course running by three Mills, viz. A. B. & C. to the said Mill, that the Defendant cut the banks of the water-course in A. whereby he lost the profits of his Mill. The Defendant pleaded Not-guilty, and found against him. And it was now alledged in arrest of Judgment, that this Ven. fac. was awarded only from A. where the cutting was, whereas it ought to have been from all the three Mills, and from the Mill where the Mill is. Sed non allocatur; because the issue is Non Culp. but if the issue had been upon the prescription, it had been otherwise. Another exception was, because it was not alledged, that he was seised of the Mill at the the time of the cutting. But Hearn, Serjeant, answered, that the Declaration was good: For it suppoeth that the Plaintiff seiscus existit of a Mill, lpsque, & omnes illi, whose Estate he hath in the said Mill, have used to have a Water-course, &c. And that is a sufficient averment of the Seisin at the time, &c. And this Exception was taken in Dame Browns Case, 14 Eliz. Dyer. 320. and yet the Plaintiff had Judgment. But all the Court (absente Popham) held, That the Declaration was insufficient for this Case. And Gawdy said, That in the said Case of 14 Eliz. the opinion of the Lord Dyer was, that the Count was insufficient, and Error is there brought of the said Judgment, Wherefore it was here adjudged for the Defendant. Ant. 427. Ant. 747. Aost. 754.

Middleton versus Baker.

Ejectione firmæ. It was held by all the Court upon evidence to a Jury, That if the Plaintiff in an Ejectione firmæ, or other action, gives in Evidence any Matter in Writing or Record, or a sentence in the Spiritual Court (as it was in this Case) and the Defendant offers to demurr thereupon, the Plaintiff ought to (9)
Co. 5. 104. 2.

Co. 5. 104. 2.

to joyn in the demurrer, or waive the evidence, because the Defendant shall not be compelled to put a matter of difficulty to Lay gents, and because there cannot be any variance of a matter in writing; but if either party offers to demur upon any evidence given by Witness, the other, unless he pleaseth, shall not be compelled to joyn, because the credit of the testimony is to be examined by a Jury, and the evidence is certain, and may be enforced more or less; but both parties may agree to joyn in demurrer upon such evidence. And in the Queens Case, The other party may not demur upon evidence, shewn in Writing, or Record for the Queen, unless the Queens Counsel will there-to assent. But the Court in such Case shall charge the Jury to find the matter special, as appears 34 H. 8. Dyer 53. But this is by Prerogative.

Plowmans Case.

(10)

PLOWMAN was Endicted, for that, he being a Constable, arrested J. S. for Felony, and voluntarily let him go at large. Exception was taken to the Endictment, because he doth not shew for what Felony: For the other may traverse it. Vide 8 Ed. 4. 3. Secondly, he doth not shew when the Felony was committed: For it may be it was before the general pardon, and then the permitting him to go at large is no Felony. Wherefore for these reasons, the Endictment was held to be insufficient, by Clinch, and Fenner, cæteris absentibus,

Anonymus.

(11)

ERROR of a Judgment in an Action upon the Case. The Error assigned was, Because the Ven. sac. was Quorum quilibet habeat 4 libratas terræ, &c. where the Form, prescribed by the Statute, is Quorum quilibet habeat 4 libras terræ, &c. But it was said, That librata terræ is as good Latine as libra terræ. And the Statute intends not a precise Form, but that every one should have 4 l. terræ; and the course in Fines is, by libratas; and the Prothonotaries of the Common Bench certified their course to be always after the Statute, to make their Writs quatuor libratas. Wherefore it was held to be no Error, and the Judgment was affirmed.

John Coston versus Thomas Coston.

(12)

TRESPASS of Battery. The Defendant pleaded de son assault demesn, &c. The Plaintiff replies, That the Defendant Thomas Coston beat him, de son Tort demesn sans tiel cause, per ipsum John Coston superius allegatum; and so to issue, and found for the Plaintiff. And it was moved in arrest of Judgment, that this was a default in the Plaintiffs Replication, and not helped by any Statute: For it is substance, and there is not any issue at all joyned: For he traverseth matter alledged by J. C. whereas it is alledged by T. C. But all the Court held it to be but a Disposition, and the Court being full, they awarded, that it should be amended.

Ant. 435.

Anonymus

Anonymus.

HArris, Serjeant, moved this Case to the Court (which he said (13)
 was then depending before Sir Rich. Leuknor, Justice of Che- St. 13. E. 1.
 ster, who desired their opinion therein) viz. If an house be robbed
 in the day, and the Felons escape, Hue and Cry being made ;
 whether the Hundred shall answer for that robbery, by the Sta-
 tute of Winton. And he shewed to the Court a Case written by
 Justice Windham, 30 Eliz. rot. 2415. That a Mercer inhabiting with-
 in a Mill not walled, was robbed in the night in his house: and
 in the morning his servants perceived it, made Hue and Cry,
 and, because the Felons were not taken, the Hundred ought to be
 charged, by the opinion of all the Justices of the Common-
 Bench. And Gawdy seeing the Case, said, That he well knew it
 to be the hand-writing of Justice Windham: but he, and all the (1)
 Court held it to be no Law. For it hath been oftentimes re- Co. 76. 2.
 solved, That for a Felony done in the night the Hundred shall
 not be charged; and he, and Popham conceived, That in the Prin-
 cipal Case the Hundred shall not be charged: For the Sta-
 tute of Winton extends onely to robberies done to the person:
 and was principally made for the safeguard of travellers: but
 every one ought to keep his house at his peril, for it is his Cas-
 tle, and no other ought to meddle there; and therefore it is not
 reason, that any should be charged, if he be robbed there: and
 Coke, Attorney-General, said, That it was ruled so about 31 Eliz.
 in the Common Bench, in a Case, wherein he was of Counsel.
 And Popham said, if beasts be stolen out of a Close, and Hue and
 Cry is made, yet the Hundred shall not be charged, for the Hun-
 dred shall not be charged but where the party robbed gives no-
 tice in convenient time; which cannot be done by Intendment,
 when the beasts are stolen in his absence; and in the particular
 Case, Fenner and Clinch delivered not any opinion. *Note,* The Sta-
 tute is, because that Roberies, Homicides, Arsons and Larcenies, &c.
 The which Arsons is to be extended to Houses.

Love versus Prin.

Prohibition; for that P. Libelled against L. before the High Com- (14)
 mission, that the said L. beat him, or at leastwise assaulted him Moor. 607.
 with a Bill, and would have stricken him being a Clerk, and cal-
 led him Goose and Woodcock, with many such words; whereas
 such pleas of Assault and Battery appertain to the Court Tem-
 poral. And now Consultation was prayed; for being done to a
 Clerk, the Court-Spiritual might examine it. But all the
 Court held, That a Prohibition well lies: for although, for vio- 2 Inst. 492.
 lenta manuum injectione in Clericum, The Sute ought to be in the
 Spiritual-Court, as appears by Articul. Cleri, cap. 1. yet for an As-
 sault only, it is clear, That the Sute ought to be at the Com-
 mon Law, and for these words, they be not actionable. Where-
 fore it is not reason he should be vered for them. And it was or-
 dered, that the Prohibition should stand.

D d d d

Lanes

Lanes Case

- (15) **L**ane, and Lane were Endicted, *eo quod Felonice duas centenas casei cepit, & asportaverunt*, because Centenas is incertain, what weight, viz. Libras, or Uncias, or any other. As also because it was Cepit in the singular number, And it was ruled, That the Endictment was ill for both causes.

Stansbies Case. Pasch. 42. Eliz. rot. 27.

- (16) **S**tansby was Endicted upon the Statute of 8 H. 6. And Exception was taken to the Endictment, because it was *tali die, & uno, &c. in messuagio, &c. existent. Liberum Tenementum J. S. intravit, & ipsum J. S. expulit, & disseisivit.* And he doth not say, *Ad eunc existent. liberum Tenementum.* For otherwise, *Existent. liberum Tenementum* may refer to the time of the Endictment taken. And for this Cause he was discharged.

Ant. 751.

Coverts Case.

- (17) **R**eplevin. The Defendant avows for Damage-felant, by reason of a Copy granted unto him of the place, where, &c. by Cooper, Bishop of Winton, Lord of the Mannor, &c. The Plaintiff saith, That, before Cooper was Bishop, one Horn was Bishop of Winton, by whose death the Temporalities came into the Queens hands; and this Copy-hold, during the time, that the Temporalities were in the Queens hands, Elcheated, and the Queen, granted it to the Plaintiff in Fee, by force whereof he put in his Beasts, and traverseth the Grant by Cooper, &c. And thereupon the question was, Whether this traverse were good; or not? and the whole Court held, That the Traverse was good. And first they held clearly, that the Grant by the Queen of the Copy-hold Elcheated was good: And, that this Traverse ought to be: for there is not any confessing, and avoyding; because he doth not confess the Seisin, and grant by Copy; but if, he had confessed, that the Bishop had entred, and granted it by Copy, then there needed not any Traverse. So where one justifies by Lease from J. S. the Plaintiff saith, that J. S. infeoffed him before, it is not good without Traverse. Or to say, That the said J. S. after the Feoffment entred, and disseiled him, and made the Lease, and afterwards re-entred. So thereby he confesseth, and avoideth the Lease alledged. Wherefore it was ruled accordingly.

Co. 6. 24. b.
Ant. 288.

Ante. 30.

2 Vul. 212.

Huish *versus* Philips.

- (18) **A**ldita Querela, and shews; That he was obliged in a Statute Merchant of 600 l. to the Defendant, to the use of one Jo. Bush, and that a Defeasance was made thereupon: that if he paid such sums, at such days, to John Bush, that the Statute should be void; and shews, that at every of the days and places, he was Paratus to pay the said sums, & obtulit them, and the said J. B. was not there to receive them. The Defendant pleaded, That at such a day John B. was at the place, where, &c. and demanded

2 Cr. 13.
Yelv. 38.

manded the Sum, and neither the Plaintiff, nor any for him, were there for to pay it, Absque hoc, that the Plaintiff obtulit the said sum at the said day, &c. And thereupon the Plaintiff demurred; and it was moved for the Defendant, That upon this matter an Audita Querela lies not; for John Bush is a stranger to the Statute: and although he tendered to a stranger, who refused, yet the Reconulance is forfeited; for it is at his peril, to procure the stranger to accept it, when the act is to be done to a stranger. But all the Court held, that the tender was a sufficient performance, the defeasance of the Statute being made to the use of J. Bush; but if he had been a meer stranger, and was not to have any benefit thereof, it should be otherwise; and therefore Glanville said, that it was adjudged betwixt Carne and Savery; that where one was obliged to another man, to the use of a third person, to deliver a Chest to the said third person, who refused to receive it upon the tender at the day: that the Obligation was saved, because the obligation was to the use of the third person; for he shall not take advantage of his own act. Secondly, It was alledged, That this Declaration was not good; for that it is therein surmised, That J. Bush was not there to receive it, and he doth not say, nor any for him; for if any other was there to receive it for him, it ought to have been paid unto him. And of that opinion was Glanville; That for this cause the Declaration was not good, but all the other Justices held it to be well enough. For it shall be intended, that neither he, nor any other by him lawfully authorized was there to receive it; for if so, it had been, as if he himself had been there, and so it shall be intended upon the pleading. Thirdly, It was held, That the traverse was not good; for there being an express affirmative before, Quod paratus fuit, & obtulit, &c. And Non obtulit being an express Negative, there shall not be any traverse; for when a matter is expressly pleaded in the affirmative, which is expressly pleaded by the other party in the negative, there a traverse is needless, because there is a sufficient issue joyned; as 36 H. 6. 15. is. Wherefore it was adjudged for the Plaintiff.

Co. Litt. 208. b.

2 Cr. 14.

R. 528.

2 Cr. 13.

Cotton *versus* Sir Gervase Clifton.

DEbt upon an Obligation. It was held, That where an Obligation is made, and afterwards a defeasance is made thereof, if he pays a lesser sum, &c. there, if he pleads, the defeasance, and the tender of the lesser sum, he need not to say Tout temps prist. For by the tender he was discharged of all. But otherwise it is of an obligation with a condition to pay a lesser sum.

(19)

Co. Litt. 207.

Co. 9. 79. b.

Bret *versus* J. S. and his Wife.

A Stumpsit. The Case was; That William Dracot, first Husband to the Feme, sent his Son to Table with the Plaintiff for three years, and agreed to give unto him for every year 8l. and died within the year. The Feme during her Widow-hood, in consideration of her natural affection to the Son, and in consideration, that the Son should continue during the residue of the

(20)

D o d d d 2

time

Pl. C. 302. a.

Co. 4. 93. a.

time with the Plaintiff, promised to the Plaintiff to pay unto him 6 l. 13 s. 4 d. for the Tabling of the Son for the time past, and 8 l. for every year after, that he should continue there with the Plaintiff; afterwards she married the Defendant, and the Plaintiff brought his Action as well for the 6 l. 13 s. 4 d. as for the Tabling for the two years following. And warberton moved. That this action lay not. First, Because it was an entire Contract by her first Husband for the entire year, which cannot be apportioned. Secondly, Because natural affection is not sufficient to ground an Assumpsit without Quid pro quo. Thirdly, That this is a Contract, for which action of debt lies, and not this action. But all the Court held, that it was well lay. For as to the first, it is well apportionable, because it being for Tabling, which he had taken, there ought to be recompense, although he departed within the year, or that the Contracter died within the year. To the second, they agreed, that natural affection of it self is not a sufficient consideration to ground an Assumpsit, for, although it be sufficient to raise an use, yet it is not sufficient to ground an action, without an express Quid pro quo. But it is here good, because it is not only in consideration of affection, but that her Son should afterward continue at his Table, which is good as well for the money due before, as for what should afterwards become due. And as to the Third, True it is, That, if the Contract had been only for the Tabling afterwards, then debt would have lain, and not this action; but in regard it is conjoyned with another thing, for which he could not have an action of debt (as it is here for this 6 l. 13 s. 4 d.) an action upon the Case lies for all. (as debt with other things may be put into an arbitrament) Wherefore it was adjudged for the Plaintiff.

Humphrey *versus* Harneage, Mich. 40 Eliz. rot 2605.

P. L. C. 72.

(22)

Audita Querela, to avoid the Execution upon a Statute, wherein is surmised; That W. Humphrey the Conusor (his Father) was seised of divers Lands in Fee, and levied a fine of them to the use of himself for life; and after part of them to the Plaintiff in tail, and of the residue to the Conusee in Fee, and died. And because the Conusee afterwards sued Execution, he brought this Audita Querela; and upon demurrer, it was adjudged, That this purchase in this manner was a sufficient discharge of the Statute; but the demurrer was upon the pleading in default of a Traverse, which was adjudged not to be material.

Willoughby *versus* Brook. Mich. 41, & 42 Eliz. rot. 1704.

(23)

Debt upon an Obligation, Conditioned, Whereas Edward Willoughby hath before this time commenced divers Sutes in the Court called the Kings Bench at Westminster, against William Hutchinson: if the said W. H. shall without delay, by his lawful Attorney, appear, and make answer to all Actions, and Declarations commenced against him; that then, &c. The Defendant pleaded, That postea, viz. such a day W. H. appeared, & paratus fuit respondere, &c. But there were not then any actions there depending: and it was thereupon demurred.

And

And all the Court held it to be an ill plea: for the obligation estoppes him from saying, that there were not any actions there depending. As if a man be obliged to perform the Covenants in an Indenture, on his part to be performed, It is not any plea to say, there were not any Covenants therein on his part to be performed. Vide 3 Eliz. Dy. 196. & 279. Wherefore it was adjudged for the Plaintiff.

Ant. 362.
Post. 769.

Thornhil & Adams *versus* King & his Wife.

Mich. 41, & 42 Eliz. rot. 1901.

DEbt upon an Obligation, conditioned for the performance of Covenants within an Indenture of a Lease, Whereof one was, That the Lessee, his Executors, or Assignes, nor any other, who shall come to have the Estate, or interest in the Term, or any part thereof, shall not alien their Estate, without Licence of the Lessor, but only to his Wife, or Children. The Lessee devises it to his Wife, and makes her his Executrix, who enters therein, as Legatee, & takes King the Defendant to Husband: they alien the Estate, the Lessor brings debt upon the Bond; they pleaded, that they had not aliened Contra formam Conventionis. The Plaintiff shews the alienation abovesaid: And thereupon it was demurred, and held by Anderson, Glanville, and Kingsmil, that the Covenant is broken for the Feme is restrained from aliening, by expresse words thereof, as well as the Lessee himself: for it extends to the Lessee, and his assignes; and she is assignee. So although there was once an alienation by Licence, yet that assignee cannot alien without Licence: but Walmsley doubted thereof; because the words are, that the Lessee or Assignee should not alien but to his Wife, or Children; and the wife is not within those words, for she cannot alien to her self; So she is not intended to be within them; but he said, it had been adjudged here, That where a Condition within a Lease was, That neither he nor his Assignes, should alien without license; the Lessee died intestate; the Administrator was bound by this Condition. Vide Dy. 152.

(24)

Holt *versus* Lister.

Tenant for life, remainder for life. He in remainder for life reciting, that he had the Estate in Fee, Levies a fine sur Connuissance de droit comeo ceo, &c. The Conuisee brings a Quid juris Clamat. The Tenant for life made default, whereby he was adjudged to Attorn, which afterwards he did. The question was, Whether both their Estates were forfeited? the one by the Fine, the other by the Attornment thereupon. And all the Court agreed, That the first Estate was not forfeited, because the Attornment was by compulsion of the Court, upon his default of appearance, and not upon his meer motion. And Walmsley, and Kingmill held; that the second Estate is not forfeited by this Fine; because the Fine is not any discontinuance. And nothing passed thereby, but what he might lawfully pass. But Anderson, and Glanville e contra, because the Forfeiture is not only where there is a discontinuance, but where he doth act in a Court

(25)
Owen 146.

Cq. Litt. 252.2

Ant. 671.
Mo. 211.

or

of Record, whereby his will may appear to disinherit him in reversion; as where he prays in aid of a Stranger, or in Mass brought by a Stranger, he pleads Nul wast fait, and so admits the reversion in him. *Wherefore, &c.*

Co.Litt. 252.a.

Johnson versus Morgan.

- (26) **D**Ebt upon a Bill, which was by these words; Be it known, &c. That I, *William Morgan*, do acknowledge myself to be indebted to *J. Johnson*, for all such sums of Money, as *A. D.* my Brother in law did owe the said *J. Johnson*; and avers in fact, That then *A. D.* owed unto him 45 l. &c. *Walmley*, and *Kingsmil* held it to be a good Bill, and the Action well grounded thereupon, with this averment; for it is thereby reduced to a certainty; and although it be uncertain in the words of the Bill, yet when it may be reduced to a certainty, it is well enough; but *Anderson* and *Glanville* e contra, because it ought be certain, what, and to whom he owed it. And here to say, That he owed that, which his Brother in law owed, is void; for he cannot be indebted for his Brothers debts; for the debts of his Brother are not thereby discharged notwithstanding. But *Walmley* said, That the words Tant amount, that he is indebted in such a sum, as his Brother in law owed, and yet thereby the debt of his Brother is not determined. And the like Case was adjudged in this Court, Pasch. 29 Eliz. *Wherefore, &c.* Adjournatur.

Bretton versus Prat. Hill. 42 Eliz. rot. 408.

- (27) **D**Ebt upon an Obligation, conditioned for the performance of the award of J. S. to be made, &c. The Defendant pleaded Nullum fecit arbitrium. The Plaintiff shews, that such an award was made, That he should make an estate of such Lands to the Plaintiff for life, remainder to J. S. a stranger in fee; and it was thereupon demurred. Et per Curiam, although this award be void, as to the remainder to a stranger, yet it is good for the particular estate, and ought to be performed; but, because there was not any place mentioned in the Replication, where this Arbitrament was made, and which is issuable, it was adjudged against the Plaintiff upon general demurrer; for it is matter of substance.

Ford versus Rider.

- (28) **D**Ower. After Verdict for the Plaintiff, it was moved in arrest of Judgment, That the Ven. fac. by the Roll was awarded returnable 15 Pasch. but the Writ it self was made returnable 15 Trin. and so no Ven. fac. warranted by the Roll; and, that it was not aided by the Statute of 18 Eliz. But all the Court held it to be within the Statute; and that for such a Disposition Judgment should not be stayed after a Verdict.

Tisdale's Case.

- (29) **A** Stumpsit. The Case was, That *Tisdale*, Administrator, had a Judgment against him for a debt of the Intestates; and promised to the recoverer thereof, in consideration, that he would

would forbear to sue Execution against him until Octabis Mich. That he would pay unto him the Sum recovered at Mich. and at Mich. he failed of payment; and after, & before Octab. Mich. he brought an Assumpsit. And, this matter being shewn to the Court, it was moved, First, That this consideration is not sufficient to maintain the Action. For the forbearance betwixt Mich. and Octab. Mich. is void. But all the Court held it to be well enough: for, if part of the consideration be good, it sufficeth: and he ought to alledge performance of that part of the consideration which is material, and valuable. But where a consideration consists of two or three parts, and every one of them is valuable, there of necessity he ought to shew performance of every part thereof. They also held: That the consideration to forbear to sue Execution for a time certain was good cause to ground that action. But it hath been adjudged, That a consideration to forbear Paululum temporis is void, for it is not certain; and Paululum tempus is not temporis pars. And the Sute after Mich. before Octabis was well, because the Assumpsit was not performed by the Non-payment at Mich. But of that was the greatest doubt.

² Cn 110. 127.
Ante. 149.

² Gr. 503. 4.

Ante 19.

Biscope *versus* White. Mich. 41, & 42 Eliz. rot. 408.

T Respals for breaking his house: The Defendant justifies his Entry into the house virtute of a warrant of the Sheriffs upon a Fieri. fac. awarded to levy such a debt de bonis, & cattallis, quæ fuerunt Philip Biscope Testatoris, tempore mortis in manibus Lucretie Biscope his Executric; and saith, That the Executric was in the Plaintiffs house cum bonis suis, and there abided. And for that the door of the house stood open, he entred to Levy that Debt, &c. And it was thereupon demurred, and adjudged to be an ill Barr; because he doth not alledge, that Bona Testatoris were in the House, but bona propria Executricis, which were not liable to Execution. But, if bona Testatoris had been there, it was conceived that the Entry had been justifiable. Wherefore it was adjudged for the Plaintiff.

(30)

Post. 909.

Sir George Moor, & Francis Brown *versus* Onslow.

Hill. 41 Eliz. rot. 1558.

Partition. The Writ was general upon the Statute of 31 H. 8. That they did hold Insimul, & pro Indivis. Manerium de D. & Terras, & Visum Franci Plegii in D. And, that the Defendant denied partition Contra formam Statuti, &c. The Declaration was according to the Writs & that the Plaintiffs held to them, and their Heirs the one Moety; and to the Defendant, & his Heirs pertained the Moety. The Defendant pleaded, Quod non tenuit insimul prout, &c. And the Jury found a special Verdict, that the Plaintiffs held in Fee, and that the Defendant was Tenant in Tail, Remainder to his right Heirs of the other Moety. Et si &c. And it was moved first, that this general Writ was not good. For it ought to have been a Writ specially founded according to the Case: For so the Statute appoints; that every one shall have his Writ according to his Case, to be framed by the Clerks of the Chancery. And of that Opinion was Anderson, That for this Cause, the Writ was not good. But all the other Justices held, that this general Writ was good, for the Statute doth not prescribe a Form, but leaves it to the Clerks

(31)

Clerks

Ant. 743.

Clerks of the Chancery to be framed. And they have devised this writ upon this Statute generally, adding only these words, *Contra formam Statuti*, which shews it to be grounded upon the Statute. And it hath been the usual practice ever since that Statute, That such Writs between Joynt-tenants, and Tenants in common of an Inheritance have been allowed, but a Writ founded upon the Statute of 32 H. 8 betwixt joynt-tenants, and tenants in common of a particular Estate, ought to be special, shewing their particular Estates: wherefore it was ruled accordingly, that the writ was good. Secondly, Exception was taken; because Partition was demanded of the view of Franckfield, which is not severable; but it was holden to be well enough; for although it be not severable by it self; as Anderson, and Glanville held, (but Walmesley and Kingsmill e contra) Yet the profits thereof may be divided: Or, it may be divided, that the one shall have it at one time, and the other at another time; yet being demanded to have Partition thereof, with the Mannor, and other things, it well lies, for it may be entirely allotted to the one, and Land in recompense thereof, allotted to the other. Thirdly, Because this Declaration suppoeth, that they held joyntly in Fee; whereas it is found by the Verdict, that the Defendant held in tail, and so the Estate mistaken. And the Court held it to be ill. For although the one needed not to take Counsel of the others Estate: yet when he will take upon him the knowledge thereof, and mistakes it, he fails, and his Writ shall abate. Fourthly, Because the Ven. fac. is awarded de vicineto Manerii de D. where it ought to have been also from the Mill. And, for this cause, it was holden to be ill. But the parties compounded.

Ant. 743.

Osborn *versus* Eden. Trin. Trin. 41 Eliz. rot. 1322.

(32)

Assumpsit. Upon retaining him to be his Solicitor, for the prosecution, and defending his Law-causes, and promised to give unto him so much, &c. The Defendant thereupon demurred, supposing it to have been unlawful. And it was adjudged for the Plaintiff, that the Action was maintainable; and in Trin. 22 Eliz. rot. 1210. the like Case was adjudged accordingly.

1 Cr. 160.
Ante 459. 2.

Wolley *versus* Mosely,

Mich. 40, & 41 Eliz. rot. 592. & Pasch. 41 Eliz. rot.

(33)
Moor. 711.

Error of a Judgment in the Queens Bench. Upon demurrer in an Assumpsit, The first Error assigned by Tanfield was, For that the Writ of Inquiry of Damages was awarded by the Roll returnable Die Martis post Tres Trinit. And the Writ was returnable Die Mercurii post tres Trinit. And the Writ was returned served, and the inquisition taken 26 Junii, which was Die Martis post tres Trin. So the Writ varied from the Roll, and therefore ill, and Error, and the Judgment erroneous, but it was thereto said, that it was the default of the Clerk to award it returnable upon another day, variant from the Roll, which is the warrant thereof: and therefore prayed, that it might be amended. And as to the book of 4 Eliz. Dyer 211. where an Exigent was awarded

awarded by the Roll returnable Oct. Mich. and the writ was returnable menſe Mich. which was ruled, that it could not be amended. It was thereto answered, that the reason thereof was; because it was in case of an Outlawry not amendable; as also because the fifth County was held between Oct. Mich. & menſe Mich. which the writ could not warrant, if it should have been amended, and therefore it could not be amended. And as to the book of 2 R. 3. 11. where a Distring. Jurat. was awarded by the Roll, returnable 3 Pasch. and the writ was returned 15 Pasch. and at the day, by the writ, the party, and Jury appeared, and Verdict, and Judgment was for the Plaintiff: And thereupon Error brought and ruled to be ill, and not amendable; it was answered, That the reason thereof was; because, if there should have been any amendment, it should have been of the Writ by the Roll, and not of the Roll by the Writ; and if there the writ should have been amended, then the Verdict which was taken 15 Pasch. had been without warrant, and none of the parties had day of appearance, at the said day. Wherefore, &c. But against those books 9 Ed. 4. 15. was urged, where a writ of Hab. Corp. with Nisi prius was awarded by the Roll returnable 15 Mich. and the writ was returnable menſe Mich. & at the day, in the Countrey, the Justices took the Enquest; and at the day in Banco this matter was moved in arrest of Judgment, and ruled, that the writ should be amended by the Roll; for the Enquest was well taken at the day in the Country, and the amendment is not prejudicial to any, and it is well warranted by the Roll. A president also was shewn Pasch. 30 Eliz. rot. 392. in the Queens Bench, between Jeff. and Wilson, where in Covenant, the Judgment was upon Non sum informatus; The writ of Enquiry of damages was awarded by the Roll returnable 15 Pasch. & the writ was there returnable menſe Pasch. and the Inquisition was taken before 15 Pasch. and being returned, the Plaintiff had Judgment in the Common Bench, where the action was brought; and Error thereof being brought, and this matter assigned for Error, and after good deliberation, it was awarded, that the Writ should be amended by the Roll, and the Judgment was affirmed. And afterwards all the Justices, and Barons, upon view of this Record, and consideration of the books held, that it was amendable, and so awarded, that the writ should be amended. Vide 46 Ed. 3. 1. 9. 11 H. 6. 11. A second Error assigned was, that although this writ should be amended, it then appears, it was not well served; for the inquisition was taken the same day, it was returnable by the Roll, and so too late; for it is the day of the returning of his writ, and not of executing it. But all the Justices and Barons held, that it might well be executed the same day of the return; for it is sufficient, if he hath it in Court the same day to return it. Wherefore the Judgment was affirmed. Vide, 31 H. 6. 13. 33 H. 6. 45.

Ant. 677.

Post. 767.

Ant. 677.

Ant. 468.

Woodyard *versus* Dannock, and Trundle. Trin. 40 Eliz. rot. 835.

DEbt Upon an Obligation of 600l. dated 4 Septemb. 37 Eliz. conditioned, That if he were seised in his Demesne, as of free, the day of the Obligation made, of such Copyhold Lands in Sybron-Docking, and if the said Lands be discharged of all Incumbrances; made by him, except the Estate, and title of Joynture of his wife

(34)

E e e e

Elizabeth

Elizabeth, that then the Obligation should be void. The breach is assigned in hoc, that the Defendant, before the Obligation made, had surrendered those Lands apud Sybton prædict. to the use of Eliz. his wife for life. The Defendant pleaded, that he did not surrender it modo, & forma. The Plaintiff sur-rejoyns, Quod sursum reddidit apud Sybton-ddocking, modo & forma, &c. And thereupon a Ven. fac. was awarded to Sybton, and tried for the Plaintiff, and Judgment accordingly. And now Error thereof brought. The first Error, because the Ven. fac. is from Sybton, where it ought to have been from Sybton-ddocking; for so is the Sur-rejoinder, which makes the issue. But the Justices, and Barons held, that in regard the surrender is alledged in the replication to be at Sybton, and the Rejoinder agreeth therewith, the issue is thereupon; and the naming of Sybton-ddocking in the sur-rejoinder is but surplusage, and shall be well amended: Whereupon it was awarded, that ddocking in the surjoinder should be stricken out, and they were ready to have affirmed the Judgment. But then another Error was assigned in the matter, that there was not any breach assigned; for the surrender to the use of Eliz. his wife is excepted, and so no breach. But it was moved by Houghton, That this Exception doth not extend to the first Clause, but only to the discharging from incumbrances. But the Court held, That it extended to both, and so appears to be the intention of the parties. Wherefore the Judgment was reversed.

Ant. 44.

Green *versus* Charnock, & Starnel. Trin. 40 Eliz. rot. 1127.

- (25) **T** Respass, Clausum fregit; they imparle, and at the day Starnel did not appear, whereupon a Nihil dicit was entred against him. Charnock pleaded in Barr; and thereupon the Plaintiff replied; and demurrer joyned upon the replication, and day given over to the next Term, and then adjudged for the Plaintiff. And at the same Term a Nolle prosequi was entred against Starnel, and a Writ of Enquiry of damages awarded against Charnock, and upon return thereof adjudged against him. And thereupon they brought Error: And the Error assigned, because this Nolle prosequi is against one, where Judgment is entred against both, being that a Retraxit against the one is as strong as a release to the one, the which being to one of the Defendants, is a good discharge for both, and then this Judgment against Ch. is erroneous. And of that opinion were all the Justices, and Barons. Wherefore it was reversed. But, Note, I heard of another reason of the Reversal of this Judgment: *viz.* Because there was not any Judgment entred against Starnel for his *non*-pleading; nor day given, and so a discontinuance of the Sute. And the Nolle prosequi against him came too late; and the discontinuance against one was a discontinuance against both, and of the entire Sute. Therefore, &c.

Termino

Termino Trinitatis, Quadagesimo secundo

ELIZABETHÆ, in Banco Reginae.

Pigot *versus* Sympson, and others

Vide ante, Hill. 40. Pl. 5. Hill. 42 Eliz. rot. 758.

Action sur Trover. Upon Demurrer, the Case was; The Plaintiff being owner of the Rectory, of Evingham, in the County of Northumberland, brought his Action sur Trover, of 20 loads of Wheat in Harlow, being the Tithes of the Rectory set out from the nine parts. The Defendant pleaded, That Harlow was a member of the Mannor of Pridhoe, both which are within the Parish of Evingham, and conveys the Mannor to the Earl of Northumberland; and prescribes, That the E. of N. and all those whose Estate he had in the same Mannor, from time whereof, &c. had paid to the Parson of E. Six pounds annually, in satisfaction of all Tithes within the same Mannor; and further, that the said E. and all those, whose &c. had used to have, in respect of the said six pounds, the tenth part of all the Corn within the said Mannor; and so these Tithes within the said Mannor, being severed from the nine parts, he took by Title under the said Earl. And it was thereupon demurred, and argued for the Plaintiff, That this was not any plea; for a Lay-man is not capable of Tithes, and therefore no continuance of time can give him any Title to that; whereof he is not capable; for, by the antient course of our Law, he cannot sue for them: And the Civil Law did not permit a lay man to sue for them there, and so he had not any remedy, and therefore not any right. There is not any also can prescribe in a thing in gross per que Estate, and here he prescribes, as for a thing in gross: And he cannot prescribe, as to a thing appurtenant to a Mannor; for a Spiritual thing cannot be appendant to a Temporall; and for that purpose cited a Case to be ruled in this Court betwixt Shirwood and Winchcomb, 36 Eliz. Wherefore, &c. But all the Court, upon the first motion, resolved to the contrary, That it is a good Prescription; For when the Lord hath used, from time whereof, &c. to pay this sum, &c. And in respect thereof to have all the Tithes within his Mannor, it shall be intended, That, at the beginning, the Lord had all in his hands, and then might prescribe to pay a sum in discharge of all the Tithes within the Mannor, & when he gave the Tenancies to hold of him, & always afterwards used to have the Tithes of those Lands, (1) Ant. 599. Ant. 293.

¶ ¶ ¶ ¶

Lands,

Ant. 599.

Lands and Tenements, it is a very reasonable prescription: for now he hath no more, then what he had before, for he had them before by retainer, and now he takes the Tithes themselves. And Gawdy said, it may be, that the Parson before time of memory granted those Tithes to the Lord of the Manor, rendering Rent, which was confirmed by the Patron, and Ordinary, and this, being before time of memory, may well be so intended, Quod Popham concessit, and said, That, that was their principal reason of the Judgment, between Pigot, and Hearn. And they said, that in this Case, the Lord might have good remedy at the Common Law, or in the Spiritual Court; Wherefore they intended to have adjudged it for the Defendant: But then Exception was taken to the pleading, that the Conversion was supposed 10 Sept. 40 Eliz. and the Defendant saith, That he found them the 20 Sept. 40 and converted them the 10 of Sept. which is repugnant in it self, which the Court held incurable, Vid. 1, & 2 Ph. and Ma. Dy. 3.

Grygg versus Moyfes. Hill. 42 Eliz. rot. 118.

- (2) *Ejectione firmæ.* Upon a special Verdict, The Case was; One lett Lands for years, rendering 50 s. Rent per annum, at the four Feasts, viz. Mich. &c. Proviso, That, If the Rent be arrear by the space of a year, after the day of payment, it being lawfully demanded, and no distress to be found there, per totum tempus prædict. he might re-enter; the Rent was arrear for a year; the Jury found a Demand, and that there was not any distress upon the last day of the year upon the premises, and that the Lessor entered, and lett to the Plaintiff; and whether the Lessors Entry was lawful? Was the Question. And, without argument, the Court resolved for the Defendant, that the Condition is not broken, if there be a distress there at any time of the year; for per totum tempus prædict. shall be taken for any part of the year; and a condition shall be taken most favourably for the Lessee: But here the words are plain, Wherefore it was adjudged for the Defendant.

Wood versus Reignold. Pasch. 41 Eliz. rot. 370.

- (3) *Ejectione firmæ* of a Lease of the Lady Russel the wife of Sir J. Russel. Upon a special Verdict, the Case was; Sir Jo. Russel seised of the Land in Fee, 15 Maii, 15 Eliz. by Indenture Covenanted with Ralph Sheldon, in consideration of a Marriage to be had between him, and the said Lady Russel, (daughter of Sheldon) to stand seised to the use of himself, and his Heirs, until Marriage; and after, to the use of himself, and the said Dame Russel, and the Heirs of his body, with other remainder over; and afterwards in Decemb. 16 Eliz. Sir Jo. Russel lett that Land to the Defendant for 31 years to commence after the end of a former Term; afterwards in Jan. 16 Eliz. the Marriage took effect; the first Term expires; Sir J. R. dies, the Lady R. enters, and lets to the Plaintiff, who, upon Entry by the Defendant, brings this Action, Et si. &c. Godfrey for the Plaintiff moved, That this Lease could not barr, nor destroy the contingent Use, or Estate to the Feme, but that it would well rise, for the Fee whereout the Use is derived, continues, and is not touched by this Lease; as a descent shall not bind a Lease, because he may have his Lease, and not touch the

Co. Lit. 249. 2.

the Freehold; So 1 Ed. 3. 5. it is said, if a Termor for years be ousted by Fine of Lands in ancient Demesne, he shall avoid that by Deceit, during his Term, and no longer: And if a Covenantor be bound in a Statute, after the Covenant before Marriage; that shall not be extended upon the Feme; and the Case Hill, 42 Eliz. between Leigh and Burton in the Court of Wards was not against this opinion; for there the Case was, that a man made a Feoffment to the use of himself for life, remainder to his Feme for life, remainder to his right Heirs, with a Proviso; That, if his Son interrupted his wife, that it should be to the use of his wife, and her Heirs; the Father made a Lease for years, to begin after his decease; the Son disturbed the Feme; Whether it now should be to the Feme in Fee? Was the question; and resolved, that it should not, by the opinion of the two Chief Justices, That the Uses should not rise; but I conceive the reason thereof to be, in respect, that the use limited to the right Heirs was the ancient Reversion, and no new Estate, and there could not be a Condition annexed thereto. Wherefore, &c. Tanfield; the point is double; First, Whether the Lease shall destroy the future Use? Secondly, If it shall not destroy it, whether it shall not bind the future Use? For it ought to arise out of the Estate, which the Covenantor had at the time of the Covenant, which Estate ought to continue without alteration, till the time, that the Use shall arise, which is not here, for this is a Term in reversion. To the second, this Lease, made upon good consideration, before the Use did arise, shall bind it; for the Use shall not otherwise be executed, then if it had been at the Common Law. And a Lease, made bona Fide to one, who had not notice thereof, shall bind it. Popham; The Statute executes only Uses in Esse, and not any contingent Uses, until they happen in Esse; then this Use was merely void until marriage: For there was not any new Estate in him; and, if he, after that Covenant had made a Feoffment, or a Gift in Tail to one, who had not any notice thereof, it would questionless never have arisen. And, as at the Common Law Feoffees might destroy Uses in Esse, so now may he out of whole Estate a future Use is to be raised; for the Freehold is destroyed, out of which it should arise. And, whether the Lease for years should altogether destroy the arising thereof, is not in this Case material: But clearly it shall bind the contingent Use, and so resolved in Strangwiches Case. And at the Common Law it is clear, that Cestui-a-que shall not avoid such a Lease made by the Feoffees, upon a good consideration, no more then a contingent Use at this day. Fenner agreed, That if a Freehold be conveyed to one upon consideration, the future use shall not rise; for there is not any person feised to that Use, when it should arise. But this Lease will not destroy, nor hinder it; for the same Freehold remains, and the Use is annexed to the Lease, and therefore the Lease shall not disturb nor bind it. Clinch agreed with him for this last reason. Sed, Gawdy absente. Adjournatur, Postea, Mich. 43, & 44. Pl. 17.

Post. 827.

Post. 827.

Douglass *versus* Shank.

Mich. 41, & 42 Eliz. rot. 221.

(4)

Co.Lit.201,a.

Ejectione firmæ. The Plaintiff declares of a Lease for years, habendum a die Datus, virtute cujus Dimissionis he entred, and was possessed, until ejected by the Defendant. The Defendant pleaded Not-guilty; and after Verdict for the Plaintiff, it was alledged in arrest of Judgment, that the Declaration was not good, because the time of the Entering is not alledged; for, if he entred on the day of the demise, he is a disseisor, and the Action not maintainable. But Tanfield and Coventry moved, That it was good; for when it is said virtute cujus Dimissionis fuit possessionatus, it cannot be intended, but that he entred after the beginning of the Term; & therefore it was ruled in 15 Eliz. in Bracebridges Case, that there needed not any Entry at all to be alledged, but the usual pleading shall be virtute cujus fuit possess, and so were all the antient presidents; for it necessarily implies an Entry in due time, otherwise he could not be possessed virtute Dimissionis; for, if he entred before the Term began, he is a disseisor, and if after the Term began, he brings an Ejectione firmæ, declaring that he entred before, although he saith virtute cujus, &c. It is ill; For it is against the express allegation; and so it was adjudged here betwixt Clement and Fuller. And of that opinion were Popham and Clinch; because the Declaration cannot have any other intendment; and if it were not good at the Common-Law, it is aided by the Statute of 18 Eliz. being after Verdict, which hath found him guilty, which cannot be, if the Plaintiff were not possessed by virtue of the Lease. But Gawdy, & Fenner e contra; for the strongest shall be taken against the Plaintiff, viz. That he entred the day of the Lease made, and that is not supplied by the words virtute cujus, &c. For Fenner said, That 7 H. 7. that virtute cujus, or prætextu cujus, nec auget, nec minuit, Popham; True it is, where there is any express allegation, which crosseth the conclusion. And Gawdy relied upon Cliffords Case, Dy. 96. which he said is all one. Adjournatur. Vide 1 H. 6. 6. 2 H. 4. 13. 12 H. 7. 19. Note. Trin. 43 Eliz. it was moved again & it was then resolved, That the Declaration was ill for this cause, and adjudged for the Defendant.

Wortley *versus* Herpingham.

(5)

St.25.6.C.13.

Ante 621.

Debt. The Plaintiff being Farmer of the Rectory of Kirk-burton in Comit. Ebor. brought debt against the Defendant upon the Statute of 2 Ed. 6. for carrying away his Corn, the Tithes not being set out, and demanded the treble Value. The Defendant pleaded Not-Guilty. Coke, Attorney General, moved, That it was not any issue in this Action. But all the Court resolved, That it was well enough; for it was not for a Non-felance, but for a Male-felance, wherein the Tort is supposed; And in an Action upon the Statute; which prohibits a thing, upon which a penalty is demanded, the issue may be Non Culp. or Non Debet, and so it hath been oftentimes ruled in this Court. Wherefore the issue was joyned accordingly.

Dalston

Dalston versus Thorp. Mich. 41 & 42 Eliz. Eborum.

Error of a Judgment in the Common Bench in debt upon an escape. The Error assigned was; for that the Original Writ had not the Sheriffs name to the return thereof according to the Statute of York, 12 Ed. 2. And for this cause it was moved, that it was Error, and the Judgment reverfable. But in regard the Defendant had appeared, and the Plaintiff had counted againft him upon the Record of the recovery, and the Defendant had pleaded *Nol tiel Record*, it was holden not to be material, although the writ had not been returned; for he fhall never take advantage (after appearance, and pleading) of fuch a Mifpriefon, nor of the Mis-warding of mean procefs. Wherefore the Judgment was affirmed. (6)

Ant. 165.

Parks versus Jackson.

Error of a Judgment in the Queens Bench, in an Ejectione Fir-
ma. The Error assigned, That the Plaintiff after Verdict, betwixt the day of the *Nifi prius*, and the day in Banco, had entred, whereby his Bill was abated; and it was thereupon demurred, and without hearing any argument refolved, that it could not be assigned for Error; for it proves that the Bill is abateable, but it is not abated in fait; and although it was alledged, that this being meane between the day of *Nifi prius*, and the day in Banco, fo as he had not day to plead, and therefore fhould assign it for Error; the Court notwithstanding held, that it was not material to assign it for Error; for upon fuch furmife, which goes only in abatement, the Judgment fhould not be examined. A fecond Error assigned was, That the Ven. fac. was awarded returnable upon the Roll die Sabbathi, post quindena Martini and the writ it felf was returnable die Jovis, post quindena Martini, fo as it varies from the Roll, & is not warranted thereby. Wherefore, &c. But the Court held it to be no Error; for in regard a *ddistringas* was awarded upon it, and the Trial is upon the *ddistringas*, the Verdict is good: And if not, it is holpen by the Statute of 18 Eliz. of Mis-warding of procefs. Wherefore the Judgment was affirmed. (7)

Ant. 761.
Post. 820.

Hertford versus Gernon.

Error of a Judgment in the Common Bench. The Error assigned was; becaufe the Plaintiff brought his Action upon the Cafe againft the Sheriff, for fuffering one fuch, who was in Execution for debt due to the Plaintiff, to escape. Whereas in this Cafe he ought to have debt, and not action upon the Cafe. But the Court held clearly, That it is at the Plaintiffs Election to have the one action, or the other. Whereupon the Judgment was affirmed. (8)

Taylor *versus* Wilbore.

- (9) **E**rror of a Judgment in the Common Bench, in an Ejectione firmæ. The Error assigned, because the Judgment is, Quod Defendens capiatur; whereas the Ejectment is alledged to be before the pardon of 33 Eliz. and so pardoned by the general pardon. Sed non allocatur; for, if he would have had advantage thereof, he ought to have prayed it, and pleaded it: For non constat curiæ, but that the Defendant might be one of the parties excepted in the pardon, unless that he avers it. Secondly, Because the Defendant was found not guilty quoad a third part, and the Judgment is entered thereupon, Quod defendens eat inde sine die, & querens in misericordia, &c. Whereas it ought to have been Quod Le Plaintiff nihil capiat per billam for that third part. Sed non allocatur: for all the course of Entries, when part is found for the Plaintiff, and part against him, is to enter only, Quod Defendens eat sine die, quoad, &c. whereof he is acquitted. Wherefore they would have affirmed that Judgment, but, because the Plaintiff had not appeared that Term, they caused him to be Non-suited.

Dowdenay *versus* Oland. Trin. 41 Eliz. rot. 1169.

- (10) **E**rror of a Judgment, in the Common Bench, Trin. 40 Eliz. rot. 2716. Assumpsit, whereas he was obliged to the Defendant by an Obligation in 40 l. for the payment of 20 l. at a day mentioned in the Condition: And whereas the Plaintiff intending to exhibit a Bill in the Chancery against the Defendant pro eo, that he confessed, that he was satisfied of the debt, took forth a Writ of Sub pena out of Chancery returnable at a day certain; that the Defendant, in consideration the Plaintiff would desist from his Sute in the Chancery, assumed to the Plaintiff to restore that Bond upon request, and alledgeth in fact, That he required the re-delivery of that Bond, and his desisting from the said Sute, and that the Defendant had not delivered it, but prosecuted Sute thereupon, &c. The Defendant pleaded Non assumpsit, and found against him, and, after divers motions in the Common Bench in stay of Judgment; because the consideration is not sufficient, being only to stay a Sute in Chancery, which is matter of conscience, and not at the Common Law, it was held to be good enough, and adjudged for the Plaintiff. And now Error being brought, the Judgment was affirmed. Mich. 43, & 44. Pl. 1.

Trin. 42. in Communi Banco.

Whyte *versus* Gerish.

- (11) **R**eplevin. The Case was, That one made a gift in Tail, reserving Rent, Tenant in Tail suffers a recovery. Whether the Rent were gone, or not: Was the Question. An-
derson

derfon and Kingfmil held, That it was; For otherwife the Land fhould be holden of two, viz. of the Donor, and of the Lord Paramount. And Anderfon faid, there was not any difference betwixt this Cafe, and the Cafe refolved, where he in reverfion granted a Rent-charge, and Tenant in tail fuffered a Recovery. But Walmsley and Glanville e contra, for he in reverfion is in poffeffion of the Rent, and it cannot be taken from him by a Recovery againft another, and he hath not any recompence for it, upon the Recovery, in value; for the recompence goes only to the Eftate-tail, and the reverfion, and he hath not any recompence for the Rent; and it is not like to the Cafe, which was put of a Rent-charge; for that was never executed after the Grant, and the Grantee was never in poffeffion thereof at the time of the Recovery. But it is here executed; as where Tenant in tail Grants a Rent-charge, and after fuffers a common Recovery, the Rent remains; and as to the Tenure of two, Walmsley held, That it well might be, as in the Cafe, where a Vefnalty is created after the Statute of Quia Emptores Terrarum. And the Donor here fhall have all the fervices, which he had before the Recovery. Wherefore Adjournatur. Refid. poft.

Poft. 793.

Shipwith *verfus* Steed. Trin. 41 Eliz. rot. 1951. or 951.

DEbt upon an Obligation, conditioned for the performance of Covenants, in an Indenture between William Steed, and Ann his wife on the one part, and the Plaintiff on the other part. The Defendant pleaded the Indenture, as an Indenture of W. S. and Ann his wife, whereas in truth the Feme never fealed. The Plaintiff replies, That the Indenture fhewn by the Defendant non fuit facta inter William Steed, and Ann his Wife on the one part, and the Plaintiff on the other. And thereupon they were at iffue, and the Jury found, That the Baron fealed it, but the Feme did not. And all the Court held, that this Verdict is found againft the Defendant, who pleaded it as to the Deed of the Feme. And Anderfon, Glanville, and Kingfmil held, That the Plaintiff is not Eftopped to fay, that the Deed fhewn is not the Deed of the Baron, and Feme. But he is Eftopped by the Condition to fay, That there is not any fuch Indentures; as 3 Eliz. Dy. Smiths Cafe. And Glanville and Kingfmil held; That if the Baron had fealed and delivered it in name of the Feme, it had been the Deed of the Feme, during the life of the Baron. And if they by Indenture bargained, and fold the Land of the Feme, rendering Rent, it had been a good Deed of the Feme, becaufe ſhe afterwards might have accepted the Rent, and affirmed it as her Deed. Wherefore it was adjudged for the Plaintiff.

Ant. 362, 757.

Barham *verfus* Dennis.

TRespafs. Quare vi & armis in Annam filiam fuam inſultum fecit, & ipſam cepit, & imprifonavit, &c. The Defendant pleaded Not guilty, & found againft him, and damages aſſeſſed for the taking 10 s. and for the Imprifonment 6 l. 13 s. 4 d. Williams moved, That this Action lay not; For the Father ſhall not have the action, unleſs for the taking of his Son, and Heir, or of his Daughter and Heir, which is by reaſon that the marriage of them appertains unto

(13)

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Ant. 55.

unto him, and not of any other of his Sons and Daughters: and the Writ ought to suppose Quare filium, & heredem, &c. Vide 9. Ed. 4. 53. and 33 H. 6. the Writ also is for the imprisonment, which makes it altogether vitious; for none shall have remedy for the imprisonment, but the party to whom the injury is done; and that is to the Daughter her self. The Writ also is Cepit & imprisonavit, & he saith not Cepit, & abduxit. And if she were not carried from him, the Father hath not any injury. And for these Causes Anderson, Walmsley, & Kingmil held, that the Writ was ill for the form: And that the action lies not for the matter. For as to the form, it ought to have been abduxit, for so is the Register, and so it ought to be: for otherwise she might be taken and imprisoned in the same place, and never carried out: And then there is not any Tort which is punishable by the Father. They held also, That the Father should not have an Action for the taking of any of his Children, which is not his Heir. And that is, by reason the marriage of his Heir belongs to the Father, but not of any other his Sons, or Daughters; and, by reason of this loss only, the Action is given unto him: And the Writ in the Register is for the Son, and Heir, or Daughter and Heir only: Which proves, that the Law hath always been taken, that the Action lies not for any other Son or Daughter. And although it hath been said, that a Writ of Trespass lies for divers things, whereof none of them are in the Register. And it hath been adjudged, That it lies for a Parrot, a Popinjay, a Thrush; and as 14 H. 8. is for a Dog. The reason whereof is, Because the Law imputes, That the Owner hath a property in them; And although they were not known at the time of the compiling of the Register, yet there be like Writs there for things, whereof the owner hath a property. And therefore being upon the like reason, the like Writ lieth: But for the taking of a Son, or Daughter, not Heir, it is not upon the same reason, and therefore not alike. And here the Father hath not any property, or interest in the Daughter, which the Law accounts may be taken from him. And in the other Cases, if Trespass should not lie a Tort should be committed, and be punishable. It is clear also, that for the imprisoning of the Daughter, the Action is not given to the Father, but to the Daughter her self. Wherefore, &c. But Glanville e contra. For the Father hath an interest in every of his Children to educate them, and to provide for them; and he hath his comfort by them. Wherefore it is not reasonable, that any should take them from him, and to do him such an injury, but that he should have his remedy to punish it. And although it hath been said, that there is a reciprocal course between the Father, and Heir, more then between the others; as the Heir shall have an Appeal, &c. and not any other of the Sons: That is by reason, the action cannot be given, but to one. And although this is not warranted by the Register, it is not material; for in novo casu novum apponendum est remedium. Wherefore, &c. Et adjournatur. Note, That here a Case was cited to be adjudged, that a Father brought his Action upon the Case for standing of his Daughter; by reason whereof she lost a convenient marriage, which he had provided, and he was enforced to be at a greater charge in providing of another Marriage, which was Trin. 40 Eliz. rot. 1225. between Ross, and Parrot. But Glanville denied it to be Law, and said, That the Action was there brought

brought by the Daughter her self. Afterwards this matter was ended by arbitrament.

Anonymus.

DEbt for 50 l. and declares upon a Bill, which was in this manner; Be it Known, That I T. D. do owe unto A. B. 50 l. to be paid unto him 10 l. at such a day, and so at five several days 10 l. until 50 l. were paid. And for payment hereof I bind me, &c. in 10 l. *nomine pena.* The Obligee after all the five days passed, brings debt for the 50 l. And Anderson, Glanville and Kingsmil held, that the action well lay, for it is a several bill for the 50 l. and a bill also for the 10 l. And he may well maintain two actions thereupon. But Walmsley held it to be one Entire bill; and cannot be said to be several bills, being all by one same Deed. But if he had written in one Deed; Be it known, that I owe 10 l. &c. In cujus rei Testimonium &c. and had after written, Be it known also, That I owe 10 l. in cujus rei, &c. and put his seal thereto: This had been several bills, Where- to the other Justices agreed, and said, That so it was here, &c.

(14)

Ewer *versus* Moyle, Hill. 41 Eliz. rot. 108.

THe Case was; One Tho. Moyle was seised in Fee of a Mannor, whereof the one moiety was holden in Soccage, & the other moiety by Knights-Service; and of a Parsonage appropriated, and lett the Mannor, and the Parsonage to the Plaintiff for years, rendering 77 l. 6 s. 8 d. per annum; and devised the Mannor to Thomas Moyle, his eldest Son, for life, remainder in Tail to John Moyle, his younger Son now Avowant, and died. Thomas Moyle surrendered his Estate to John Moyle, who distrained; and in his Avowry shews all this matter; and that the Parsonage was worth Twenty Marks per annum; and for five parts of the residue of the Rent being divided into six parts, as for Rent due for five parts of the Mannor, he Avows; the Plaintiff saith, That the Parsonage was worth 20 l. per annum; but shews not of what value the Mannor was, and demanded Judgment of the Avowry. And hereupon the Defendant demurred, because he doth not shew the entire value of the whole demise; and it was much debated, whether there could be any apportionment in this Case; For although there should be an apportionment in cases at the Common Law, as in cases where Land at the Common Law, and Land in Burrough English, are lett for years, and the reversion of the one descends to the Heir at the Common Law, and of the other to the Heir by the Custom; and so of a descent of a reversion to Coparceners, and a partition made betwixt them: Yet if it should be so upon a devise, which is the act of the Lessor, especially as this Case is by the surrender of the Tenant for life, for until then, there was not any apportionment to be made, the Court much doubted, and were of several opinions, and if there ought to be an apportionment, how it ought to be made. Whether the Tenant should not shew what is due, and plead a tender thereof? For, whether the Avowant ought not at his peril to shew the value of the Entire? Whereupon the Court moved the parties to agree; and they thereupon

1 Rol. 235.

2 Inst. 504.

Yelv. 140.

Mo. 665.

2 Cr. 160.

Dyer. 5. a.

Co. Lit. 164. b.

Co. Lit. 148. a.

Post. 8, 11.

on put the matter to arbitration. Vide for the apportionment 28 H. 8. Rulhdens Case, 6, and 7 Eliz. Dy. 82. and 4 Ass. 5. 30 Ass. 12. 7 H. 6, 3. 12 H. 4. Note, That afterwards in Hill. 43 Eliz. the Case was argued again; and all the Court then agreed, That there should be an apportionment, in regard it was not a division by the Act of the partie, but by the Law, viz. The Statute of Wills, as in 34 H. 6. where the Lessor grants the Reversion to the Lessee, and a stranger; they also held, that the barr to the Avowry was not good; because, that all was not valued, but part. And this is matter to be tried by a Jury. Wherefore it was adjudged for the Avowant.

Term. Mich. Quadragesimo secundo & tertio

ELIZABETHÆ, in Banco Regina.

Hall *versus* Matthew Denbigh, and others.

Hill. 42 Eliz. rot. 930.

Ejectione firmæ, of a Lease of Francis Folliamb, by Indenture dated 1 Novemb. 39 Eliz. Habendum a confectione Indenturæ prædictæ, and the Ejectment is supposed 2 Novemb. 39 Eliz. The Defendant pleaded Not guilty; and found against him. And, after Verdict it was moved in arrest of Judgment, that this Declaration was not good. For it doth not appear when the Lease was sealed, and delivered; for it might bear date at one time, and be afterwards delivered; and a Declaration ought always to be certain; and therefore the common course is to say, That such a day and year demisit per Indenturam dated the same day, and year. But all the Court, after divers arguments, resolved for the Plaintiff, that it was well enough. For when he declares that he lett by Indenture of such a date, it shall be always intended to be delivered at the same time, whereon it bare date, if it be not shewn with a primo deliberatum at another day; and he, who pleads a Deed of such a date, cannot by replication, or other pleading, maintain it to be delivered at another time, for it would be a departure; as 5 H. 7. 26. Dy. 167. 221. Wherefore it was adjudged for the Plaintiff. (1)

Post. 890.

Howel *versus* Johns. Pasch. 42 Eliz. rot. 364.

Error of a Judgment in Gloucester, in a Court of Pyepowders, in an action upon the Case for words; where the prescription was to have a Market every Saturday, and a Court of Pyepowders every Market-day. The first Error assigned, was; That a Court of Pyepowders cannot be to a Market, but only to a Fair. But the Court held, That it well might be to the one, or other. Secondly, Because this action is for words not arising in the Market; for the Market was holden 8 Junii, and the words (as appears by the Declaration) were spoken 5 Junii. And it was holden by the whole Court to be Error; For they cannot meddle with any matter in that Court: But with what happens in the Market the (2)

Moor. 823.

4 Inst. 272.

Co. 1043 b.

1 Rol. 544.

4 Inst. 272.

the same day. They also held, that this was not an action proper for that Court: For it is only for matters of Contracts, and for matters arising within the Market, and by occasion of the Market, as Batteries, or disturbances, happening there; but, if the words were by occasion in the same Market, it might peradventure be otherwise. A third Error assigned was, Because a Writ of Inquiry of Damages was awarded, and no day given to the Plaintiff. And that was held to be Error. But, upon view of the Record, it was well enough. But for the two first Errors, it was reversed.

Collins Wills and his Wife.

(3)
Moor. 468.
Ow. 63.

A Sumpsit. And declares; That, whereas the Defendant Wills was a Sutor to the other Defendant (his now Wife, and the Plaintiffs Daughter) and the Plaintiff offered to give with her in Marriage 80 l. and would give no more: And Wills the other Defendant required 90 l. and without that would not marry, and the Feme before marriage, in consideration that the Plaintiff would give the other 10 l. at her request, to make the 80 l. 90 l. assumed, and promised to repay it within a Month after she should be required, and alledged in Facto, that he thereupon gave 90 l. to the Defendant Wills in marriage, &c. and alledgeth request after marriage, &c. The Defendant pleaded Non Assumpsit, and found against him; and Judgment entred accordingly without privy of the Court; and it was now alledged, That this was an insufficient, and unlawful consideration to ground this action, and made only in deceit of the Defendant, who was her Husband. And of that opinion was the whole Court, for, as well as she may promise the repayment of 10 l. she may promise the repayment of all, or more; so as her husband should be defrauded of all; And that, which is given in marriage, cannot be a consideration to ground a promise; especially to charge the Baron with that promise: Wherefore in regard the Judgment was entred this Term, and the Record is yet in their breasts, It was adjudged, that it should be altered, and made Quod querens nihil capiat per Billam. And a Superseas was awarded to stay Execution.

Holland *versus* Dantsey and others.

(4)
Moor. 622.
Ant. 739.

Error to reverse a common Recovery in Lancashire, in a Writ of Entry, and whilst that was depending, a Writ of Estreapment was awarded, and an Attachment thereupon. And now the Defendants who came in by the Attachment, moved, That this Writ of Estreapment was not grantable in this Court upon this Writ of Error. First, Because that in the first Writ, wherein damages were recoverable, it was not grantable. Vide 14 H. 7. 10. But the Court held, notwithstanding this reason, That it was well granted; for more damages may be done by the Waste, than may be answered. Secondly, That in a Writ of Error, Estreapment lies not. For he is here to be restored to all what he lost. And therefore there is not any cause to stay him. Thirdly, For that he comes in by conveyance of the party. For a common Recovery is accounted but a Conveyance in Law. But of those last the Court would advise. Et adjournatur.

Co. 5. 115. b.
Ant. 484.

Costard,

Costard *versus* Winder. Pasch. 42 Eliz. rot. 127.

DEbt upon an Obligation, conditioned for performancē of Covenants in a Lease; upon demurrer, the Case was; That one Doctor Longhem, being Doctor of the Civil Law, and never any Spiritual person, was admitted, instituted, and inducted to a Benefice, and afterwards made a Lease for years of the Rectory: The Patron and Ordinary, before 13 Eliz. confirm it: And he was afterwards deprived by Sentence declaratory, quia mere Laicus. Whether this Lease should bind the successor? Was the question. Doderidge for the Defendant argued, That it should not bind. For, being a Lay-man, he was never capable, and so the institution merely void; and he never was Incumbent. And of that opinion was Gawdy; that such acts, which he was not capable to do, shall not bind the successor: because upon the matter he was never Incumbent: And in proof thereof was cited, 4 H. 7. and 28 H. 8. Dyer. But Popham, and Fenner e contra. For in regard he was Parson de Facto, and such an one, whereof the Law takes Consuance by his Induction, and the people cannot take notice of any other, all acts done by him, during that time, shall bind as well, as if he had been rightful Parson. For it would be mischievous, if all the acts by such aberments should be drawn in question. And every one agreed, That all Spiritual acts as Marriage, the Administration of the Sacraments, &c. by such an one, during the time that he is Parson, are good: By the same reason, these temporal acts, and this Lease being confirmed by the Patron, and Ordinary shall well bind the incumbent successor. Wherefore they, by Assent of Gawdy, resolved to have adjudged it accordingly, Clinch absente. But for other defects the Judgment was stayed.

(5)
1 Rol. 476.
Moor. 606.

Co. 5. 109.

Dyer 293. a. b.
Ant. 699.Agard *versus* King.

DEbt for Rent upon a Lease made to the Testator of the Defendant, and declares of a Lease made de anno in annum, quam diu ambabus partibus placeret, and that the Testator occupied it for two years, and paid the Rent, and part of the third year occupied it, and died. And for Rent of the third year the Action was brought. The Defendant pleaded Non debet; and found against him, and now moved in arrest of Judgment, That this was but a Lease at Will, which determined by his death. And so the action lay not for this third year. But Gawdy, and Fenner held, although, at the first, it was a Lease certain but for two years, yet when he occupies, and enjoys it part of the third year, it is then a Lease certain for that year also; so as neither the one, or the other can determine the Will during that year, which he had begun to occupy. Wherefore the Action well lies for the Rent of that year. Popham held, That it was a Lease at Will for the other years after the two years. And then it determined by the death of the Lessee. Et adjournatur.

(6)
Co. Lit. 45. b.

x Holway. 65 Court. If according
to Holway it was adj. held
Yelv. 74.
7. Anna. B. R. if it
might determine
if it was after 7 year
was begun.

Solles

Bolles versus Hewit.

- (7) **D**Ebt upon an Obligation, made to the Sheriff. The Condition was, That, if such an one, who was arrested upon a Latitat appeared personally, and answered, &c. The question upon demurrer was, Whether this were a good Obligation within the Statute of 23 H. 6. for he might appear by Attorney, and answer, which peradventure would be accepted. But it was resolved, That in regard his appearance is necessary to put in special Bail, if the party requires it; therefore the Bond is good, and so ruled in the Court, between Woolverston, and Sackford. And of that opinion was the Court here, but they would advise.

Co. 1c. 161. 2.
Post. 800.

Foster versus Taylor.

- (8) **A** Sumpsit. For that the Defendant, upon such a consideration, assumed to pay to him 100 l. viz. 50 l. at one day, and 50 l. at another day, and failed on the first day, and before the second day the Plaintiff brought an Assumpsit, and whether it lay, or, not? Was the doubt. And the Court held, viz. Clinch and Fenner (*Æleris Julticiariis absentibus*) that it well lay; but they would advise.

Ante 118.
Post. 807.

Robert King versus Mary King. Hill. 42 Eliz. rot. 249.

- (9) **E**rror of a Judgment in the Common Bench in an Ejectione firmæ. The Error assigned was, because the Ejection supposed was of a demise of Thomas Bull, and Ann his wife. The Defendant pleaded Not Guilty. In the Record of the Nisi prius, the demise was alledged to be by Thomas Bull, and Agnes his wife: So Agnes for Ann, and so not warranted by the Record. And the Verdict, and Judgment thereupon erroneous; and it was moved on the other part, That Ann, and Agnes are all one name. And if they be not, yet in regard she is named the Wife, &c. although she be misnamed, it is not material. And if it were material, that yet it is amendable; because it is the default of the Clerk, That the Record of Nisi prius varied from the principal Record, which is the warrant thereof. But all the Court resolved, That Ann and Agnes are several names. And that it is not amendable after Verdict: Because it is a matter in fact, and may be to the prejudice of the Jury, to make them give a false Verdict. For if it should be amended, it should be to make it agreeable to the first Record, and that peradventure would be false. For Thomas Bull and Ann his wife did not demise, and so the truth was, that the Lease was by the name of Agnes, and, if the Record of the Nisi prius had been agreeing with the principal Record, The Defendant could not have been found Guilty of this Lease, and this alteration should be to alter the Verdict in matter of fact, which never ought to be. Vide 10 H. 7. 25. 11 H. 6. 11. 20 H. 6. 15. Dy. 260. 2 R. 3. 11. And Gawdy, and Fenner held clearly, That this Misnomer of the Feme made it material, and avoided the whole Lease. And it is not the same Lease whereof the Plaintiff declares. But Popham doubted thereof, because the naming her wife was sufficient, and the naming the Christian name is idle, and not material. Vide 11 Ass. 11. & Dy. 299. Et adjournatur. Afterwards Mich. 43 & 44. Eliz. It was reversed for the Error assigned.

2 Cr. 425.
2 Rol. 135.

The

The Countess of Salop *versus* Crompton.

Mich. 41, & 42 Eliz. rot

Action upon the Case, whereas the Plaintiff 20 Febr. 34. Eliz. Let (10)
 unto the Defendant an House, a Stable, & three Barns in Post. 784.
 Shirland, Habendum to him at Will, and the Defendant Entred ac-
 cordingly; And afterward 20 January, 36 Eliz. being so possessed,
 tam negligenter, & improvide kept his fire in the said House, That
 through default of good keeping the roof, the said House, Stable,
 and Barns were burned down, to her damage, &c. The De-
 fendant pleaded Not guilty, and after Verdict it was moved in Ar-
 rest of Judgment, That this Action lies not against a Tenant
 at Will, who burns the Houses by negligence: For against a Te-
 nant for Life or years, or other particular Tenant, who comes
 in by Demise of the party, an Action lies not for Waste at the
 Common Law: But by the Statute an Action is given against Ant. 461.
 Tenant for life, or years: But Tenant at Will remains, as at
 the Common Law. And there is not any remedy against him for
 voluntary, or negligent Waste. But on the other Part it was
 said, That although Waste lies not for a negligent, or permissive
 Waste (for it is not given by any Statute, because the Estate of
 Tenant for Will is uncertain, and by reason of the uncertainty
 he is not bound to repair it) yet for a voluntary which destroys
 the thing demised, or for a voluntarie negligence, whereby the
 thing Demised is lost, an Action well lies: As Litt. fol. 15. is, That
 Trespass lies where tenant at will cuts down the trees, as
 it lies against a Shepherd, who destroys the Sheep committed
 unto him: So 12 Ed. 4. 18. Bayliff of Goods waste them, Action
 upon the Case lies, and 14 H. 8. & 48 Ed. 3. 25. Brook Action sur le
 Case 25. And Mich. 3 H. 8. rot. 755. The Earl of Oxford *versus*
 Marning; Action upon the Case was brought, supposing that the
 Plaintiff was Tenant for life, Reversion to the King in Fee:
 And the Defendant was Tenant at Will to the Plaintiff, and
 cut down sixty Oaks, and carried them away, by reason where-
 of the King recovered the Place wasted, and treble Damages
 against the now Plaintiff: But no Judgment can be found
 therein. And another President was cited, Mich. 22. H. 7. rot. 320.
 Cricost *versus* Nichols, where Tenant for years made a Lease of
 Parcel thereof, for a Lesser term of years, to the Defendant, An
 Action upon the Case was brought against the Defendant, for
 negligently burning his House: But there is not any Judgment
 to be found therein. Wherefore, &c. But all the Court held in
 this Case, That for the negligent burning, this, nor any other Ant. 481.
 Action lies: For he comes in by the Act of the Party, and it was
 his folly, that he did not provide for his remedy. But Popham and
 Fenner agreed, That if Lessee at Will cuts down Trees, an A-
 ction of Trespass well lies, Because he voluntarily destroyed the
 thing Demised: So where a Shepherd kills the Sheep. But
 for this negligent keeping of his fire, whereby his house was
 burned, no Action lies. Wherefore it was adjudged for the De-
 fendant. 5 Co. 13. b. Vide postea, Plac. 22.

Dighton *versus* Bartholomew. Mich. 41, & 42 Eliz. rot. 354.(11)
Post. 881.
1 Rol. 225.

Ante 435.

Ant. 768.
1 Rol. 225.

ERror of a Judgment in the Common Bench, in Trespass of Assault, Battery, and Imprisonment. The first Error assigned was, for that the Defendant pleaded there in Barr a Concord, But it was not with satisfaction, and so no Plea: also as it was pleaded it was not for the same Trespass, and so void. And yet the Issue is taken thereupon, and found for the Plaintiff, and Judgment given upon the Verdict, where it ought to have been given for the Insufficiency of the Plea: And an Issue taken upon a void Plea is merely nugatory, and idle, and the Verdict there void. As if in Debt the Defendant had pleaded Not Guilty, and Issue be taken thereupon, and a Verdict is found, yet it is void, and Judgment ought not to be given. But all the Court held, that although this Plea was ill, so as the Plaintiff have Demurred thereto, yet it is not merely void: For Concord is a good Plea in this Action: And although it be not sufficiently pleaded, The Defendant shall not now, after Verdict, take advantage thereof: But it is aided by the Statute of 32 H. 8. of Issues misjoyned. And to that purpose a stronger Case was Cited to be adjudged in the Erchequer-Chamber, upon a Writ of Error out of this Court, where the Defendant in Debt upon a single Bill pleaded payment, without acquittance, which made not any colour of Plea: Yet Issue being taken thereupon, and found for the Plaintiff, Because, although it was an Issue misjoyned, yet it was a proper Issue in this Action, Judgment was here given for the Plaintiff, and that Judgment was affirmed. And when a proper Issue is joyned in an Action, although it be upon an ill Plea, And it is found by Verdict, it is holpen by the Statute. A second Error assigned was, because the offence is alledged to be before the Pardon of 39 Eliz. and thereby the offence to the Queen is Pardoned: yet the Judgment is Ideo capiatur, where it ought to have been a Nihil only for the Queen. And the Entry is usual in such Case to say de misericordia nihil, or non capiatur, Quia pardonatur. But Kemp, and the Clerks said, That sometimes they use to enter it accordingly, and sometimes not. And the Court held it to be no Error, Quia non constat, That he was not a person excepted. Wherefore the Judgment was affirmed.

Wats *versus* Brains.(12)
Ant. 695.
Noy 171.

R. 189.

APpeal of Murder for the death of her Husband. The Defendant pleaded Not Guilty, And upon evidence at the Barr it appeared, That two days before her Husbands death, He, and the Defendant fighting upon a Quarrel then betwixt them, The Defendant was hurt in that Fray: and the third day after the Plaintiffs Husband, passing by the Defendants Shop, the Defendant pursued him suddenly; and the Husbands back being towards him, so as he perceived him not, the Defendant stroke him upon the calf of his Leg, whereof he instantly died. The Defendant to excuse himself affirmed, That he, who was slain, when he came by his Shop, smiled upon him, and wryed his mouth at him: and therefore for this mocking of him, he pursued him. And it was much enforced by the Defendants Council, That it was a new cause.

cause of Quarrel; and so the stroak is not upon any Precedent Malice, and therefore it is not Murder. But all the Court severally delivered their Opinions, that if one make a wry, or distorted mouth, or the like countenance upon another, and the other immediately pursues, and kills him, it is Murder: For it shall be presumed to be Malice Precedent: And that such a slight Provocation was not sufficient ground, or pretence, for a Quarrel; and so delivered the Law to the Jury, that it was Murder, although what the Defendant pretended had been true. Whereupon the Jury going from the Barr, notwithstanding the Evidence was pregnant against the Defendant, Eight of them agreed to find him Not guilty: But the other four withstood them, and would not find it, but to be Murder: And on the next day morning, two of the four agreed with the eight, to find him Not-guilty: And afterwards the other two consented in this manner, That they should bring in, and offer their Verdict Not-guilty; And if the Court disliked thereof, That then they all should change the Verdict, and find him Guilty, And upon this Agreement they came to the bar, and the Foreman pronounced the Verdict, that the Defendant was Not guilty. And the Court much misliking thereof, being contrary to their direction, Examined everyone of them by the Poll, Whether that was his Verdict, And ten of the first Part of the Pannel, severally, affirmed their Verdict, That the Defendant was Not guilty: But the two last affirmed, How they agreed, and discovered the whole manner of their agreement: Whereupon they were sent back again, and returned, and found the Defendant Guilty. And for this practice, Harris, the Foreman, was afterwards Fined 100 Mark, And the other seven, who agreed with him at the first, every of them was fined 40 l. And the other two who agreed with the eight, although they affirmed, That it was, because they could not endure, or hold out any longer; yet, for that they did not discover the Practice, being examined by Poll, but affirmed the Verdict, were Fined each of them, at 20 l. and all of them Imprisoned: But the other two were dismissed, yet blamed for such a manner of consenting in abuse of the Court. And afterwards the Defendant was adjudged to be hanged.

R. 670.

Ant. 695.

Dalton *versus* Hamond.

Ejectione firmæ. Upon a Lease of Hoberts, the Defendant being Tenant to one Luther, a Copy-holder of the Mannor of Stansted, it was holden per Curiam, that, if the Lord demands an unreasonable Fine of his Copy-holder, where the Fine is uncertain, if he denies it, it is not any Forfeiture of his Copy-hold: and it was Ruled, as it was cited in one Hoddesdens Cause. It was also holden, That where the Fine is certain, the Heir ought to tender it upon his prayer to be admitted, otherwise, the Lord is not bound to admit him: But where the Fine is uncertain, he needeth not to bring it, because he knoweth not what he ought to bring: But the Lord ought to Assess a Fine, and admit him, and he ought to have convenient time for the payment thereof: And if he pays it not, the Lord may Seise all as forfeiture. It was also resolved, That, if divers Copy-holds descend to one Heir, the Lord cannot demand one Fine for them all. But he ought to demand several

(13)

Co. 4. 27.

Moor. 622.

Co. Lit. 59. b.

1 Rol. 507.

Ante 351.

G g g g 2

Fines:

Fines: For, peradventure, the Heir may accept of the one, at the Fine Assessed, and refuse the others upon such Fines. Wherefore, &c.

Wigley *versus* Blackwal.

- (14) **T** Respass. The Defendant pleaded a Feoffment from the Plaintiff: The Plaintiff shews, that it was upon Condition, that if he payed 200 l. at such a day, and 10 l. for every Fodder of Lead, which should be delivered unto him, by the Feoffee, or his means, and should make a sufficient Lease for one and twenty years of Bl. Acre, parcel thereof, that the Feoffment should be void: And shews the payment of the 200 l. and that the Feoffee had delivered so many Fodders of Lead, and that he had paid 10 l. for every Fodder: And that Bl. Acre was parcel of the Land, whereof the Feoffment was made, wherein the Feoffee yet continued in possession, and so he could not make a Lease thereof. And that, having performed all the conditions, he entred, &c. Whereupon it was demurred. First, because it is not shewn, that he paid for the Lead delivered him by the Feoffees means; For, That he ought to have done as well, as for the Lead delivered him by the Feoffee himself, which was holden to be a manifest Fault. Secondly, Because it is not alledged, That the Lease of Bl. Acre was made, &c. For although he cannot make a good Lease, yet he ought to make a Lease by Indenture, which should be good by Estoppel. But Popham, and Clinch held, That he needed not to alledge the performance of that part of the Condition, for it is impossible to be performed: And if he perform that Part, which is possible to be performed, it sufficeth. For when a Condition consisteth of two parts, and the one Part is possible to be performed, and the other not, this is a good Condition: If he performeth that Part of the Condition, which is possible, sufficeth: But if the Condition be altogether impossible, it is void. And here he cannot make a sufficient Lease, for the Feoffee is always seised. And it is not intended, that he should make a Lease by Estoppel, the Words being, That he should make a sufficient Lease, Wherefore, &c. But for the first point it was adjudged against the Plaintiff.

Co.Let. 206.a.

Griffiths Case.

- (15) **A**ction for these Words, Thou hast stoln my Mare, or consentest to the stealing of her. The Defendant pleaded Not guilty, and found against him, and after Verdict it was moved, That an Action lay not for these Words, For they are in the Disjunctive: And as to the last Word, it lies not; For he may be said to be consenting, because he did not contradict it. And of that Opinion were Fenner and Clinch, being only in Court, and awarded, Quod Querens nil capiat per Billam.

The Lady Russel, and Woods Case.

- (16) **T**He Lady Russel and Wood, were returned by the Sheriff of Berks to have made Rescous upon such a Bailiff, to whom he directed his Warrant to Execute his Writ. Williams, Serjeant, moved,

moved, That this Return was Insufficient, because it doth not appear, That the Bayliff had *Returna brevium*, which ought always to be mentioned upon the Sheriffs Return; As 33 H. 6. 20. 9 Ed. 4. 19. & 2 H. 4. And all the Court agreed, That it ought to have been so, if he returned it as a Return of the Bayliff of a Liberty, But he here returns it in his own name, wherefore it shall be intended, that it was his own Bayliff: And although he names him in his Return, Bayliff of a Libertie, that is but a void addition. And then it was prayed, That they might be admitted to Traversers this Return, because it is false, according to 4 Eliz. Dyer, 212. And a President was cited in this Court, 13 Ed. 4. rot. 3. and that in the Common Bench it is usual to admit a Traverser in such Cases. But the Clerks said, That the course of this Court hath always been to reject such traverses, and that the President of 13 Ed. 4. which is cited, could not be found. Wherefore Popham, and the Court commanded, that Presidents should be searched, whether a traverser had been admitted in such Case. And if it could not be found before these times to have been admitted, then it should not be allowed. Wherefore, &c.

Jones 201.

Dier 212.

Gumbleton versus Grafton.

Action upon the Case, supposing, that he delivered to the Defendant certain Wools to keep, and the Defendant had converted them to his own use. The Defendant pleaded Not guilty, and found against him. Godfrey moved in arrest of Judgment: For that the Ven. Jac. and Distringas, bare Teste upon one and the same day. But Gawdy, and Fenner held, that it is aided by the Statute of 32 H. 8. of Jeofails. Secondly, He moved, that the Declaration is not good, because he alledgeth not that he lost them; and the conversion doth not take away the Propertie from him, but that he always may have a Detinue; as 18 Ed. 4. 23. But Gawdy and Fenner held, that the Action well lies: For the conversion takes away the property from him, and it is an offence, for which this Action lies; as 2 H. 7. 2. & Dyer, 22. Cores Case. Wherefore, *ceteris Justiciariis absentibus*, it was adjudged for the Plaintiff.

(17)

Mo. 623.

Ant. 183.

Ant. 745.

Harrison versus Nowel.

Error of a Judgment in Doncaster. The first Error assigned was, For that in this Assumpsit the Jury found for the Plaintiff, and assels Damages, *occasione Assumptionis*, whereas it ought to have been *occasione non performance Assumptionis*. Secondly, Because in the Judgment it was omitted, that the Defendant sit in misericordia. And for both Causes, Fenner being only there held, that the Judgment was Erroneous and it was Reversed.

(18)

Ant. 677.

The Earl of Pembroke versus Syms.

Trespas upon Demurrer. The Case was, the Earl of Pembroke was Seised of the Manor of Stoke-Trilster, whereto the Lieutenantship of the Forrest of Fromeslet-wood appertained, and shews, that within the said Forrest were two Walks; the one called Staverdalle-walk, the other called Brewcombe-walk, and Prescribes; That

(19)

That the Lieutenants of the said Forrest, for the time being, had used always, from time, &c. to grant those Walks in Fee, or Fee-tail, &c. And that William Earl of Pembroke, his Father, was seised in Fee of the said Mannor, and Lieutenancy, &c. and granted that Walk, called Brewcompe-Walk, to Sir Maurice Barkley in Tail, and died, and that the now Earl of Pembroke confirmed that Grant, and further granted unto him the Custody of Staverdale-Walk in Tail, Proviso, &c. That he should not cut down any trees super præmissa. And because he had cut down trees growing in Brewcombe-Walk, he entred. And the Defendant, as Servant to Sir H. Barkleigh, the Son of Sir Maurice Barkleigh, re-entred, whereupon the Action was brought. And upon this matter disclosed by the Replication, it was demurred in Law: First, Because the Condition, That he shall not cut down Trees super præmissa, is void: For there is nothing granted but the Walks, and Trees cannot be super præmissa, which refers only to the Things granted. And therefore it is impossible, and void: For a Condition is to be taken strictly, according to the words, and not by intendment: And therefore it is not good, As where one grants Rent, Issuing out of the Mannor of D. upon condition, that he shall not cut down Trees super præmissa. So a grant of a Warren, with such a Condition is a void Condition for the impossibility. And of that Opinion was Gawdy. Secondly, Admitting it should be taken to extend to the Trees growing within the Walks; yet it shall not be intended by this Word præmissa, to extend to Brewcombe-Walk, which is only confirmed; But to Staverdale Walk solely, which is thereby granted. But they all resolved for the last Point, That this Word Præmissa extends as well to that, which is confirmed, as to that, which is granted: For that extends in this sence to præmentionata, and to avoid his entire Grant. And, as to the first, all the Justices, besides Gawdy held, That here super præmissa shall not be intended of the Office of the Walks it self: For that would be insensible, and impossible, and therefore it shall be construed, as reasonably it may be, to the Trees growing within the Walks. And although præmissa hath properly relation to the Thing it self, which is granted, yet when it cannot have such construction, it shall be as it may well stand with reason. And he, who hath the Custody of the Walk, hath Quasi the Custody of the Soyl it Self, and of the things growing thereupon, viz. the Verbage, and Pannage for the Deer, which is the reason, That, if the Keeper of a Park cut down the Trees, it is a forfeiture of his Office, for it is an hurt to the Game. And therefore this Condition is necessary, and reasonable. And they denied the Cases of the Grant of a Rent, and the Custody of a Park: For if such a Condition were annexed, it were good. Wherefore it was adjudged for the Plaintiff Vid. 11. Co. 51.

Co. 11. 51. a.

Ante 123.

Heath *versus* Pole.

Action for Words : Whereas he was Goalor of Maidston, (20)
 That the Defendant spake these Words, Heath hath let forth
 Prisoners out of the Goal, and had his part, and Shares with them : And by
 that means he came to his Goods: He had not a Sheet to his bed, before he
 let them out of the Goal to steal them. After Verdict for the Plaintiff
 it was moved, That an Action lies not for these Words: For
 as to the first, He may let Prisoners out, being acquitted, and
 to have Fees of them, and thereby he may have share, and get
 his goods by that means. And for the last Words an Action lies
 not : For it doth not appear that he had any Sheets at all, nor
 is it averred, that they stole any Sheets for him. And of that
 Opinion was the whole Court. Wherefore it was adjudged for
 the Defendant.

Duncomb *versus* Reeve and Green.

TRespass. For the taking of certain Raw Hydes. The Defen- (21)
 dant Justifies as Bayliff of Ipswich, by Custom there, That, 1 Rol. 568.9.
 if any Butcher kills any Beast within that Town, and sells 2 Rol. 562.
 the flesh within the Market, he is to pay two pence for every
 Hyde; And that the Bayliffs may distrain the Hyde for the two
 pence, if it be denied: And so Justifies for that, &c. The Plain-
 tiff replies, that after the Distress the Defendants Canned the
 Hydes, and so converted them to their use, &c. The Defendants
 by Rejoinder say, That they Canned them, because otherwise
 they would have rotted. And thereupon the Plaintiff Demur-
 red, and all the Court held it to be an ill plea: For the Custom
 to distrain doth not enable them to Can: For that is Tortious,
 because thereby the property is Quasi altered, and the Marks
 to know them are taken away from the Owner, so as he can- Dy. 121.b.
 not have them again. And although one may in some Cases medle
 with, and use a Distress, where it is for the Owners benefit,
 as Popham said: As where one distrains Armor, he may cause
 them to be scoured to avoid Rust: So if one distrains Raw-cloth,
 he may cause it to be Fulled, for it is for the Owners benefit
 But here this Canning is not for his benefit: For it takes from
 him the notice of the thing, and so is a means of taking away
 the thing it self: For he cannot have any knowledge thereof, to
 have it again. This Prescription also for the payment of two
 pence for every Hyde, where the flesh is sold within the Town,
 cannot be maintained that Toll should be paid for that, al-
 though the Hyde it self be sold elsewhere, The Rejoinder also is
 a departure from the Barr. Wherefore it was adjudged for the
 Plaintiff.

Countess of Salop *versus* Crompton. Ante, Plac. 10.

(22)
Ante 777.
Co. 5. 13. b.
Littl. Sect. 71.

THe Case was now moved again, and all the Justices resolved, That the Action lay not for this negligent Waste. But Gawdy said, he allowed, That, if Tenant at will burnt, or pulled down the Houses voluntarily, that Trespass lay, because, the privity of the Lease is determined by this Act done; which his estate permits not, which is the reason of the Case in 2. & 3 Ph. & Mary. & 121. & 15 Ed. 4. 20. & 2 H. 7. 11. That if a Bayliff destroys the thing delivered, Trespass lies. And where a Shepherd will not keep his Sheep, but suffers them to be drowned, Action upon the Case lies, because he there took upon him the charge. But here he takes not any charge upon him, but to occupy, and pay his Rent, and none will affirm, if a Lessee at will suffers his house to fall down, that an Action should lie against him: For he is not bound to repair it. Wherefore, &c. And to this difference of voluntarie, and permissive Waste, Popham, Clinch, and Fenner agreed. And Popham said, There was difference betwixt an Interest, and an Authority: For if a man hath an Authority to do a thing in general, Action of Trespass lies: But where a man hath an Interest, during that time his Misfeasance shall not be punished by a general Writ of Trespass. But as it hath been said, If a tenant at will cuts down the Trees, or pulls down the houses, a general Action of Trespass lies. For thereby his Interest is determined, and he is become a stranger, for that he voluntarily had done such an Act, which could not be done by his Interest and determines the Will. Wherefore Judgment was given accordingly.

Crouch *versus* Fryer.

(23)
Moor. 618.
Yelv. 2.
Mo. 51.
1 Rol. 653.
Noy. 132.

Prohibition for suing for Tithes, &c. wherein is surmised, That the Bishop of Winton was seised in Fee of the Mannor of Bishops-Walton, whereof the Plaintiff is a Copy-holder in Fee: And that he, and his Predecessors, from time, whereof, &c. had been Patrons of the Church of E. whereof the Defendant is Parson: And that he, and his Predecessors, from time, whereof, &c. and all his Farmors, and Copy-holders of the said Mannor, had been discharged of Tithes, &c. and shews, That this Land is ancient Copy-hold of the mannor Demisable, from time, whereof, &c. And because the Parson sued for Tithes, and the Court-Christian would not allow of that Plea in discharge, he brought the Prohibition. And upon this Surmise the Defendant Demurred. Tanfield for the Defendant moved, That the Surmise is not sufficient to ground this Prohibition. For, although the Bishop himself, being a Spiritual Person, may Prescribe to be discharged, &c. Because by Intendment, they might be so before the Council of Laterane, by reason whereof their Farmors for years, or Tenants at Will might be so discharged, because they be the Possession of the Bishop himself; as it hath been adjudged in Wrights Case: yet

Post. 814.
Ant. 512.

yet it is not so for Copyholders, which are also grounded by Custom, before time of Memory; so it cannot by Intendment be the Possession of the Bishop, at the time of the said Council: But had continued in the hands of the Copy-holders a long time before, For otherwise it could not be Copy-hold. And in 29 Eliz. It was ruled, by Advice of all the Justices, upon a Case depending in the Exchequer; That, although the Queen shall not pay Tithes for her own Possessions, because she is Persona mixta and so might well retain them, yet if she Grants them by Patent, in Fee, or her Copy-holder of Inheritance, They shall pay Tithes; for they do not participate of the Queens Prerogative therein: And this Copy-holder, who was before time, &c. cannot prescribe; for then there would be two times of Memory, which is repugnant in it self. Wherefore, &c. Coke e contra; For although a lay Person, at the Common Law, could not prescribe to be discharged of Tithes, because he is not capable of such Spiritual things; yet, as being Tenant to a Spiritual Corporation, he may prescribe in them, but not in himself: For all those Copy-holds are derived out of the Mannors, which were the Possessions of the Bishop: And the Free-hold yet abides in the Bishop. For this Prescription is for the Bishops benefit: for thereby he shall have the greater Fines from his Copy-holders; especially the Lord of the Manor, who hath the Advowson, may so prescribe: because, it may be, it was so at the Foundation, that he, and his Copy-holders, should be discharged. Which is the Reason, in Cottons Case, that the Lord of a Manor, in respect of a Recompense given to the Parson, shall have the Tithes of his Tenants: And so Pigot and Hens Case was Ruled. Wherefore, &c. But Popham, and Fenner held, that this Prescription is ill. Because the Copy-holders are intended to be before the Council of Laterane, at which time every one might give his Tithes where he would; And Spiritual persons might prescribe to retain them to themselves: But they ought to prescribe in themselves, and their Predecessors, and not in a Que estate of the Manor: And then a Copy-holder cannot prescribe, to retain them himself, and so, by consequence, he cannot prescribe to be discharged: But a Bishop may prescribe to have the Tithe of his Copy-holders, which shall be good against the Parson: And upon the Erection of the Patronage it could not be allowed, that Copy-holders should retain their Land discharged, which always should be out of the Lords Possession; and they ought to be appointed how they shall go by him, who had then the Possession before the Council made, and that was intended to be the Copy-holder himself. But of Lessees for years, it is otherwise; for they shall be intended to be the Possessions of the Bishop himself, at the time of the Council. Wherefore, &c. Gawdy, and Clinch doubted thereof: Wherefor Adjournatur, 8 Ed. 4. 13. Note, That Paich. 44 Eliz. This Case was Argued again; And then Gawdy, Fenner, and Yelverton Resolved, That this Prescription was good: For all Copy-holds are derived out of the Manor; And it shall be intended, That this Prescription had its Commencement at such time, when all was in the Lords hand: And the one Prescription is not contrariant to the other, although both were from time, whereof, &c. For the one shall give place to the other:

h h h h

And

Ant. 511.
1 Cr. 94.Ante 511.
1 Cr. 94.
Jones 387.

Ant. 587.

Ante, 599.

Co. 2. 45. 2.
Ant. 512.

Ant. 704.

Yelw. 3.

And this Objection may be, where a Copy-holder prescribes for Common, or the like, which is usual. But Popham held his former Opinion: yet notwithstanding, it was adjudged for the Plaintiff.

Royal versus Peckham.

Post. 834.

- (24) **A**ction for these Words: Whereas he was Endicted of such a Felony, for Robbing of the Defendant, and was arraigned, and acquitted thereof before the Justices of Peace of the County of Norf. That the Defendant said of him, If Mr. Hasset, and one A. (Justices of Peace of the said County) had done Justice, Royal had been hanged for Robbing me. The Defendant pleaded Not-Guilty, And after Verdict, it was moved, that an Action lay not for these Words; because it is not a direct Affirmative, That he Robbed him; and, being acquitted, he cannot be endangered by them, and therefore no loss: And the Slander is rather to the Justices of Peace, then to the Plaintiff. But the Court held, that the Action well lay, for, although he were acquitted, yet he thereby slandered the Plaintiff; wherefore the Action lies: And they be quasi a precise Affirmative, that he was the Party, who Robbed him. And it was adjudged for the Plaintiff.

Symcock versus Payn.

Ant. 242.
Post. 859.

- (25) **A**ssumpsit. For that the Defendant, in consideration that the Plaintiff had Lett unto him such Land for a year, promised unto him ad tunc & ibidem, to pay pro firma terræ prædictæ at the years end 20 l. The Defendant pleaded Non Assumpsit, and found against him. And it was alledged in Arrest of Judgment, That the Action lay not; for it appears to be for the Rent, for which Debt lies. But all the Court (Popham absente) held, That the Action was maintainable; for it is not a Rent, but a Sum in gross; for which he, making a promise to pay it, in consideration of the Lease, the Action lies: And it was adjudged for the Plaintiff. But afterwards, because it was but a meer Debt, for which an Action of Debt lies, and it is but a Contract, it was reversed.

Ingolsby versus Johnson.

Ant. 446.

- (26) **P**rohibition, for Suing for Tythes of dry Cattle, and surmiseeth, That he used to pay the tenth Sheaf of Corn, the tenth Cock of Hay, the tenth Fleece of Wool, the seventh Calf, and the Parson to pay 1 s. ob. and the eighth Calf, if he had eight, and the Parson to pay 1 d. & sic usque 10. And if he had under the number of seven, to pay onely an half penny for every one, and so after that rate for Lambs, and Colts; and that it was in satisfaction for the Tythes of all dry Cattle, and for all other Tythes of Corn, Hay, and Cattle. And it was thereupon moved, That this Surmise is not sufficient: for that, which he used to pay, is but the Tythes in kind; and therefore cannot be in satisfaction for the Tythes of other things, then themselves. And this was the Opinion of the whole Court. But, if he had made this Prescription

Prescription only for his dyv Cattel, for his Plough, or to Manure his Soyl, it had been otherwise: But this general Prescription cannot be good; for then thereby he would excuse all Feeding Cattle, although he kept 500, or more, which is not reasonable. Whereupon Consultation was awarded.

Holwood versus Hopkins.

Action for these Words, spoken to the Plaintiffs Servant, viz. (27)
Thy Mistress is an arrant Whore, and would have lain with me seven Years since, and I would not, unless she would go to the Hedg. And it was alledged in the Declaration, That she was in communication of Marriage with J. S. who was seised in Fee of Land worth 200 l. per annum: And that, by reason of these Words, she lost her Marriage. The Defendant pleaded Not Guilty, and found against him. And it was now moved, in Arrest of Judgment, by Waiberton, that an Action lies not for these Words; for the words are spiritual Slander and Defamation, and punishable there, and not by our Law; for our Law cannot take Conulance, nor try whether one be a Whore, or not: which is the reason in 27 H. 8. That for calling one Whore, or Heretick, an Action lies not in our Law. And of that Opinion was all the Court. But they held, That, if the Words had been spoken to him, who was in communication to have married her, so as it had appeared, that he purposely intended to hinder the Marriage, the Action had been maintainable for the loss, which she sustained; but when they be spoken generally, although peradventure an hinderance comes by reason of them, yet Non constat. And therefore for such collateral hinderance it is not reason the Action should lie. And it is not like to Anne Davies Case; for there they were spoken, as appears by the Record, to him who was in communication with her to Marry her: Co. 4. 17. a. And these words were, Will you marry her, she hath had a child, or two? And the having a Bastard is triable by our Law, and punishable, And so not like to the Case in Question. And for the calling one Bastard an Action lies; for Bastardy is triable by our Law: And to say, Such a Tavern, or Inn, is a Bawdy-House, an Action well lies, for the Temporal loss, which they sustain by reason thereof. And here, the Words being a spiritual Defamation, and there punishable, the Damages sustained by reason thereof are but accessory, and, by consequence, shall not alter the nature of the Action. Wherefore, after divers Arguments at the Barr, and upon view of the President of Anne Davies Case, it was adjudged for the Defendant, that the Action lay not.

Thaxbie versus Smith, Pasch. 42 Eliz. rot. 939.

Action for these Words, Thou art forsworn in the Carpenters Hall, and didst rob the Hall, and deceive the Compay of 20 l. The Defendant pleaded Not-Guilty, and found against him; And now alledged in Arrest of Judgment, that an Action lies not for these Words: For the Plaintiff declared, That the Company of the Carpenters, in London, were Corporated, from time, &c. and consisted of Master, Wardens, and the Company; And that the Plaintiff was elected Master; and that he had the (28)
Words,

Goods, and the Honey appertaining to the Company, delivered unto him, and was sworn to render an Accompt at the end of the Year: And so he could not rob himself, but it is only a deceiving of the Trust committed unto him; For which Words an Action lies not. Sed non allocatur: For it is not affirmed, That he was Hatter at the time, when he robbed the Hall, but shall be intended the contrary; wherefore the Action well lies for those Words. But for the first Words, Thou wert forsworn in Carpenters Hall, they be not Actionable; And although one properly cannot rob an Hall, yet, in common Parlane, it is well understood what he intended thereby; For loquendum ut vulgus, &c. And all the Court held, when any of the Words are Actionable, the Plaintiff shall have Judgment; and so it hath been oftentimes adjudged. Wherefore Judgment was given for the Plaintiff.

1 Cr. 328.

Wylson versus Fenton.

(29)

Action for these Words; Thou art a forsworn Bayliff, and wert forsworn this day. After Verdict for the Plaintiff, upon Not-Guilty pleaded, It was moved in Arrest of Judgment, That an Action lies not for these Words; for he doth not shew, that he was forsworn in any Court; It is not also shewn, that he was a sworn Bayliff at the time of the speaking. And the Opinion of the Court was, that the Action lay not, upon the first Reason principally.

Ante 135.

Baker versus Rogers. Mich. 42, & 43 Eliz. rot. 3333.

(30)

Moor 914.

Prohibition. Upon Demurrer, The Case was; That one Broughton, seised in Fee of the Advowson of Barby, the Church being void, Thomas Baker contracted before the Pardon 39 Eliz. with Broughton for this Avoidance, who for 180 l. granted it to Tho. Baker, who, by colour of that Grant, presented Walter Baker his Brother (now Plaintiff) who was admitted, instituted, and inducted thereto: and after his Induction, and before the Pardon, Thomas Baker acquainted the Plaintiff, what he paid for that avoidance, requiring him to have consideration thereof: and after the Pardon of 39 Eliz. Walter Baker was used in the Spiritual Court, before the High Commissioners, for Simony; and (the proof there being no more then as before is shewn) he was sentenced, that this was Simony; and that Walter Baker was as an Intruder, and his Admission and Institution utterly void, and as if he never had been Parson; For so is their Course there, when one is deprived as Simoniacus; and thereupon he brought the Prohibition, comprising all this matter, and the Pardon, and that he was not a Parson excepted. The Defendant pleaded the Act of primo Eliz. which gives Authority to the High Commissioners, and the Sentence before them, and prayed a Consultation; But mispleaded the Act in the Date, viz. 25 January, for 23 January, &c. And it was thereupon Demurred. First, It was moved, That this presentation was not by Simony; For although the Contract was Simoniackal for the avoidance, yet it was a meer void Grant; for, the Church being void, the avoidance cannot be granted, because it is a thing in Action (Quod fuit concessum) then, when he presents, he gains

Moor 753.
Co. Litt. 120. a,
3 Inst. 154.

4 Inst. 7. a.

gains it by Usurpation; and the Presentee is in, by that Presentment, by Usurpation, and not by the Simoniackal Contract. Secondly, although this be Simony in the Presentor, yet this acquainting of the Presentee therewith, after the Induction, makes it not to be any Simony in him; but he is quasi accessory thereto; which offence is not excepted in the Pardon, although Simony it self is excepted: And the Exposition of a Pardon belongs to the Common Law, and not to the Spiritual Court. And in 27 Eliz. in this Court, in the Case of one Fox, who was deprived, during the Parliament, for Incontinency, before the Pardon, and another Admitted, Instituted, and Inducted; and afterwards the Pardon discharged the Offence, it was adjudged, that this Deprivation, and the others Admission also were both of them utterly void. Wherefore, &c. But all the Court held, that the Prohibition lay not; For as to the first, although the Presentee come in quasi per Usurpation; yet because it is by means of a Simoniackal Contract, which is the cause thereof (For otherwise it is to be intended, That he would not have permitted that Presentment) It was held, that it was as well Simony, as if the Grant had not been void. And as to the second, They held it to be Simony; For there be not any Accessories in Simony; but all are principal therein, as well as in Trespass; and it appertains to the Spiritual Court to determine it, and not to this Court to meddle therewith; And when the Spiritual Court hath so sentenced it, This Court ought to give credence thereto, and ought not to dispute, whether it be Error, or not? For this Court cannot take Cognisance of their proceedings, whether they be lawfull, or not? which is the Reason, that in this Court, it sufficeth to plead a Sentence, out of the Spiritual Court, briefly, without shewing the manner thereof, or of their proceedings. And, as the Case is in the Lord Dyer, if the Spiritual Court will certifie the especial matter upon a Certificate of Matrimony, or Bastardy, or the like, it is not good; but they ought to certifie precisely the one way, or other; For this Court cannot adjudge of that special matter, but it appertains to their Law to determine it. And although it were said, that in the Spiritual Court, they ought not to have intermeddled, to divest the Freehold, which is in the Incumbent after the Induction; true it is, They should not meddle, to alter the Freehold; But they meddled only with his manner of obtaining his Presentment, which, by consequence, divested the Freehold from him, by the dissolution of his Estate, when his Admission, and Institution is avoided. And, as to the miscrecital of the Statute, it is not material, because it is in Barr, and the Prohibition it self lies not. And they all held, That it was Simony in the Incumbent, although he were not privy thereto at the first; And Simony was defined to be *Voluntas, sive desiderium emendi, vel vendendi spiritualia, vel spiritualibus adhærentia*. And Warberton said, that, if one be presented by Simony, and he, who is presented, is party, or privy to the Simony, he shall be deprived, and always disabled to take any other Benefice: But, if he be presented by Simony between two Strangers, whereto he is not privy, he is deprivable, by reason of the corruption, but not disabled to take any other;

And

Ante. 41.

3 Inst. 153.

Moor. 914.

Ant. 686.

Ante 686.

Moor. 753. 914.

Co Litt. 120. 2.

3 Inst. 154.

Ant. 686.

2 Cr. 534.

3 Inst. 154.

and that is the Rule of the Civil Law. Wherefore they all, after several Arguments, agreed. That the Prohibition lay not: and Consultation was Awarded. Note, No Consultation awarded upon the Roll.

Sir Robert Basset *versus* Gee,

- (31) **Q**uare Impedit, Supposing, That his Ancestor was seised in Fee of the Advowson, and Presented, and afterward granted the next Advowance to Manwood, That the Church became void, and Manwood presented H. that the Church became void by the death of H. and it belongs to him to Present. The Defendant pleads, that H. was created a Bishop in Ireland, whereby it appertained to the Queen, by her Prerogative, to Present, who presentend him (the Defendant.) And it was Ruled to be no Plea, without Traverling the Advowance by death; and this creation of the Incumbent a Bishop of Ireland was admitted to be a Cause of Advowance; and that the Queen should have it by her Prerogative. And it was held per totam Curiam, That if the Queen doth not take the benefit of the first advowance, but suffers a Stranger to Present, and the Presentee dies, she shall not have her Prerogative to Present to the second advowance.

2 Cr. 691.
Ante 527.
Ante 44.
2 Cr. 54.
Ante 119.

Shyfield *versus* Barnfield.

- (32) **A**ccompt against the Defendant, as Bayliff of certain Goods to Merchandize. The Defendant tendered his Law; and the Court said, That it had been oftentimes adjudged here, and in the Queens Bench, that a Bayliff cannot waige his Law, but a Receiver may. Whereupon he pleaded to Issue.

Ant. 579.
Co. Litt. 295. a.

Williams *versus* the Bishop of Lincoln, and the

Mayor, and Burgeses of Bedford.

Mich. 42, & 43 Eliz. rot. 3614.

- (33) **Q**uare Impedit, To Present to the Hospital, or Parish-Church of Bedford. Upon Demurrer upon the Count. The Case was; That the Corporation of Bedford was seised of the Advowson, and granted the first, and next Presentation to Scriven, & afterwards Granted primam & proximam advocacionem to the Earl of Bedford, who granted it to the Plaintiff. The Church afterwards became void, and Scriven presented his Clerk, who was Admitted, Instituted, and Inducted; and then the Church became void again, and the Plaintiff Presented; and, being disturbed, brought a Quare impedit. And, after Argument at the Bar, It was Resolved by Walmsley, Kingsmil, and Warberton, that this second Grant was void, so as the Plaintiff had not any Title;

2 And. 173.

Co. Litt. 378. b.

For

For when they had granted primam, & proximam Præsentationem to one, they had not any Authority to grant it afterward to another. But peradventure, if the first Deed had been lost, before he had taken the benefit thereof, and that it could not be pleaded, the second Grant might have been good; And so it was not void to all Purposes, but he can never have the second Presentment; For it is against the expresse words of the Grant, which is; That he should have primam, & proximam Præsentationem, which cannot be altered by any Intendment; and in the Pleading he ought to Avert, That it was the first, and next Avoidance. But Anderson held, That he should have the second Presentment; for so was the Intention of the Grantor, when he had granted the first before, and it may well stand with the Law, as where two Coparceners make Composition to present by turn, the eldest first, and the younger afterward, if the youngest grant primam, & proximam Advocationem, it is in Law but the second only, and yet the Grant is good enough; So 15 H. 7. 3. where one granted the third Pre-
Co. Litt. 392.
 sentation to an Advowson, and died, his Feme was endowed of the third Presentment, the Grantee shall have the fourth Presentment. So here, the Grantee shall have the first, and next which belongs to the Corporation; He conceived also, that the Writ, which was in the Disjunctive, was ill. But all the other Justices were against him therein: wherefore it was adjudged upon the matter for the Defendant. Vide Dy. 26, & 35 & 20 H. 8. Presentm. Bro. 54.

Temple versus Temple.

DEbt The Case was; A Rent was granted to Baron and Feme (34)
 for their lives, the Rent was Arrear, the Baron dies, another Rent is Arrear, the Feme dies Intestate, and her Administrator brings Debt for the Arrearages due in the Life of the Baron, and after. And all the Court resolved, That it well lay; because the Arrearages survived to the Feme, as well as the Rent it self. But an Exception was taken to the Declaration; For that it is alleged, That Administration was committed by the Dean of Lichfield, and it shews not by what Authority he committed it, nor that he was Loci illius Ordinarius; and for this Cause the Court held the Declaration to be ill, for the Court intends not his Authority, being special, without shewing it. But the pleading of Admini-
Ant. 431.
2 Cr. 556.
Post. 838.
879. 907.
 stration committed by a Bishop is good enough, without saying, that he was Loci illius Ordinarius, for so it shall be intended, and so the Presidents warrant it, but in a Barr, or Replication it is vitious. Vide 35 H. 6. 46. Wherefore, &c.

Pill versus Towers. Pasch. 42 Eliz. rot. 1332.

REplevin. The Defendant made Conusance, as Bayliff to Sir Fulk Grevil, for the Amercement of a Free-tenant within his Mannors, and shews, That Sir Fulk Grevil was seised in Fee of the Mannor of D. and that he, and all those, whole, &c. have had a Court Baron within the Mannor before his Steward of the Mannor, tenendum from three weeks to three weeks, and alledgeth a Custom to have Sute of Court from all his Free-tenants of the Mannor; and that, if any of them made Default, and his De-
(35)
 fault

Co. Litt. 58. a.

fault was presented by the Homage, they had used there to amerce him, and the Amercement to affer, and the Lord had used to distrain such a Tenant for such an Amercement per aliqua bona, vel catalla sua within the Mannor; and for an Amercement for this cause the Distress was taken, &c. Upon this Conulance, thus made, the Plaintiff demurred. And, after Argument at the Barr, It was Resolved by the whole Court, that the Advowry was insufficient. First, Because he prescribes to have a Court-Baron within his Mannor, whereas it is of Common Right, and cannot be by Prescription; for it is incident to a Mannor: For Walmsley said, Usage is not, but where there is a Defect of Common Right, but here it stands with Common Right, and therefore it is not good; And whereas it is said, that it shall be maintained by Custom, in regard the Prescription is to hold it before the Steward of the Mannor, which is against Common Right (for of Common Right it ought to be holden before the Sutors) yet it is not good: For a Court Baron cannot be holden but before the Sutors, and sometimes before the Bayliff, and Sutors, as by Writ; And by Plaint, it shall be before the Sutors only, but in no Case without the Sutors. And one cannot have a Court by Prescription, but where he cannot have it otherwise; And all the Justices agreed with him, that he could not have a Court-Baron by Prescription, but he may by Prescription enlarge the Authority thereof, as to hold Plea above 40 s. and the like. Secondly, Walmsley held, that the Prescription to distrain the Goods of the Offendor in any Part of the Mannor is not good, for thereby he may distrain in the Lands of one, who did not offend: But some of the other Justices held, that it might be good by Prescription. Thirdly, He prescribes to distrain the Beasts, or Goods of the Free-tenant, who made Default of Sute, and here the Distress is taken of the Beasts of his under-Tenant, who is not within the Prescription. Wherefore it was adjudged for the Plaintiff.

White *versus* West. Trin. 42 Eliz. rot. 3417.

(36)
2 And. 170.
Ant. 727. 68.
Noy. 9.

R Eplevin. The Defendant made Conulance, as Bayliff of one Gerish. Upon Demurrer, the Case was; that one Baynton seised of the Land in Fee, he and White, levied a Fine thereof to Long, who rendered it to White in Tail, rendering Rent: And by the same Fine it is limited, That, if White died without Issue, Tenementa prædicta integre remanebunt to Baynton, & his Heirs. Afterwards Baynton, by Indenture Enrolled, Bargains, and Sells his Reversion & Rent to Gerish in Fee; White suffers a Common Recovery; And afterward, for this Rent, West Distrained: And, Whether the Rent was gone by this Recovery? was the Question. Two points were moved; First, Whether this were a Reversion, or a Remainder, limited to Baynton, being all by one Fine? For, if it be a Remainder, the Reservation of the Rent is void. Secondly, Admitting it to be a Reversion, and to be bound, and taken away by the Common Recovery, Whether the Rent also be extinct? And, after Argument at the Bar, it was Resolved for the Defendant. First, That this is a Reversion; For, being one Fine, it enures, as if it had been at several times; and it shall be intended, as rendering the Tail at one time, and rendering the Reversion

Reversion at another time; and so in the usual course of Fines; and so it hath been always expounded; But it is not so in Grants by Deed. Secondly, (which was the most doubtful point) They Resolved, that the Rent was not extinct, because the Grantee was always in possession thereof; and it is distinct from the Land. And that, whereof one is in possession, cannot be Divested by a Recovery against another man. And here is not any recompence for the Rent, for that goes only for the Land: And it is not like the Case of a Rent Granted out of Remainder, because that never was in possession; nor a thing executed: And it is as if Tenant in Tail himself had granted a Rent, and afterwards suffered a Common Recovery: That Rent which was in esse shall not be gone by this Recovery. No more shall this Rent which is annexed to the Reversion, although the Reversion it self be gone. And where Tenant in Tail discontinues the Land, yet the Donor shall always have his Rent, and it shall not be taken from him; As 48 Ed. 3. and 31 Ed. 3. Title Guard So it shall be in the Case of a Common Recovery: For it is all one in effect, And not like to a Recovery by Title, which defeats the Estate utterly. And the manner of pleading it shews always when it is a Common Recovery, and when not. Wherefore it was adjudged for the Defendant. Vid. Mich. 41 & 42. C. B. Pl. 62.

Ante 769.

Littleton *versus* Hibbins, &c. Mich. 42 & 43 Eliz. rot. 627.

SCire fac. against Executors; Upon a Judgment against their Testator in Debt: They pleaded, that before they had any Conscience of this Judgment, they had fully Administred all their Testators Goods in paying of Debts upon Obligations. And it was thereupon demurred, and, after Argument at the Barr, adjudged for the Plaintiff, that it was not any Plea. For they at their peril ought to take Conscience of Debts upon Record, and ought first of all (unless for Debts due to the Queen, wherein she hath a Prerogative) to satisfie them. And although the Recovery was in another County, then where the Testator and Executors inhabited, it is not material. But if an Action be brought against them in another County, then where they inhabit, and before their knowing thereof, they pay Debts upon Specialties; that is allowable. Wherefore it was adjudged accordingly. Vide 4 H. 6. 8. 21 Ed. 4. 21.

(37)

Moor. 678.

Perren *versus* Bud.

Action upon the Case. Whereas Bud had brought Debt in the Common Bench, upon a Bill of 40 l. against the Plaintiff. And upon Examination, it appeared to the Court, that all besides 28 s. was paid; whereupon they in Trin. Term. Ordered, that if the Plaintiff would not accept of the 28 s. with such damages as the Court should Assess, then the now Plaintiff should Imparl until Octabis Mich. That the Defendant knowing of this Order, had procured a Nihil dicit to be Entred, and upon this Receipt he brought this Action: And it was thereupon demurred. First, in regard of the manner of the pleading, because he doth not aver, that he tendered the 28 s. for otherwise the Plaintiff (then Defendant) was not to have the benefit of the Order. Secondly, this

(38)

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this

This Action lies not in respect of the matter. For this Entering of the Nihil dicit is the Act of the Court, whereof none can take advantage, nor any Actions lies for it; and in proof thereof was Cited 26 Aff. Pl. 46. and 21 Ed. 4. 22. where a Writ of Privilege was Granted without Cause, no Action lies, But all the Court held, That the Action for the matter would well lie for procuring a Nihil dicit to be entered in abuse of the Court, whereby the Party Defendant in the Action suffered prejudice. And therefore, if one procures another to Sue me without Cause, an Action lies not against him, who sued without Cause: But for this Fallity in procuring my vexation an Action well lies. So where one casts a Protection in delay of my Action: And likewise for every Fallity an Action upon the Case is maintainable. But here this is not good for the manner, because there is not any Tender, or Refusal in the other to accept of the 28 s. alledged: For, without that, there is not any breach of the Order in the now Defendant; And his then procuring of the Nihil dicit was lawful. Wherefore, &c.

Ant. 629.
2 Cr. 223.
Post. 836.
Ante 629.
Post. 838.

Dotter *versus* Ford. Trin. 42 Eliz. rot. 541.

(39)
Noy. 33.

Action upon the Case for words: Whereas he was of good Name, &c. & per multos annos jam retroactos fuit Mercator, and used the Trade of Merchandizing tam infra Regnum, quam extra, That the Defendant spake of him these words; Thou art a Beggerly Knave, and a Bankrupt, and thou art not able to shew thy face. It was moved, That an Action lay not for these words, unless, it had appeared by the Declaration, that he was a Merchant at that time. For being spoken of a Gentleman, or any, who used not the Trade of Merchandizing, an Action lies not. And of that Opinion was the whole Court: But the Question was, Whether by alledging, that he used the Trade of a Merchant per multos annos jam retroactos, It shall be intended, that he was a Merchant at the time of the words spoken: And the Court seemed to doubt thereof; because it is not precisely alledged. For it may be he used that Trade for a time, and left it afterwards. Wherefore they would advise thereof.

Worledg *versus* Kingswel. Pasc. 40 Eliz. rot. 1418.

(40)
2 And. 168.

Replevin: Upon Demurrer, the Case was: That a Copyholder of a Mannor, which had Common by Prescription in sixty Acres, parcel of the Demeasns of the Mannor, Escheated; And the Lord by Deed Granted it to another in Tail per nomina, &c. Communiarum quarumcunque, dicto Messuagio, sive Tenemento spectant. sive in aliquo modo pertinent. vel cum eodem Messuagio dimisso usitat. Whether by these words, the Grantee shall have Common in those sixty Acres? was the Question. And after Argument, it was Resolved by all the Court, That the Donee in Tail should have such Common, as the Copyholder had. But the ancient Common, which was by Prescription, is determined by the Unity of Possession in the Lord. But the Grant Enures as a new Grant of the same Common. As Grant to Illington of the like Liberties, which London hath, is a new Grant of the like Liberties. Wherefore it was adjudged for the Plaintiff.

Co. 9. 30. b.

Cowper versus Temple. Hill. 42 Eliz. rot. 1434.

R Eplevin. The Defendant avows for Damage-Felant, by reason of a Copy-hold Granted to the Defendant, and one Godfrey, and three others; and that the three died; and afterwards Godfrey died, whereby he was in by the Survivor, and is sole seised, and took the Beasts Damage-Felant. The Plaintiff confesseth the Copy granted, and that the third died; And the Defendant, and Godfrey survived, prout, &c. But he further alledgeth, that afterwards Godfrey surrendered his part to a Stranger, who conveyed it to the Plaintiff, who put in his Beasts: And Traverseth Absque hoc, that the Defendant was sole seised, prout, &c. tempore Captionis. And it was thereupon demurred. For the sole Seisin is not Traversable, but the Survivorship only: And the Joynt-tenancy, and Survivorship, are here confessed, and avoided, and therefore the Travers is double. But the whole Court were of Opinion, that the Travers is well taken: for the sole Seisin being alledged by way of Bar precisely, and materially, it ought to be Traversed; as 2 Ed. 4. 28. But where it is alledged only in the Count by way of Supposition as in Mordancester, or Dower, or the like Joynt-tenancy may be pleaded against it without a Travers. And here the Sole Seisin had not been fully confessed without a Travers. Wherefore it was adjudged for the Plaintiff. Vid. 6 H. 7. 5.

(41)

Woodcock versus Woodcock,

Hill. 42 Eliz. rot. 1339.

P Artition. Upon a special Verdict, the Case was: That one Jamey Woodcock, Father of the Plaintiff and Defendant, was Possessed of a Lease for years, of an House called Paradise, and of divers other Leases, and had Issue J. W. the Plaintiff, and Samuel W. the Defendant, and Thomasine a Daughter: And by his Will devised, that his Daughter should have the said House for her Life, And if she chanced to die before Samuel my Son, Then I will, That Samuel my Son shall have it upon such reasonable Composition, as shall be thought fit by my Overseers, allowing to my other Executors such reasonable rates, as shall be thought meet by my Overseers. And he Devised all his other Lands and Goods to his Executors: And made the Plaintiff, and Defendant his Executors, and J. S. and T. D. his Overseers, and died. Thomasine Entred by the Assent of the Executors, and died, during the Term, Samuel W. Entred, claiming it as Legatee (without any Composition made with the Overseers, and no sum being appointed by them to be paid) and brings a Writ of Partition against the other Executor: Supposing, That they held joyntly as Legatees. And upon a Non Tener pro indiviso pleaded, all this matter was found. Et sic, &c. The first Question moved, was, Whether the Daughter by this Devise had the Entire Term; so as it should go to her Administrators? or Whether the Remainder of the Term limited to Samuel were good, to give the residue of the Term unto him? Secondly, Whether this Estate limited to Samuel be upon a Condition Precedent, so as he ought first to have compounded with the Overseers; and to pro-

(42)

Co. 8. 96. b.

Co. 8. 95. a.

Co. 8. 95. a.

cure them to set down what Rate he should pay? D^y, Whether it were a Condition subsequent; that, if he said not what they set down, it should be a determination of his Estate? Warberton for the defendant argued, that as to the first, it is a good limitation of the Remainder to Samuel, according to the Intent of the Devisor. For it is a particular limitation to the Daughter: and therefore, Pasc. 33 Eliz. rot, 607. It was adjudged, that where one devised a term to his Feme for Life, and after to his Children not provided for, and the term was afterwards sold upon an Execution for the Debt of the Feme, and afterwards the Feme died during the Term; it was adjudged, that notwithstanding this alienation, The Children of the Devisor should have the Residue of that Term. But as to the second point he moved, that this Estate is Vested in Samuel, and the Condition is Subsequent: And the Estate is not defeated, until the Overseers appoint what he shall pay, and he fails in payment thereof. Wherefore, &c. Walmsley; It is a Strange Case, that the Devise of a Term for life, Remainder over, should be a good Remainder by the Exposition of a Will, to make the first Devisee to have so many of the years as she shall live, and he in the Remainder the Residue. For every one, who hath a Term, ought to have a certainty of Estate in the beginning, and end thereof, and beyond such bounds it ought not to extend: And those bounds to be such, as he may claim it certainly. In Waste, the Lessor ought to Count, that he hath the Entire Estate: So he hath the Entire Term, and then a Remainder over is void. As a Devise in Fee the Remainder over, the Remainder is void: So a Devise of a Term to one, and his Heirs, the limitation of the Heirs is void. So here when he deviseth the Entire Term to the Daughter, he hath nothing left in him thereof to devise to another. And whereas it is said, That it is but a special Property in the first Devisee, and the general Property remains in the Devisor to Devise over; the Remainder notwithstanding is not good. For then it is a Devise of the Term of the daughter, which is not good; because the term devised unto her is uncertain, and because the Law will not presume, that there should be a continuance of the Term after the death of the daughter: And here is not any special limitation to the daughter; Wherefore the Remainder is void. But there be divers Judgments against my Opinion, but upon what reasons I understand not. And as to the second part, he conceived, that the Estate is Precedent in Sam. and the Condition subsequent. And the Condition is extinct, because Sam. is one of the Executors, who should take advantage thereof: Wherefore Partition lies not. Anderson; By the devise the whole Term is to the daughter. And, although a devise ought to be expounded according to the Intent of the Devisor, Yet his Intent ought to be guided by the Law. And, if such a devisee be ousted, and is to bring his Action, he ought to shew the certainty of his Estate, which is the entire Estate: And then, if the daughter hath the entire Estate, the devise to him in Remainder is void. As if a man should grant so much of his Term, as should be after his death; D^y, if a man should devise so much of his Term, as should be to come after the death of J. S. It is void: So here. Wherefore, &c. And of that Opinion was Kingmil. For that he devised the Term to his daughter for her Life, That is the entire

fire Term, and the Remainder is void. And they agreed, that the Estate is Precedent, and that the Overseers might make Agreement with him at any time. And therefore Partition lies not Et adjournatur.

Dean *versus* Executors of sir Francis Hinde.

Audita Querela. Upon demurrer, the Case was; The Plaintiff (43)
was Conuisee of a Statute, and Sir Francis Hinde was Conuisee of an elder Reconuiseance; The Conuisor had Lands in the Counties of Cambridge and Middlesex, The Plaintiff sues Execution first, and had the Lands in the County of Cambridge delivered unto him in Execution. The defendant sued Execution upon the Reconuiseance, and had the Hovety of the Lands in the County of Cambridge delivered unto him in Execution, and nothing in Middlesex. And thereupon the Plaintiff sued an Audita Querela, Comprehending all this matter. And upon demurrer, it was adjudged for the Plaintiff, That this Audita Querela well lies upon this Surmise. For the Reconuisee ought to have sued Execution as well of the Lands in the one County, as in the other whereby the money should the sooner have been levied. And the not suing Execution according to the Law is a prejudice to the Plaintiff, as much as if he had purchased Parcel of the Land of the Conuisor, and this Land only had been extended. Wherefore it was adjudged for the Plaintiff. Vide Cokes Entries, 236.

2 And. 70.
Noy. 47.
Yelv. 12.

Moor. 535.
Co. 4. 14.

Block *versus* Palgrave. Hill. 42 Eliz. rot. 1539.

Debt upon an Obligation, Conditioned for the performance of the Award of one Doctor Talbot; So as the same Award be in writing delivered to either of the Parties before Mich. The Defendant pleads Nullum fecit arbitrium. The Plaintiff shews an award, and that it was delivered unto him, and doth not alledge, that it was delivered to the Defendant also: And for this cause the Defendant demurred. And, after Argument, it was adjudged that this Delivery ought to have been to both. For so is the sence of this word Either in this place, because the Intent of the Condition was, that every of them might have Conuiseance thereof. Wherefore it was adjudged for the Defendant. (44)

Co. 5. 103. 2.
Post. 885.

Sicklemore *versus* Simonds.

Debt. The Case was; That the Plaintiff Let to the Defendant by Indenture certain Lands for years: And the Lessee Covenanted to pay, for the first year six pounds, and afterwards eight pounds for every year: And for the eight pound, being Arrear, brought Debt. And it was demurred, Whether this Action, or an Action of Covenant should have been brought? And without Argument it was adjudged, that the Plaintiff might at his Election bring either of them; for both are maintainable. (45)

Fawkner *versus* Powel. Trin. 42 Eliz. rot. 1528.

(46)

Ejectione firmæ. The Defendant pleaded, That before the Lessor of the Plaintiff had anything, &c. The Father of the Lessor of the Plaintiff was seised in Fee, and Let to the Defendant for Life, and died seised of the Reversion, which descended to the Lessor, who entred, and disseised the Defendant, and Let to the Plaintiff. The Plaintiff saith, that the Father of his Lessor was, seised in Fee, and died seised, and it descended to his Lessor, who entred, and Let to the Plaintiff, &c. and traverseleth, Absque hoc, That the Father of his Lessor Let to the Defendant, prout, &c. and it was thereupon demurred; because he traverseleth the disseisin, and not the Lease, which is but a conveyance. But, after Argument, it was adjudged for the Plaintiff, that the Traversers was goods; and, that he might Travers the one, or other at his Election. For when both Parties make their Conveyance from one and the same person, there always the mean Conveyance is traversable. Wherefore it was adjudged accordingly. Vid. 4 H. 7. 9.

Ant. 288.

Stapleton *versus* Morfe. Trin. 42 Eliz. rot. 3432.

(47)

Replevin, de Captione unius Equi, unius Spadonis, duarum Vaccarum, &c. The Defendant avows for Damage Felant. The Plaintiff in Bar to the Avowry shews, that he is seised in Fee of such Land, and Prescribes to have Common Appurtenant thereto, in the place where, &c. pro omnibus Equis, Vaccis, & Porcis suis, &c. And hereupon the Defendant demurred; because he did not Prescribe for Geldings. So the Prescription doth not maintain his Declaration. And of that opinion was Anderson. For Stone-Horses, and Geldings are several, and there ought to have been a several Prescription, And by such a Prescription he cannot put in a Mare. But the other Justices e contra, For the word Equus is a general name, and compriseth both as well Horses, as Geldings: And Geldings are called Horses in general speech. But for Mares, it is not so: Wherefore they held, that the Declaration was well maintained by the Prescription. And they said, that all the Justices of Serjeants-Inn, with whom they had conferred about it, except one, were of the same Opinion. Wherefore it was adjudged for the Plaintiff.

Nose *versus* Bacon. Mich. 42 & 43 Eliz. rot. 283.

(48)

Co. Lit. 208. 2.

Debt upon an Obligation of 100 l. Condition for payment of 50 l. and no day limited for the payment of the lesser Sum, It was Resolved upon Demurrer, that the 50 l. was payable maintenance upon request, and he had not any time after to pay it: For it is part of the Bond. And the purchasing of the Original Writ is a request in it self. And the Obligee is not bound to make a special demand. And it is not like to the Condition of an Obligation to make a Feoffment; for that is Collateral, and the Obligor without request shall have time to make it, during his Life, and shall have a convenient time after Request to make it. But

But here it is a Duty presently, and part of the greater Sum. Wherefore it was adjudged accordingly. Vide 20 Ed. 4. 1. 14. H. 8. 17.

Lewes versus Bucknal, Trin. 42 Eliz. rot. 1128.

R Eplevin. The Issue was, Whether the Plaintiff held of the Defendant such Lands by Fealty, Rent of 3 s. 4 d. and Sute of Court: And the Avowry was for the Rent. The Jury found a Special Verdict, that the Plaintiff held by the Fealty, and Rent only, and not by Sute of Court, &c. And, if by this Verdict the Defendant shall have Return, was the Question. And the Court held, that it was found against the Avowant. For in an Avowry, all the tenure alledged is material. But in Trespass, or Rescous, if any part of the tenure be found, it is sufficient. (49) Co. 9. 36. d.

Simons versus Wenlock.

R Eplevin. The Case was such; One had a Lease of two Granges for eighty years, & takes a second Lease of them for ninety years, to begin after the Expiration of the first Lease. And afterwards in 21 H. 8. Devised all his Leases to the Church-wardens of such a Church, paying Annuity to the Abbot of D. and his Successors 5 l. and giving yearly to a Priest, to sing for his Soul 5 l. And further willed, that when the Priest died, his Son should have the Nomination of another, And, that his Son should have the Letting, and Setting of the Land, una cum omnibus proficuis, exceptis Redditibus prædictis: and died. The Rents were employed accordingly, until 1 Ed. 6. The first Lease ended in 34 Eliz. All this matter was disclosed in Bar to the Avowry. And he entitles the Queen thereto by the Statute of 1 Ed. 6. of Chanteries, and that he put in his Beasts, &c. and prayed ayd of the Queen, and yet derives not any Title to himself from the Queen, nor as her Bayliff, nor otherwise: and it was thereupon demurred. And all the Court held, that this second Lease was not within the Statute. For that Statute gives nothing to the King, unless it were converted and imployed to Superstitious uses. And this Lease began not until 34 Eliz. So although the first Lease was converted, this cannot be converted until it began, and so out of the Statute. It is also out of the Statute, because nothing is given, and converted, but the Rent of 5 l. to the Abbot, and 5 l. to the Priest: and the Land it self is not given. For the profits of Letting and Setting thereof are limited to his Heir: and therefore the Queen hath nothing to meddle with the Land. And here the Plaintiff shall not have ayd from the Queen: For here is a meer Intruder, who is not accomptable to the Queen: as 35 H. 6. Wherefore it was awarded, that he should answer without ayd. (50) 1 E. 2. cap. 14. Co. 4. 110. a

Cospey versus Turner, Hill. 42 Eliz.rot. 1659.

(51)

Ant. 627.

DEbt upon an Obligation. The Defendant pleaded Quod Factum prædictum was made, and delivered without Date, and that afterwards the Plaintiff put a Date thereto, and so not his deed. And it was thereupon demurred, because the Defendant first confesseth, that it is his Deed, and then concludes, that it is not his Deed. And of that Opinion was all the Court: that the Plea was ill for this Cause. For he first confesseth the Deed, by saying Factum prædictum, and afterwards denies it: Whereas he might have said, Non est Factum generally. Wherefore it was adjudged for the Plaintiff. Vid. 9 H. 6. 37.

Guybon versus Whitetost.

Trin. 42 Eliz. rot. 720.

(52)

Noy. 33.

Ant. 776.

DEbt upon an Obligation, made to the Sheriff; upon arresting one upon mean Process. The Writ was ad Respondendum *H. Guybon*, nuper Vicecom. *Norff.* And the Count thereupon was, Quod concessit se teneri præfato *H. Guybon* in prædict. 20 l. and he doth not say prædicto *H. Guybon* tunc Vicecomiti *Norff.* existent, and for this Cause after demurrer upon the Bar (wherein the Statute 23 H. 6. cap. 10. was pleaded in aboydance of the Bond, because the Condition was, that he personally should appear, &c.) The Count was adjudged insufficient, and the Writ abated.

Blackbourn versus Lassels.

(53)

Noy. 33.

Ejectione firmæ. Upon a Special Verdict, The Case was such; John Molineux Covenanted to stand Seised of such Land to the use of himself for Life, and after to the use of his Daughters, who should be unmarried at the time of his death, until every one of them Successive shall, or may have Levied 500 l. Remainder to his eldest Son for Life, with divers Remainders over. And it was found, that he had four Daughters unmarried at the time of his death; and, that the Land was worth 100 l. per annum; and that the Father died in 30 Eliz. and that the eldest Son entered immediately, and disturbed the Daughters of Entering; and that the eldest Daughter did not Enter until 42 Eliz. who then entered, and made the Lease to the Plaintiff. And Whether her Entry, and Lease were Lawful; Or, Whether she had not surceased her time, was the Question. And all the Court held, that she had overpassed her time, and could not Enter. For then she should prejudice her other Sister: So as they never should Levy their Portions. But they held, that she had remedy for her Portion against the eldest Son, who had received the Profits in disturbance of her.

Williams

Williams moved, Whether such a Contingent Use might be raised out of a Covenant, although out of an Estate executed by Feoffment it might well be raised. Anderson doubted thereof. But the other Justices held, That it well might be raised; because it ariseth out of the Possessions of the Covenantor. Et Adjournatur.

Memorandum, That the last Day of this Term *Peter Warberton* was made Justice of the Common Bench.

K k k k k

Termino



Termino Hillarii,
Anno Quadagesimo-tertio ELIZABE-
THÆ, in Banco Reginae.

Rud *versus* Tucker. Ante, Hill. 42. Pl. 6.

(1)
Ante 737.
Co. 2. 66. b.
Litel. Sect. 566.

THe Case was now moved again. And all the Justices, besides Clinch, resolved for the Defendant, That the Attournment by one Joint-tenant was good, and should settle the Reversion in the Grantee, and is as well, as if both had Attourned; For Gawdy said, there was not any difference betwixt the Case of an Attournment upon Grant of a Seigniorie (as Littleton is) and the Grant of a Reversion: For both are entire: For if a Reversion of Land be granted, which the one jointly holds, it is void, because there is not any such Reversion, as 13 Ed. 3. Title Grants is. But if he grants the Reversion of the Mowety of the one, that is good by such express words; And the Case of 28 H. 8. Dy. 12. put by Baldwin is all one with this Case, where a Reversion is granted to the one Joint-tenant, & he accepts the Deed, it is good. And there is not any difference between an express Attournment, and an Attournment in Law, & the Attournment shall bind all, for they be seised per my, & per tout, and an Attournment doth not pass any Interest, but an Assent only, which ought to be upon true notice of the Grant, and then his Attournment to part of the Grant is good for the whole; And an Attournment ought to be good for all, or void for all. And Fenner agreed with him in omnibus, and said, That the reason, why one Joynt-tenant in a Quem Redditum reddidit, Quid Juris clamat, or a Per quæ Servitia shall not be compelled to attorn, is; Because it shall be according to the Grant of the Record, and according to that which the Plaintiff demands, and that it might not be variant from it; and an Attournment is a lawful Act, and is not any Prejudice to his Companion, and therefore shall bind him, and if he in Reversion had disseised the two Joynt-tenants, and made a Feoffment, and the one had re-entred, there is no doubt, but that it had been an Attournment for both in Law, and had settled the Estate for Life in both, and the Reversion in the Grantee; a multo fortiori, an express Attournment shall do it. Popham accord, and said, That to examine the reason hereof, is to examine

mine what Acts of the one Joynt-tenant shall bind his Companions, and what shall be avoidable by the others: It is clear, that every Act by the one Joynt-tenant for the Benefit of his Companion shall bind, but those Acts, which prejudice his Companion in Estate, shall not bind; as the Default of the one, the Surrender of the one, &c. And therefore if two Joint-tenants have the benefit of a Condition to increase their Estate, and the one will attorn in a Quid Juris clamor without saving it, it shall not hurt his Companion, but himself only: But in the matter of the Profits of the Land, the one may damage the other, for there is quasi a Privy betwixt them, and it was his folly to joyn with one, who would prejudice him: As where the one takes the entire Profits, the other hath not any remedy. So where two Joynt-tenants be of a Signiory, and a Wardship happens, if the one will distrain for the services before Election of the Wardship, it shall bind his Companion. And here, This is but a Consent, which, being given by the one, shall bind the other, by reason of the privacy of their Estates. But if the Attornment had not been good, the Surrender had not helped the Case; For that cannot be, unless there had been an Attornment before, which if it were not a good Attornment to vest the Reversion, he cannot accept of a Surrender. Wherefore it was adjudged for the Defendant.

The Wardens, and Corporation of Weavers in London
versus Brown.

Action Upon the Case. Supposing, that the Plaintiffs from time, whereof, &c. were a Corporation in London, &c. paying for it twenty shillings, eight pence, to the Queen, per annum, &c. And that the Custome there is, &c. that none ought to intermeddle with their Guild, nor with their Art within London, or Southwark, but those of the Guild; And that the Defendant, being none of their Guild, had bought forty pounds worth of Silk of one R. to be woven, and had weaved it, &c. The Defendant pleaded Not-guilty, and a special Verdict found these Customs, &c. and that the Defendant, being a Stranger, had received of R. forty pounds worth of Silk to be woven, and had carried it to Hackney, and there had woven it, and had brought it back to London, & received his Salary, &c. Et si, &c. And hereupon all the Court resolved, That it was not any offence; for although it were a good Custom, as they all allow it was, being used time, &c. yet this contracting for it in London, and working of it in the Country, is not Intermeddling with their Trade in London; No more, then if a Taylor should buy Cloth, or receive any other thing in London, and make a Garment thereof in the Country; and although it be a Contracting in London, yet it is no Intermeddling with the Trade. Wherefore it was adjudged for the Defendant.

(2)

Co. 8. 125. 3.
R. 687.

Peck versus Loveden.(3)
R. 571.

Ant. 459.

Assumpsit. Whereas T. L. the Defendants Brother was indebted unto him in 8 l. and made his wife Executrix, and died, leaving Assets to his Executrix for the payment of all Debts, and he intended to sue the Executrix to recover the 8 l. secundum debitum Legis cursum; That the Defendant, in Consideration he would forbear the Executrix, promised to pay, &c. After Verdict, It was moved, That this was not any Consideration; For this Debt is to be intended most strong against the Plaintiff, to be a simple Contract, with which the Executrix is not chargeable, and to stay this Sute is not any Consideration. And of that opinion was all the Court; for the Sute intended is to be intended an Action of Debt, which lies not, and so no Consideration; But if he had declared, that he intended to sue an Action upon an Assumpsit against the Executrix (as this Declaration doth not warrant it, because he intends to recover the Debt it self, which cannot be in an Action upon the Case) or that he intended to sue in chancery for it (which is not intended here, because he declares, that he intended to recover it per debitum Legis cursum) Then peradventure this Action would have lain, for the Consideration of staying the Sute was good. But, as it is here, it is not good. Wherefore it was adjudged for the Defendant.

Kerchever versus Wood.

(4)

Error of a Judgment in the Common Bench. The Error assigned was; For that in Debt upon an Obligation Payment was pleaded apud domum mansionalem Rectorie de Much-Hadham in Hertfordia; And Issue thereupon, and a Venire facias was awarded de Vicineto de Much-Hadham; Whereas it ought to have been de Vicineto Rectorie de Much-Hadham. But all the Court (absente Popham) held, That Much-Hadham is here intended a Vill, and the Rectory of Much-Hadham, and the Vill of Much-Hadham be all one, wherefore the Venire facias was well awarded. And the Judgment was affirmed. Vid. 39 H. 6.

Gawen versus Ramtes.

Mich 42, & 43 Eliz. rot. 333.

(5)
Moor. 625.

Replevin. Upon Demurrer, the Case was; That one Knowls seised of Lands in Fee granted a Rent-charge to James Huish, and his Heirs for the Life of one Hilderham. James Huish devised that Rent to William Huish, The Rent was arrear; And Hilderham dieth, and for the Rent arrear in the life of Hilderham the Defendant made Conusance, as Bayliff of William Huish. All which being disclosed by pleading, It was demurred in Law. The first Question

tion was, Whether the Grantee of this Rent hath such an Estate, as that he can make a Devise thereof by the Statute of 34 H. 8. Secondly, Whether this Distress be maintainable by the Statute 32 H. 8. cap. 37. To the second all the Justices agreed, That this Distress is maintainable by the said Statute; because the Estate, in the Rent, is determined, and the Rent was due before; and it is within the Intent of the Statute, although it were not Rent for his own, or anothers Life, but quasi a Fee. But, as to the first, Gawdy, and Fenner held, That it is Deviseable by the Statute of 34 H. 8. for the Debtor hath a Fee therein, although not an absolute, yet a base Fee; for this Estate is descendable to the Heir, although the Heir upon such a Descent of the Land shall not have his Age; Nor is it such a Descent, as shall toll the Entry of him, who hath right; nor that the Feme of such a Grantee should have Dower; yet the Grantee, having such an Estate, which is disposible by him, whereof if he disposeth not, the Heir is to have it quasi by descent, but not by descent, but by limitation. And as 33 Ed. 3. Title Devise 21 is, That, at the Common Law, where Land is Deviseable by Custom, he, who hath such an Estate, might Devise it; A multo fortiori now. Et in 8 Eliz. 253. a. Dyer, It is allowed to be Deviseable. Wherefore, &c. Popham, and Clinch e contra; For the Statute of 34 H. 8. expounds the Statute of 32 H. 8. and shews the Intent of the Words, That he who hath a Fee, might Devise it, to be meant of a Fee-simple, and that it shall not be expounded to extend to a Fee-tail; and therefore much less to extend to an Estate which is but per auter vie; But peradventure, a Fee-simple, derived out of an Estate for Life, is well Deviseable; As where Tenant for Life Grants a Rent to one, and his Heirs, or if Rent be reserved upon an Estate for Life, and is Granted over, such Rent, it may be, may be Deviseable; For such a Grantee hath a Fee: But when in the same Deed (although the Heir should have it by limitation) it is, That an Estate per auter vie is Granted, the Statute doth not intend, That such a Rent should be Deviseable. And the Case of 33 H. 3. may be Law; For the Custom is there general, That every one, seised of Land, might Devise; But so is not the Statute. And Popham said, that this Case had been put to the Justices at Serjeants Inn, in Fleet-street, and many of them were of Opinion, That it was not Deviseable. Et adjournatur.

Co.Lit.162. b.

Co.10.96.

Payn versus Malory.

UPON a special Verdict, The Case was; That one made a Lease for years, reserving Rent; and that, if the Rent be Arrear, and Distress taken for it, and not Redeemed within six weeks, That the Lessor might enter: The Lessor Grants this Reversion by Fine; The Conusee Grants it over; The Lessee for Years attorns to the second Grantee; the Rent is Arrear; He Distraints; The Lessee Sues a Replevin, and had the Beasts delivered unto him: But made not any other Redemption of them within the six weeks: The Grantee re-enters for the Condition broken; And, Whether his Entry was congeable? was the Question. For, admitting that the Rent,

(6)

Co.5.111.
Post.832.

Rent, and the Reversion be settled in the Grantee, by the Attornment of the Lessee; so as he might Avoir for it, although the Conusee, who was his Grantor, could not; Whether he may take advantage of this Condition, because the Conusee, who was his Grantor, could not, because there was not any Attornment made unto him: And the Statute of 32 H. 8. gives the same Remedy to the Grantee of a Reversion, as his Grantor had. Secondly, Admitting he might; Whether this Redemption of the Distress, by Replevin sued, which is not absolute, be a Redemption thereof within the Intent of the Condition? Quære, For the Justices delivered not any Opinion therein. Sed adjournatur, postea 832.

Williams *versus* White.

Hill. 42 Eliz. rot. 57.

(7)
1 Rol. 776.
Winch. 5.

Ant. 536.

1 Rol. 776.

FRror of a Judgment in Bristol, in Accompt, where the Plaintiff declares against the Defendant, as his Bayliff, for divers Goods, to the value of 100 l. The Defendant pleaded Nunques son Bayliff, &c. and found against him. Whereupon he was Adjudged to Accompt; and Auditors were Assigned, who prefixed a day of Accompt unto him; at which day he made Default. Whereupon it was Awarded, Quod Querens recuperet valorem bonorum prædictorum, viz. 92 l. 10 s. The Error Assigned was; because the Court had Awarded Quod recuperet valorem, and doth not award a Writ to enquire of the value. But it was thereto answered, and held by the Court, That upon Default of the Accomptant, the Court may Order that the Plaintiff might recover the value, as the Plaintiff had Counted; As 14 Ed. 3. Accompt 109. & 10 Ed. 3. 37. But then the Judgment ought to be, Quod recuperet, and according to what the Plaintiff had counted. But here it is Quod recuperet valorem, viz. 92 l. 10 s. which is not as the Plaintiff counts. It is also erroneous, because Day is given him to Accompt, he not being present to take Conusance thereof, so as he is condemned by Default without Notice. Wherefore for these two Errors the second Judgment was reversed. But, because there was not any Error found in the first Judgment, it was affirmed. And it was said, That a Capias ad Computandum should Issue out of this Court to bring him in to Accompt.

Taylor *versus* Foster.

Assumpsit. Whereas the Defendant in Consideration, that the Plaintiff would marry his Daughter, assumed to pay for him to J. S. to whom he was indebted, 100l. viz. 50 l. at such a day, and 50 l. residue at the end of the year ensuing. And because the first 50 l. was not paid, he within the year brought the Action; and after Verdict, upon Non assumpsit, It was moved, that the Action lay not until the last day, as it is in Debt upon an Obligation payable at two days. *Se non allocatur*; For true it is, so it is that in Debt upon an Obligation, where the entire Debt is to be recovered; But not in this Action, or in Covenant, where Damages only are to be recovered. It was also held, that the Action well lies for the Plaintiff, although the 100 l. had been to be paid to a stranger, and not to himself; because the promise is unto him. Wherefore it was adjudged for the Plaintiff. (8)

1 Rol. 29.
Ante 776,

Ante 118. 776.

Philips *versus* Turner.

Error of a Judgment in Coventry, in an Assumpsit, wherein the Plaintiff declares; Whereas there was Communication betwixt him and one Archer, concerning the sale of certain Beasts, that the Defendant assumed unto him, in Consideration he would deliver to Archer such Beasts, as he should buy, that if the said Archer bought of him any Beasts for such a Sum of Money to be paid ad aliquod tempus, vel tempora tunc futura inter eos concordand. and did not pay it accordingly, that he would pay it; and alledgeth, That he sold, and delivered to the said Archer 20 Beasts for 38 l. whereof 20 l. to be paid in hand immediately, and the other 18 l. at a day to come, and that A. had not paid the 18 l. the Defendant pleaded Non Assumpsit, and found against him, and Judgment for the Plaintiff. The first Error assigned was, That the Consideration is not alledged to be performed, for he assumes only to pay for those, which are sold to be paid at a future day, and here it is not sold to be paid at a future day, but part in hand, and part at a day to come. And of that Opinion was Popham, That for this Cause it was Error. But all the other Justices e contra; For when any part is to be paid at a day future, it is within the Assumpsit; for otherwise he would not have given credit for any part; and the Promise is not, if he sells for payment at a future day, but tempus futurum, which is, although part be paid immediately. A second Error assigned was; for that the Ven. fac. is awarded de civitate, whereas it ought to be de vicineto civitatis. Sed non allocatur. For so are all the Presidents for Trials in Cities, where no Parish, or Ward is alledged. Vid. 7 H. 4. 13. 8 H. 5. 10. Thirdly, For that it is awarded servientibus ad Clavam Ballivis, & Ministris Curiae, and one of them only returned it; But because the award was eis, & eorum cuilibet, It was held to be well enough, Wherefore the Judgment was affirmed. (9)

1 Cr. 164. 165.

Hillarii, 43 Eliz. Reginae, in Communi Banco.

Child *versus* Low.(10)
2 And. 190.
Mo. 131.

Ant. 231.

Ejectione firmæ. Upon Evidence Warberton cited one Bridgwaters Case to be resolved by advise of the Judges in the Court of Wards, That where the Queen had Let Lands, and granted the Reversion to one, mis-reciting the name of the Tenant, and afterwards made a new Grant to another with a true recital of the name of the Tenant; And, after that, the Statute 18 Eliz. of Patents was made, That it shall not revive the first Grant, because it was utterly defeated before the Statute. And all the Justices here affirmed it to be good Law. Vid. 27 H. 8. Parliament, Br. 77.

Sir George Clyfton *versus* Web.

Hill. 42, & 43 Eliz. rot. 607.

(11)
Post. 852. 862.

Ante 624. 672.

Debt Upon an Obligation made unto him, as Sheriff of the County of Cambridge, conditioned for the Appearance of one arrested upon a Capias. The Defendant pleads, that the Plaintiff took the Obligation of him, and a stranger, and the stranger had nothing, and did not inhabit within the said County, and pleaded the Statute of 23 H. 6. and pretended, That for this cause the Obligation was void. And it was thereupon demurred; and, after Argument, it was resolved, that the Obligation was good: For the Statute hath two parts; The one for the benefit of the Sheriff, viz. That he shall take Obligation with Sureties, which is for his Indemnity, that, if he be amerced for Non appearance of the Party, that he should have his Remedy; And the Statute prescribes the Form, viz. That it shall be made unto him by the name of his Office, and with a Condition, that the Party shall appear at the day, &c. And it prescribes, that, if the Obligation be made in any other Form, it shall be void: and this Clause is for the benefit of the Party, that the Sheriff, under color of his Office, should not oppress the Party to make him any other manner of Obligation, so as the Statute makes the Obligation void only, for not pursuing of the Form, prescribed in the manner thereof, but not in the matter thereof, and that is for his own Indemnity, which he may relinquish, if he pleaseth, & it is nothing to the Party, Plaintiff, or Defendant; For if he, after he hath taken the Obligation, will release it, it is nothing to the Plaintiff, or the Party arrested. And it hath been adjudged in the Case of Sir William Drury, That if a Sheriff takes an Obligation with one Surety only, it is good enough, and not void by the Statute. Wherefore it was adjudged for the Plaintiff.

Nuby *versus* Sabb. Mich. 42, & 43 Eliz. rot. 1337.

DEbt upon an Obligation, conditioned for the performance of an Arbitrament of all the Actions and Quarrels betwixt them, until the day of the Date, so that it be delivered up before the last of August then following. The Defendant pleaded, *Quod nullum fecerat arbitrium*. The Plaintiff shews an Arbitrament, which was 30 August, whereby they awarded, that the one should pay to the other 40 s. in recompence of all Trespases, at such a day and place, if the other would come thither in person to receive it; and that the one should release then, and there, to the other all Actions and Demands, unto the day of the date of the Arbitrament; and it was thereupon demurred. And all the Court resolved, That the Arbitrament was good for the first part, and void for the last part; and that he ought to perform the first part. Wherefore it was adjudged for the Plaintiff. (12)

Post 839.

Proctor *versus* Johnson. Pasch. 42 Eliz. rot. 1711.

DEbt upon an Obligation, Conditioned for performance of the Articles, Covenants, and Agreements, comprised in such an Indenture. The Indenture recites, that whereas the Arch-Bishop of York had demised, by Indenture, to the Defendant, and to one Windsor, such Lands and a Mill for years; and that Windsor died, whereby he had all by the Survivorship; that he granted, bargained, and aliened the said Land and Mill, & totum jus, & titulum suum in præmissis to the Plaintiff, to have, and to hold, during the years. The Breach assigned was, that Windsor, in his life-time had granted his Estate to a Stranger, who, after this Grant entred and evicted the Plaintiff out of a moiety. And it was thereupon demurred. The Question was, whether this word Grant implies an express Warranty against this Title, without any other express words of Warranty? Co. 5. 80. b. Walmsley and Kingsmil, held, that it did not. Warburton e contra. Anderson absente, adjournatur.

Forrest *versus* Ballard. Mich. 42, & 43 Eliz. rot. 2886.

Audita Querela to avoid a Statut-Merchant, acknowledged before the Mayor of Nottingham, surmising in his Writ, two Causes to avoid the Statute; the one, that the Mayor there, had not any Authority to take such a Statute: The other, *Quod scriptum recognitum, &c. non fuit sigillatum cum sigillo Regine de duabus peciis*, proviso pro sigillatione Statut. Mercator. And, upon this Writ, the Plaintiff counts, and alledgeth these two matters to avoid the Statute. And it was thereupon demurred, and held by all the Court, that, for this Cause, the count was double and vicious; for although a Writ of Audita Querela may comprehend divers Causes for the avoidance of the Statute, yet the Count ought to comprehend but one Cause; or of it alledgeth divers Causes, yet it ought to rely upon one only, to which the Plaintiff ought only to answer; for doubleness is uncertainty, and inveigles the Court. And therefore it hath been

Ant. 319.

been adjudged in Gascoyns Case, that a double Plea is vitious in substance; and, if there be a demurrer, it needs not be shewn for Cause, notwithstanding the Statute of 27 Eliz. but he may well take advantage thereof, without shewing it. And it was held by all the Court, that either of these Causes alledged was sufficient to avoid the Statute; and an Audita Querela lieth in such Case; and he shall not be put to sue a Writ of Error to avoid it. And although the Statute is not enrolled in two places, nor writ with the hand of the Clerk, which is a Circumstance appointed by the Statute; yet the omitting of them is not a Circumstance to avoid the Statute. Wherefore it was adjudged for the Defendant.

Trinity Colledge in Cambridge *versus* Tunstall, Parson
of Sharinford, in the Countie of Leicester.

(15)
Ant. 675.

A Nnuity by Prescription for a Pension, issuing out of the Church of S. it was resolved, without Argument, That it lay against the Incumbent, as well for the Arrearages due in the time of his Predecessor, as in his own time; for the Church it self is charged, in whosoever's hand it comes. Wherefore it was adjudged for the Plaintiff.

Bethel *versus* Edw. Stanhope. Hill. 41 Eliz. rot. 939.

(16)
Owen 132.
2 And. 172.

Ante 102. 565.

Ant. 292.

S Cire facias against him, as Executor of Francis Vaughan, Upon a Judgment given against the Testator of 220 l. He pleaded payment of 40 l. debt due to the Queens and, besides that, he had riens in ses mains. And thereupon they were at Issue, whether he had Assets? And it was found by Special Verdict, that the Testator was possessed of divers Goods, to the value of 250 l. and, by Covine to defraud his Creditors, made a gift of his Goods to his Daughter, with a Condition upon payment of 20s. that it should be void, and died. The Defendant entermedled with the Goods; and afterwards the Daughter by this gift, took the Goods; and after that administration of the Goods of Fr. Vaugh. was committed to the Defendant; and, whether, upon this matter, he shall be charged as Executor, and that these Goods should be Assets in his hands? Was the Question. And after Argument, it was adjudged for the Plaintiff: For first, when he medled with the Intestates Goods, although he were neither Executor, nor Administrator; and afterwards Administration was committed unto him, a Creditor hath election to charge him as Executor, or Administrator; especially here, when he pleads as Executor, the finding by the Jury, that he is Administrator, is not to purpose, 9 Ed. 4. 53. 2 R. 3. 20. 21 H. 6. 8. Secondly, All the Court held, that this Gift of the Goods is in it self fraudulent, as appears by the Condition; and the Covine is expressly found by the Jury; and then it is utterly void against the Creditors, by the Statute of 13 Eliz. and the Intestate died possessed of them; and when the Donee afterwards took them, it is a Trespass against the Administrator; for which he hath his remedy, and they are always Assets in his hands: But if a Trespasser takes Goods from a Testator in his life-time, so as they never were but a chose in Action

A tion to the Executor or Administrator, they be not Assets until they be recovered. Wherefore, notwithstanding this taking of them by the Donee, yet they always remained as Assets in the hands of the Administrator; and therefore he is chargeable for them as Executor de son tort, by his intermeddling with them before Administration committed; and the Goods, by Law, remained always in his possession. Wherefore it was adjudged for the Plaintiff.

Francis Leak *versus* Episcopum Coventry, and Doctor Babington. Mich. 42, & 43 Eliz. rot. 317.

Quare Impedit; And counts, how one Langford was seised in Fee de medietate Ecclesiæ de S. viz. ad præsentandum ad eandem Ecclesiam qualibet prima vice, ut in grosso; and that one Busby was seised of the other moyety Ecclesiæ prædictæ, viz. &c. ut in grosso; and that Langford presented his Clerk in the first turn, who was admitted, instituted, and inducted; and afterwards the Church became void; and Busby presented in his turn, whose Clerk was admitted, instituted, and inducted, and afterwards deprived; and that the Bishop, without giving notice of the deprivation; collated: and that afterwards Langford granted this Advowson to the Earl of Salop in Fee, who granted it to the Plaintiff in Fee; and that the Clerk collated by the Bishop, died; and the Defendant, in right of Busby, claimed the turn, and presented, and disturbed the Plaintiff. And it was thereupon demurred; and, after argument adjudged for the Defendant; for when Langford had right to present upon the Deprivation, as in his turn, although the Collation by the Bishop, without notice, was not good, nor ousted him, but that he always might have presented, and ousted the Incumbent, by his bringing of a Quare Impedit; yet it is but a thing in action; and when he hath granted the Advowson over, the Grantee cannot have this thing in action, nor the Grantor cannot have the action; but he hath destroyed it, so as none can now have it. Secondly, All the Court held, although that this Grant is sufficient to pass the Advowson in fee (as they all agreed that it was) And although this Title to present had been transferred to the Grantee, yet this Collation by the Bishop is good against all, but against the very Patron; and this only through defect of notice: So as he might have removed the Incumbent by a Quare Impedit; but when he doth not remove him, so that he dies Incumbent, this is a serving of his turn, and as a Presentment in his turn; so as Busby shall not be prejudiced by his negligence, but shall have it now as in his turn. And it is a good Plenerty, and Incumbency against him; so as he now may present, and well say, that the turn of the other was served: So as they all held, for the matter to be against the Plaintiff. And Anderson & Warberton here held, that the Declaration was not good, because it is not shewn, how the Presentment by turn began: But the other Justices held it to be well enough. And they all held, that the Collation never gained the Church, but a Usurpation gained it, so that the Advowson cannot be granted over. Wherefore it was adjudged for the Defendant.

(17)
Owen 131.

Ante 119.
Co. 5. 102. 3.

Ante 241.
Co. Lit. 233.

Prettyman versus Lawrence,

- (18) **T**RESPASS; Quare domum & clausa sua fregit. The Defendant pleaded, that the House is called Crable-house, and one of the Closets is Black-Acre, and the other is White-Acre; and pleads, that they are his Freehold, and so justifies. The Plaintiff saith, that the Trespass done was in the House called Crable-house, and in Black-Acre, which are his Free-hold; Absque hoc, that they be the Free-hold of the Defendant; and that the Trespass was done in another place, containing 20 Acres, alias quam White-Acre, &c. And it was thereupon demurred. For it was said, When the Plaintiff makes a new Assignment, so that the Defendant hath not agreed to him, and hit every parcel intended in the Declaration, this new assignment is as a new Declaration, to which the Defendant shall have a new answer in all, and is a waiver of the former pleading in all; wherefore he ought to have omitted his Traverse: And of that Opinion was Walmley. But all the other Justices e contra; For in regard that the Defendant hath hit some of the places, wherein the Plaintiff intended the Trespass, and pleaded thereto, the Plaintiff may well answer to that part, and the Defendant shall have no other answer; as if the Defendant had hit one place, and had confessed the action therein, the Plaintiff needed not make any answer thereto; and the Defendant shall not waive his answer, and answer to all de novo. Wherefore it was adjudged for the Plaintiff.

Whitnel versus Cook. Mich. 42, & 43. Eliz. rot. 3346.

- (19) **R**EPLEVIN. The Defendant, as Bayliff to one Pyne, who was seised of the third part of the place-where, &c. justifies for Damage-felant. The Plaintiff saith, That a Stranger was seised of the other two parts, and, by his Licence, he put in his Cattle. The Defendant saith, De injuria sua propria absque tali causa, &c. And the Plaintiff demurs, and it was adjudged to be no Plea; but he ought to answer to the special matter in the Barr.

Ante 539.

Termino

Termino Paschæ,
 Quadagesimo tertio ELIZABETHÆ,
 in Banco Reginae.

Pilkington *versus* Hastings, & Meacock. Hill. 43 El. rot. 381.

REplevin. Hastings abowed for Damage-felant in the place, where, &c. as in his Free-hold. Meacock made Conulance, as Bailiff unto him. The Plaintiff saith, that after the taking, and before delivery of them, viz. &c. he tendered to the said Meacock 2 s. which was sufficient amends for the damage; the which he refused to accept, &c. and detained his Cattle, Quousque, &c. And hereupon the Defendant demurred. Godfrey for the Defendant, moved, that the Plea was not good: First, Because the tender of the amends was not instantly upon the taking, but after Impounding, which is too late; as 13 H. 4. 7. 27 Ed. 3. 88. Secondly, That the tender of amends to the Servant is not good; for he hath not any authority either to accept, or refuse it; but it ought to have been made to the Master, especially as this Case is, where the Master distrained. Thirdly, Because he doth not shew to the Court, what the damages were; so as the Court might have adjudged, whether there were sufficient amends tendered, or not: But, as to this last, all the Court resolved, that it was not material; for, having averred that the 2 s. tendered was sufficient for the damages, this averment is sufficient. And, as to the first, all the Court held, that the tender came too late, after the Impounding; for, being lawfully Impounded, they were in custodia legis; and the party, who distrained, had not any interest in them, nor authority to deliver them. And, as to the second, they all held, that the tender to the Servant was not sufficient, especially the Master being present at the distress. But if the Servant had only distrained, Gawdy said, that then the tender unto him might have been more colourable. And Popham said, that if the tender had been to the Bayliff of the Mannor, it might peradventure have been good; but not to a Servant, who joyned in the distress only. Wherefore it was, adjudged for the abowant. But a President was cited in this Court, that the tender of amends, after the impounding, was good; which was Trin. 33 Eliz. rot. 327. between Bardsey and Segrave. But the Court had not much regard thereto, because they were resolved upon the last point, That the tender to the Servant was not good. 5 Co. 76. a.

(1)
Co. Entr. 602. b.

Post. 820.

Ante 332.

Co. 5. 76. a.

Ante 332.

Sir Henry

Sir Henry Linleys Case.

(2)

Sir Henry Linley, who was indicted of Treason, being brought to the Barr, and demanded, whether he could say any thing, why the Court should not proceed upon the Enditment, which was before Commissioners of Oyer and Terminer? He produced the Queens Pardon, without any Writ of allowance thereof. And Pope, second Clerk of the Crown, informed the Court, that the Presidents were, that, in Case of Treason, it was used to allow of the Pardon, without Writ of allowance; but not in Felony. Whereupon the Pardon was allowed.

Sands *versus* Drury.

(3)

1 Rol. 498.

Ante 784.

1 Rol. 498.

Co. Lit. 58. a.

Ante 413.

Action sur Trovers of 20 Loads of Hay. Upon Not Guilty pleaded, a Special Verdict was found, That this Hay was parcel of the Tithes severed from the nine parts, pertaining to the Rectory of Hackley, and demised, and demisable, time, &c. secundum consuetudinem Manerii de Hackley; and that the Prior of Newbury was seised in Fee of the Mannor, and Rectory of H. and in 27 H. 8. demised those Tithes, by Copy, to H. under whom the Defendant claimed; and afterwards, by the dissolution, &c. the Mannor and Rectory, came to the King Henry 8. who conveyed it to the Arch-bishop of York, who lett that Rectory to the Plaintiff; who claimed those Tithes; and the Defendant, under pretence of that Copy, carried them away. Et si, &c. The sole Question was, whether those Tithes were grantable by Copy, &c. And it was moved for the Plaintiff, that they were not. First, In respect of the nature of Tithe, wherein none could have any propriety before the Council of Laterane, which was in the time of King John; for, before that time, every one might have paid them to whom he pleased; but, by those Constitutions, they are annexed to the Rectory: It is then impossible, that there should be any Custom to demise them by Copy, from time, &c. when as none had interest in them, but within time of memory. Tithes also cannot pass, unless by Deed; and therefore to grant them by Copy of Court-Roll cannot be good. There cannot also any thing pass by Copy, but that, which is parcel of the Mannor; but it hath been adjudged, that Tithes cannot be parcel of a Mannor; Wherefore, &c. And of that Opinion was Popham, for the first and last Reasons; for although, Common, and prima vestura Prati may be granted by Copy, because they be parcel of the Mannor, yet Tithes cannot be so, because they cannot be parcel of a Mannor; for a Mannor, and Tithes are of federal natures, although they be united in one mans hand; and then it is not possible, that that which is not parcel of a Mannor, can be demised secundum consuetudinem Manerii. And therefore it was adjudged in the time of Queen Mary, in the Case of the Duke of Suff. that where one had two Mannors, and granted a Copy-hold of the one Mannor, at the Court of the other Mannor, that it was a void Grant; for it cannot be a Copy-hold, according to the Custome of a Mannor, whereof it is not parcel. But Gawdy doubted thereof, and conceived it had been well enough, if it had been so used, from time whereof, &c. But, because upon the Verdict it did not appear, that

That it had been granted by Copy, from time, whereof, &c. It was held, that there was not any Title found for the Defendant; and therefore adjudged for the Plaintiff.

Southcot versus Bennet.

Detinue of Goods and Counts, that he delivered them to the Defendant, to keep safely, &c. The Defendant confesseth the delivery, and that afterwards J. S. feloniously robbed him of them. Wherefore, &c. The Plaintiff replies protestando, that J. S. did not rob him; for Plea saith, that the said J. S. was Servant to the Defendant; and it was thereupon demurred. And, after argument at the Barr, Gawdy and Clinch, cæteris absentibus, held, that the Plaintiff ought to recover; because it was not a Special Bayment: That the Defendant accepted to keep them as his proper Goods, and not otherwise; but it is a delivery, which chargeth him to keep them at his peril. And it is not any Plea in a Detinue to say, that he was robbed by one such: For he hath his remedy over by Trespass, or Appeal, to have them again. And that is the Reason of 33 H. 6. 1. That if a Gaol be broke open by Thieves, and the Prisoners let at large, yet the Gaoler is chargeable; because he hath his remedy over: But if it be broken by the Queens Enemies, it is otherwise. And although it was moved, that the Replication was vitious, for that the Protestation is repugnant to the matter confessed; and then, the Replication being ill, although the Barr be vitious, the Plaintiff cannot have Judgment; as 2 El. Dautries Case is; yet it was held to be but a default of form, and not of substance; and, the Demurrer being general, no advantage can be taken thereof. Wherefore it was adjudged for the Plaintiff Vide for the principal Case 3 H. 7. 4. 6 H. 7. 12. 9 Ed. 4. 40. 29 Aff. 28. 8 Ed. 2. Detinue 59. 4 Co. 83, & 84. (4)

Dumper versus Syms. Pasch. 40 Eliz. rot. 361.

Trespass. Upon a Special Verdict it was found, that the President & Scholars of Corpus Christi Colledge in Oxford, were seised in Fee, and Anno 10 Eliz. lett it by Indenture to one Bold for 30 years; Proviso, that the Lessee and his Assigns should not alien the Premises, or any part thereof, without Licence of the Lessors, rendering 33 s. 4 d. per annum, &c. In 15 Eliz. the President and Scholars, by their Deed, licensed Bold to alien the Premises, or any part, for the entire term, or for part thereof, to any person, whom he pleased. Bold assigns the entire term to one Tubb; Tubb devises the entire term to his eldest Son, and made him his Executor, and died: The Executor entred generally; and they find, that the Testator was not indebted to any: That afterwards the Son died intestate; and administration of his Goods were committed to J. S. who entred, and aliened to the Defendant; that afterwards in 38 Eliz. the said President, and Scholars, by the name of the President and Scholars of Corpus Christi Colledge in Oxon, in Comitatu Oxon, made a Lease thereof to the Plaintiff, rendering 22 s. Rent per annum; and that they made a Warrant to one Englesfield, to enter, and deliver the Lease upon the Land (but it was not found, that this Warrant was by writing under their Seal) and that Englesfield entred in their name, and delivered the Lease upon the Land to the Plaintiff, (5)

1 Rol. 429. 514.
2 Rol. 699. 700.

1 Rol. 514.

tiff, upon whom the Defendant re-entred; whereupon this action was brought. Et sic, &c. First, and which was the principal Question in the Case, it was moved, Whether this Licence to the first Lessee to alien (who aliened accordingly) be a Dispensation only, or a total Determination of the Condition? Moor, for the Defendant, moved, that, at the first, the words do not extend to Alienations by Assignees in Deed; but the word Assignees in the Condition, extends only to Assignees in Law, as Executors, or Administrators, and for that vide Dy. 6. As also, that by this Licence to alien the Condition is determined, that it shall not bind any other; and in proof thereof vide Dy. 152. that the Restraint is determined by the alienation. And when a Condition is dispensed with in part, it is dispensed with in the whole; and to that purpose he cited a Record of a Judgment in the Common Bench, Trin. 28 Eliz. rot 256. between Lylds and Crompton, where the Lord Stafford made a Lease to three, upon Condition, that they, nor any of them, should alien without his Licence: and the one, by Licence, aliened his part; and afterwards the other two aliened their parts, without Licence; it was adjudged, that the Lessor could not enter: For the Condition was dispensed with before. And, as to that point, Gawdy, Clinch, and Popham delivered their Opinion severally, that the Condition was gone, and discharged, by this Dispensation to alien to the Lessee himself; for the Condition being once dispensed with, it is utterly determined: For it cannot be discharged for a time, and in Esse again afterwards; 28 H. 8. Dy. 13. And for that Popham said, he held the Law to be against the Opinion in 16 Eliz. Dy. 334. where Lessor licensed his Lessee to alien part, that he might alien the residue without Licence; for the Lessor cannot enter, because, if he should enter for the Condition, he should enter upon the Entire, as it was limited; and if he should enter upon the Entire, he should destroy that which he had licensed to be aliened, which he cannot do; and therefore the Condition is intirely gon: for it cannot be in Esse for part, and destroyed for the residue. Secondly it was moved, admitting this condition to continue, this Devise being to his Executor, and he entring generally, whether he shall be in, as Legator? For then clearly, by the Devise, the Condition is broken. And Gawdy said; that he had it as Legatory, and so the Law would repute him to be in accordingly: as 22 Eliz. Dyer 367. is. But to that point the other Justices spake not. Thirdly, It was moved, that although this Condition remained, yet this Lease to the Plaintiff is void for the Dishonour of the Corporation by the addition in Comit. Oxon. But the Court over-ruled it, and that it was not a material variance. Fourthly, That this Lease is void to the Plaintiff; because the ancient Rent is not reserved; for the ancient Rent was 33 s. 4 d. and the Rent now reserved is but 22 s. and no Corn, according to the Statute of 18 Eliz. And therefore void by the Statute of 13 Eliz. and 18 Eliz. And of that Opinion was the whole Court, That, for this Cause, the Lease was void against the Lessor himself; and that they are general Laws, whereof the Court ought to take Consilance, although they be not found. Fifthly, It was held, that the second Lease was not good; because it was not found, that the Attorney had any Warrant by writing. Wherefore (but principally for the first Cause) it was adjudged for the Defendant. 4 Co. 119, 120.

Co. 4. 120.
Mo. 205.

1 Rol. 429.
Ante 348.

2 Rol. 700.
Ante 292.

Preston *versus* Perton. Mich. 42, & 43 Eliz. rot. 441.

UPon Demurrer. The Case was; A Scire fac. was brought in Chancery, upon a Reconuſance there. The Defendant pleaded to Iſſue, which was ſent hither to be tried, and found for the Plaintiff, and Judgment for him here. Afterwards he brought Debt in the Common Bench upon this Judgment, and had Judgment there to recover, and afterwards brought a Scir. fac. here to have Execution upon the Judgment in this Court, and the Defendant in Barr of that Execution pleaded this Recovery. And thereupon the Plaintiff demurred. And it was moved for the Plaintiff, that this was not any Plea; for both the Records are equal, and the one cannot determine the other: But the Plaintiff, may ſue Execution upon what he will. But Godfrey for the Defendant moved, that by the newſuing of this Original and Recovery had, he hath waved the Benefit of having Execution of the firſt Judgment: and in proof thereof relied upon 13 Eliz. Dy. 300. Puttenham's Caſe. But the whole Court held it not to be any Plea: becauſe the one Judgment cannot determine another Judgment, which is of equal nature; no more then one Obligation can determine another; as 11 H.4. is. But Gawdy ſaid, that if a man recover upon an Obligation in Debt, during that Judgment in force, he cannot have a new Action of Debt upon that Obligation, becauſe it is reduced in rem judicatam. Whereupon Judgment was given, that Execution ſhould be for the Plaintiff, unleſs other matter were ſhewn the third day of the next Term. At which time, it was moved, and Exception taken, becauſe he began at the Judgment, and did not recite the Entire Record. Sed non allocatur. Wherefore the Plaintiff had Judgment.

Yelv. 133.

Dyer. 299. 34.

Ant. 608.

Wood *versus* Smith.

ACtion ſur Trover of Goods. The Defendant pleaded Not Guilty, and found againſt him. And it was now moved in arreſt of Judgment to be an ill Declaration; for he counts, that he was poſſeſſed of ſuch Goods, ſhewing what they were in ſpecie, cum aliis Implementis ad valentiam 3 l. but expreſſeth not what they were; and that he was alſo poſſeſſed of other parcels (particularly declaring what) cum aliis neceſſariis; but mentions not what they were; and that he was alſo poſſeſſed de ſuiſbus, but ſetteth not forth their number. The Defendant by Verdict was found Guilty of all contained in the Declaration; and damages entirely aſſeſſed for all, which being ſo uncertain, the Court cannot give Judgment for thoſe parcels, which are uncertain. And of that Opinion was the whole Court for the uncertainty in the Declaration. But Gawdy held, that in regard the Defendant hath admitted it, he cannot now after Verdict take advantage thereof; as 20 Aff. 3. is: but the other Juſtices e contra; becauſe there is not any certainty at all pro Implementis & neceſſariis; but where there is a reaſonable certainty, although upon Demurrer, becauſe it is not altogether certain, Judgment ſhall be againſt the Plaintiff for the uncertainty: yet, after Verdict he ſhall not take advantage, if there be any convenient certainty. But here is not any certainty. Wherefore it was adjudged for the Defendant.

Poſt. 819.

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Biſhe

Bishe versus Walford.

- (8) **D**Ebt against the Defendant for money for his Tabling. The Defendant tendered his Law, and was ready to have made it at his day : but Gawdy being then only in Court, conceived, that Ley gager lay not in this Case. Wherefore, by assent of the Parties, the Defendant waded his Law, and pleaded al pais, vid. 9 Ed. 4. 1. 1 Ed. 4. 5.

Co. Litt. 295 a.

Hill versus Giles.

- (9) **E**jectione Firmæ was brought of a Cottage. After Verdict it was moved, that an Ejectione Firmæ lay not thereof; no more then a Præcipe quod reddat. Sed non allocatur. Wherefore it was adjudged for the Plaintiff.

1 Cr. 555.

Goodwin versus Cornelius Mountenaigh an Alien.

- (10) **E**jectione Firmæ. The Defendant pleaded to Issue, and a Ven. Fac. was awarded de medietate Linguae upon the Defendants Suggestion, that he was an Alien. And at the Nisi prius a Tales de Circumstantibus was awarded, and found for the Plaintiff. And now moved in Arrest of Judgment; for that the Tales was not awarded de medietate Linguae, for it ought to pursue the Ven. fac. Kemp, Secondary, shewed also, that the Ven. fac. was not well returned, because Aliens and Denizens were returned together, whereas there ought to have been twelve Denizens by themselves, and twelve Aliens by themselves returned; and there ought to have been on Denizen and one Alien, and so another Denizen, and another Alien in their turns sworn upon the Jury, which could not be done here, because it appears not by Panel, who is a Denizen, and who an Alien, & so non constat which of them were sworn. And of that Opinion was Gawdy and Clinch, cæteris absentibus. Whereupon Judgment was stayed. Vide post, Trin. 43. Pl. 18.

Post. 841.

Post. 841.

Green versus Rofs.

- (11) **E**rror. For that Judgment was given by default against the Defendant, being an Infant : Issue was taken, that he was of full age. And Godfrey moved, Whether the Trial should be in North. where the Land was? Or in Middlesex, where the action was brought; and the Court held, that it should be tried in the County where the Land lay. And Tanfield said, it was so adjudged in this Court between Throgmorton and Burfind. 46 Ed. 3. 7.

Draycot versus Piot.

- (12) **A**ction sur Trover of divers Goods, & inter alia de decem Capsis, & Cistis, Anglice, Chests and Coffers, and of a Bag, and 20l. therein. The Defendant was found Guilty de quatuor Cistis, & Capsis, and of 13 l. parcel of twenty pound, and of divers other particular parcels : and of the Residue Not Guilty. And Exception was taken in Arrest of Judgment, that the Declaration.

That

that he converted 10 Capfas & Cistas, and doth not shew how many of Chests, or how many of Coffers, was uncertain and ill; and therefore the Verdict also was ill: but the Justices Gawdy and Fenner held them to be all one. But if Chests and Coffers should be said to be distinct things, it then should be ill. Secondly, It was moved, that this Trover and Conversion of Honey out of a bag, cannot be good, because it cannot be known. And when he is found Not Guilty of the bag, and Guilty of the Honey, that as much as if he had declared of the Trover and Conversion of Honey out of a bag, which was ruled to be ill in Hicks and Holydays Case. But they held, that an action of Trover and Conversion of Honey only was good enough, and an action well maintainable for it. Wherefore, cæteris absentibus, it was adjudged for the Plaintiff.

Ant. 817.

Ant. 661.

Post. 841. 879

1 Cro. 89.

Beal versus Web.

Prohibition for Tythes against the defendant, Farmor of the Rectory of Frit-tender in the County of Essex, and surmiseeth, that from time, whereof, &c. he had used to pay 4 s per annum, in discharge of all tythes; and his proofs were, that he used to pay 4 s. 6 d. per annum. And upon this variance, a Consultation was prayed. And because it appeared, that there were not any tythes due in kind to the Parson, as he hath sued; but it is a Modus decimandi, although not in such manner as the Plaintiff surmiseeth, the Court held, that the defendant should not have Consultation: for he had not any cause for tythes of that Land, and it was ruled accordingly. Vide 2 Eliz. Dy. 171.

(13)

Ant. 307.

Ant 736

Moor. 911.

Basset versus Maynard.

Action sur Trover, and conversion of certain loads of wood. Upon a Special Verdict, the Case was, Sir Tho. Palmer was seised of a great wood, and bargained and sold to one Cornford and his assigns, as many trees, as would make six hundred coards of wood, to be taken by the assignment of Sir Tho. Palmer. Cornford assigns over his interest to the Plaintiff. Afterwards, Sir Tho. Palmer granted to the Defendant so much of his wood, as would make four thousand coards of wood, to be taken at the Defendants election. The Plaintiff afterwards by the assignment of Sir Tho. Palmer cut down the trees in question, to make six hundred coards: and the Defendant claiming them by vertue of his Grant took them. And it was found that there was sufficient wood left for the Defendant to take his four thousand coards. Et si, &c. And upon this Verdict, it was moved, that here was not sufficient title found for the Plaintiff. For first, it is not found, that the bargain and sale was for any sum of Money; nor upon any Consideration. Sed non allocatur. For it is intended to be so, being found by the Verdict. But, if it had not been so found, it might peradventure have been otherwise, as primo Mariae, Dy. 91. is. Secondly, It was alledged, that this Grant to the Plaintiff is void: for, untill the assignment made by Sir Thomas Palmer, no interest vested in Cornford himself, so as he could not make any Grant thereof over. But all the Court held the Grant to be good: for being made to

(14)

2 Rol. 699.

Noy 32.

Moor 661.

2 Rol. 699.

M m m m 2

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him, and his Assignes, he may make an Assignee, which shall enure as a nomination to one, who is to have by the appointment of Sir Thomas Palmer. And it may well vest in him, as the Interest also. And here he hath an Interest before the Assignment made by Sir Tho. Palmer; insonmuch as if Sir T.P. will not assign it in convenient time, he himself might take them. And therefore he may assign this interest; as 44 Ed. 3. 43. is. But, admitting the Grant to the Plaintiff had been void; yet Popham said, that the Action was maintainable, because by the cutting down of them he had Possession and a good Title against the Defendant and every Stranger: and, being cut down, it was not lawful for the Defendant to take them: for if one sells a thousand Coards of Wood to be taken at the Vendees Election; and afterwards, the Grantor himself, or a Stranger, cuts down some of the Wood, the Vendee cannot take that which is cut down: but he ought to make his Grant good out of that which is growing. As if Estovers were granted unto him, to be taken in a great Wood, and the Owner of the Wood cuts down some of the Wood, the Grantee cannot take that which is cut down; but he must take his Estovers out of the residue: and if all be cut down, he hath not any remedy, but an action upon the Case. So here, although the Plaintiff had not a good Title, yet his having Possession of them being cut down, sufficeth. Quod Gawdy & Clinch concesserunt. Wherefore it was adjudged for the Plaintiff. 5 Co. 24. b.

Carew versus Merler.

(15)

Ante 767.

Error of a Judgment in the Common Bench in Debt, The Error assigned was; because the Ven. fac. was awarded, bearing Teste after the Judgment, as in truth it was dated a year after. But it was held, that in regard it was after Verdict, and the Trial is upon the Distringas with the Nisi prius; so as if there had not been any Ven. fac. at all, the Statute would have helped it: and it shall not be intended, that this Ven. fac. which bare Teste after the Judgment, was the Ven. fac. in this Sute: and although it were certified to be the same Ven. fac. the Court would not take it so; but rather, that there was not any Ven. fac. at all, the Trial and Judgment thereupon are good. But they held, that the Teste of a Ven. fac. can never be amended, but the Return thereof may be amended, because the Roll warrants it. And this being variant from the Roll may be amended. But the Rolls make not any mention of the Teste thereof; as 2 Mar. Dy. 121. 11. Wherefore the Judgment was affirmed.

Cubit versus Harrison.

(16)

Ant. 813.

TRespas de Herbis depascend. cum Averiiis, &c. The Defendant pleaded Tender of so much for amendsto the Plaintiff, who refused it, being sufficient. And it was held to be no Plea, according to 21 H. 7. 30.

Butcher & Aldworths Case.

DEbt upon a Recovery in Bristow. And it was traversed, and a Certiorari issued out of this Court to certifie it, which was certified under the Seal of Bristow. And it was moved, that this Certificate was not good. But it ought to have come in under the Great Seal: but it was held to be well enough: for so is the course upon such Certiorari directed to have it certified under the Seal of the Inferior Courts. And it was adjudged for the Plaintiff. (17)

Chadwick *versus* Sprite.

A Sumpsit. Whereas one Bailly was indebted unto him in 5 l. and being possessed of two Obligations, made by two Strangers of 20 l. delivered to the Plaintiff the said Obligations to receive the Honey due upon them, or to sue them in the name of Bailly; and of that, which he recovered, to satisfy himself, and the residue to return back to Bailly; that Bailly died, and the Defendant being his Wife, in consideration, that the Plaintiff would deliver unto her the said bonds, promised to the Plaintiff to pay unto him the said 5 l. upon the first payment of any sums of those bonds: and alledgeth, that the Defendant had received those sums contained in the bonds, &c. After Verdict upon Non Assumpsit pleaded, and found for the Plaintiff; it was moved, that this is not any Consideration, because by the death of Bailly, who delivered them, the authority, which he gave to the Plaintiff to sue them, is determined; and the Plaintiff hath nothing to do with them. And the Defendant hath not any benefit by the receipt of them, unless she were Executrix, which is not alledged. And if she were Executrix, the receipt of them by her is not any Consideration: for she receives but her own, and therefore there is not any Consideration for the making of this promise. And of that Opinion was Fenner, and relied upon 12 H. 7. 14. and 6 Ed. 4. 19. but Gawdy and Clinch e contra: because by this delivery and gift of the Obligations, the interest in the Deeds is given unto him; although the debts themselves, which are things in action, pass not, and he had authority to dispose of them. And this delivery of them to the Defendant, and by her acceptance, and promise upon this Consideration, whether Executrix, or not, is sufficient to bind her. Wherefore it was adjudged for the Plaintiff. (18)

Gardeners Case.

Gardener having Judgment in debt against St. John Justice of Peace in the County of Bedford, procured a Writ of Execution directed to the Sheriff of Bedford; who made a Warrant to Gardeners own brother, to be a Special Bailiff to serve that Execution, who going to serve it, and fearing a Rescousse to be made, carried with him a Dagge; whereupon the said St. Johns caused one of his servants to go and search him, and finding him armed with a Dagge, brought him before his Master, being the next Justice of Peace, who, by colour thereof, committed him to Goal; (19)

St. 33 H. 3. c. 6.

Co. 5, 72. 2.

Goal, until he paid 10 l. according to the Statute of 33 H. 8, cap. 6. Whereupon he removing himself by an Hab. Corp. and all this matter being disclosed to the Court, they all held it to be no offence against the Statute, for a Sheriff or his Ministers in Execution of Justice, to carry such an Hand-gun: for otherwise no Justice would be administered. And in this Case, and for this purpose, it is lawful. Vide. 3 H. 7. 1. And they all held that a Dagge was an Hand-gun within the Statute, although it be not named therein. Wherefore they commanded a Plea to be drawn, comprising all this matter, which was done, and then it was confessed, and the Partie discharged. 5 Co. 71, 72.

Bearblock *versus* Read. Ante, Hill. 42. Pl. 2.

(20)
2 And. 160.
Yelv. 29.
Ante 734.
1 Brownl. 39. 81.
1 Rol. 926.
Co. 4. 50. b.
Ant. 575.

Yelv. 29.

Ant. 575.

The Case was now moved again. And Popham, Gawdy, and Clinch (Fenner absente) delivered their Opinions; that the Plea was not good, but that the Plaintiff should have Judgment, because a Judgment is higher than a Reconuissance, or Statute, and therefore ought to be first satisfied: and the Executor is put to his Audita Querela, to discharge himself against the Conusee. And whereas it was said, That the Statute is Eigne to the Judgment, that is not material: for there is not any regard to the priority of the Judgment, or Statute acknowledged by the Testator, but only to the equality of the manner of the debt: for that, which is highest, ought to be first satisfied: but the Judgment is higher; for a Reconuissance is but an assurance by consent of the parties, and is but a Bond recorded, and therefore not to be compared to a Judgment. And there is no reason, that an Executor, by bringing a Writ of Error, should make the Judgment to come after the Statute: and therefore the Execution upon the Statute shall not prejudice it. Whereupon Rule was given, that Judgment should be entred for the Plaintiff. But afterwards, because Popham said, that he had conferred with the Justices and Serjeants at Serjeants Inn, and many of them were of Opinion, that this Execution upon the Statute was to be allowed as a good Barr against the Judgment, they would advise. Et adjournatur. Note, in Mich. 44, and 45 Eliz. the Case was moved again (Gawdy absente) and Popham said, that he had again conferred with the other Justices at Serjeants Inn, and the greater part held the Plea to be good; and that the satisfying of the debt upon the Statute was not any Devastavit; because he could not withstand it, and he shall not be put to his Audita Querela. Wherefore it was adjudged for the Defendant.

Gray *versus* Chapman.

(21)
Noy 32.

Ejectione Firmæ. The Plaintiff declares, that Prudence Cozen by Indenture apud S. lett unto him an House and twenty Acres of Land by the name of all her Tenements in S. And, after Verdict, it was moved by Foster in Arrest of Judgment, that the declaration was not good, because it is not alledged in what Till the Tenements were. And of that Opinion was the whole Court. Wherefore it was adjudged for the Defendant, for the naming of the Till in the per-nomen was not material.

White

White versus Ewer.

Covenant. After Verdict for the Plaintiff, Tanfield moved, That (22)
 the Declaration was ill. First, Because the Plaintiff brings
 this action as Assignee, and doth not name himself Assignee (but
 afterwards in the Declaration shews how he is Assignee) as
 where a man brings an action as Heir or Executor, he ought to
 name himself so; and of this Opinion was Fenner; but Popham
 Clinch, and Gawdy e contra, in regard that in the body of the De-
 claration he shews how he is Assignee, for the naming himself
 Assignee is but matter of form, which is not material after Ver-
 dict. Secondly, because the Covenant is, that the Lessee and
 his Assignees shall enjoy it without the interruption of Francis Ewer,
 and all other claiming under the said Fran. and the breach assigned
 is, because he was ousted by J. S. who claims under the title of the
 said Francis Ewer, and doth not shew how he claims under his in-
 terest, nor by what Conveyance. But all the Court held it to
 be well enough; for he is a Stranger thereto, and cannot shew it
 certainly. Wherefore it was adjudged for the Plaintiff. Note in
 Pasch. 44 Eliz. this Judgment was reversed upon this second Ex-
 ception by the Opinion of all the Justices and Barons in the Post. 899.
 Erchequer-Chamber.

The Earl of Huntingdon versus Hall.

Error of a Judgment in the Common Bench, in Debt upon (23)
 an Obligation, Conditioned for the payment of 300 l. within
 six Moneths after the death of the Earl of Huntington. The Defend-
 ant pleads, that 1 Maii 39 Eliz. the E. of H. died, and that within six
 Moneths after, viz. 1 Decem. 41 Eliz. he paid that Sum, &c. the
 Issue was, that he did not pay it modo & forma. The Jury found
 for the Plaintiff, and Judgment was given accordingly. And
 the Error assigned, because the Jury found, that he did not pay Post. 883.
 it 1 Decem. 41 Eliz. which is void. For it ought to have been in-
 quired, whether he had paid it within the six Moneths. And the
 payment alledged the 1 Decemb. 41 Eliz. which is a year and a quar-
 ter after, is void, and to no purpose. And Gawdy held, that the
 Judgment should be given upon his Confession, that it was
 not paid within the six Moneths; for by his own shewing, it was
 paid long after. But upon motion another day, all the Court
 agreed, that this Confession of Non-payment within the six
 Moneths is no Express, but an Implicite Confession; where-
 upon no Judgment can be obtained; and the Judgment here R. 585.
 is given upon the Verdict, which is void. Wherefore the Judge-
 ment, by the Defendants own desire in the Writ of Error, was
 reversed.

Talbot versus Case.

Action for these Words Thou hast killed my Wife. After Verdict (24)
 for the Plaintiff, upon Not Guilty pleaded, It was moved,
 That an action lay not for these words, because it is not said with
 what intent he killed her; violently, or otherwise. And he doth
 not

not aver that his Wife is dead. But notwithstanding, it was adjudged for the Plaintiff, for it is to be intended, if the contrary be not shewn by the Defendant, that his Wife is dead. And it shall be taken in the worst sense, viz. violently.

Bishop *versus* Viscountess Montague.

Pasch. 42 Eliz. rot. 733.

(25)
2 Cr. 50

Action sur Trover, and Conversion of five Oxen. The Defendant pleaded Not guilty; And by Special Verdict it was found, that one J. S. as Bailiff to the Defendant took those Beasts as for Hariots due to the Defendant, where there were not any due, and without any command from the said Visc. Montague; but that afterwards he agreed thereto, and converted them; and after that, the Bailiff died. And, whether this action lies, or that he should have brought a general action of Trespass, was the Question. And Walmesley and Kingmil held, That this action lies not: for when the Bailiff took them Tortiously, the property is divested out of the Plaintiff, and the Possession: so that he cannot suppose that he was possessed of them, until he lost them, and until they came to the Defendants hands. And the Defendant, by assenting to the taking, is a Trespasser ab initio; as 38 Aff. 9. 38 Ed. 3. 18. and 40 Ed. 3. 20. are: Wherefore where he might have had a General Writ of Trespass, he cannot have any other manner of action; especially not this action, which differs from it in nature and quality. But Anderson & Warberton *e*contra. They agreed, that an assent before, or after the taking of the Goods made her Trespasser ab initio, and to be punished as a Trespasser: but not an assent after to a Battery formerly done; or to that, which is a Tort, and punishable by the Statute-Law, as an assent to a Riot, or forcible Entry, after it be done, shall not make him punishable. But although Trespass lies, yet he may have this action if he will: for he hath his Election to bring either. And as he may have Detinue or Replevin for Goods taken by a Trespass, which affirms always property in him at his Election: So he may have this action: for one may qualify a Tort, but not increase a Tort. So he hath Election to make it a Tortious Præfal, or not: which is the reason that if Goods be taken by a Trespasser, yet if the Party from whom they were taken, be attainted of Felony, he shall forfeit them. For the Right and Property remains in him, and the Law shall adjudge them in him, until he makes his Election to the contrary, by bringing of a Writ of Trespass. Wherefore here he might maintain the one Writ, or other at his Election. Wherefore, &c.

2 Cr. 50.

John Davies and Ann his Wife *versus* Selby.

Dower and demand the third part of Lands, whereof her first Husband was seised in Fee. The Issue was, Whether it were the Custom in Gavelkind, that if the Husband alien his Land, that his Wife might demand the third part for her Dower, or the Moiety, at her Election? And upon the evidence it was shewn for the Defendant, that the Custom of Gavelkind precisely is, that she is to have the Moiety: And this Custom there is the Common Law of the place, which cannot be waved by demanding a third part. Vide Book of Entries 228. 2 Ed. 4. 18. And a president was shewn, 30 Eliz. betwixt Hunt and Gilburn, where it was resolved, that she cannot wave this Dower, and demand that Dower by the Common Law: And because the demandant could not shew any Presidents, nor Proofs, that there were any other Dower there, then Dower by the Custom. And it appears by the Statute of Consuetudinibus Kentiæ, quod vide in Master Lamberts Perambulation of Kent, where the Custom is cited, that the Feme is to have the Moiety, so no other kind of Dower is shewn to be there: And it is for the benefit of the Tenant of the Freehold, that she should have the Moiety; for thereby she is to have it only during the time that she lives sole and chaste, and it is a restraint unto her; and Customs are as the Laws in the places where they are used. Therefore all the Court resolved, that she was bound by this Custom, and cannot wave it: And in such Case she shall have it by Assignment in Severalty, and cannot hold in Common. Wherefore, after Evidence, the Plaintiff was non sued.

(26)
Mo. 260.

Ante 121.
Moor. 260.

Swan *versus* Gateland. Mich. 42, & 43 Eliz. rot. 3267.

Ravishment de Gard. The Case was, that a Feme took Baron, and had Issue a Son by him, the Baron dies: She takes another Baron seised in Fee of the Lands holden in Socage, & hath Issue by him another Son; the Baron dies, the Feme dies, the second Son within the age of fourteen years, whether the eldest Son of the half blood, or the Mothers brother shall be Guardian? was the Question. Walmesley and Kingsmil held, that the Brother should have it, for he is the nearest of kin, to whom the Inheritance cannot descend.

(27)
2 Rol. 40.
2 And. 171.
Owen 128.
Moor 635.
2 Inst 88.b.

Stutfield *versus* Somerset. Hill. 43 Eliz. rot. 1358.

Debt upon an Obligation. The Condition was, that after Marriage of the Plaintiff, and having a Son by his Feme, that if he conveyed Lands to the value of 40 l. per annum in tail to the Son to enjoy, after the death of the Obligor, that then, &c. The Defendant shews the Day of the Marriage, and the having of a Son: And that he made a Feoffment to a Stranger to the use of himself for Life, and after to the use of the Son in tail. The Plaintiff saith, Quod non Feoffavit, &c. The Defendant demurs. First, It was held, that although the Barr, as here, is ill, yet when the Plaintiff replies thereto, he hath by the Replication lost the advantage of Exception to the Barr: And here the

(28)

M n n n

Barr

Barre is ill; for it is not any performance of the condition by this Feoffment, as it is pleaded; because the Infant was not made party to the conveyance, nor had any deed or assurance to prove his Estate: So is he not sure thereof, nor peradventure can have any knowledge of such an Estate, nor means to prove the Uses limited, which was not the intent of the condition: And therefore such an assurance made is no performance of the condition, and to that purpose, vide 20 Ed. 3. Audita Querela: One is obliged to make a Release to the Obligor; it is not sufficient to make it, and deliver it to a Stranger to the use of the Plaintiff. It was also held here, that the Plaintiff having admitted the Barre to be good, he may traverse the Feoffment, or the Uses at his Election.

Smith *versus* Arden. Hill, 43 Eliz. rot. 1807.

(29)

2 And. 178.

Ejectione firmæ. The Defendant pleads ancient demesne, and it was thereupon demurred. And Walmesley and Kingsmill held it to be a good Plea; for at this day Possession is recovered, so it is a meddling with the Land, and a transmutation: And if it were allowed, that ancient demesne should be no Plea in this action, all titles in ancient demesne would be tried at the Common Law: and this toucheth the reality, and for this cause is a Plea, as in Replevin, or Mass, as it was ruled in Greens Case, because they concern the Land. Wherefore, &c. But Warberton e contra, because the action is meerly personal, and in Trespass ancient demesne is no Plea, and this action is in nature of Trespass, and where the Action is vi & armis, so that the King is to have a Fine, it is holden, that ancient demesne is no Plea. Anderson was absent, and afterwards the demurrer was waved, and the Defendant pleaded the general Issue. Vide 7 H. 6. 55. 8 H. 6. 34. 3 Ed. 3. 42. 21 Ed. 3. 10. 22 Ass. 55. 28 H. 8. Dyer 40 Ed. 3. 4. 5 Co. 105. a.

Ante 104.
1 Rol. 323.
Co. 5. 105. a.

Greswold *versus* Holms, and his Wife.

(30)

Formedon. The Tenant pleaded Non-tenure, and found for the Demandant. And now the Feme, after Verdict, prayed to be received upon the feint Plea of her Baron, because he had pleaded Non-tenure, where he might have traversed the Gift, and he brought a Writ out of Chancery de Attornato recipiendo for the Feme, Et per Curiam it was received: For a false pleading is a feint-pleading, and a feint pleading is within the Statute. And here there needs not any new Declaration, because the Feme is party to the Sute; otherwise it is, where he in Reversion is not party to the Sute, and is received.

Wells *versus* Fenton. Hill, 43 Eliz. rot. 1106.

(31)

Mo. 634.

Ejectione firmæ. Upon a Special Verdict, the Case was such; Sir Ralph Egerton seised in Fee, levied a Fine to the use of himself for Life, and after to the use of his Wife, who should be at the time of his death, for Life, remainder to Edward Egerton in Tail. Sir Ralph takes to Wife Alice, he, and Alice his Wife, by Fine, reciting that he is Tenant for Life, remainder to the

said

said Alice for Life, give it to a Stranger in Fee, who renders it to the Baron for life, remainder to Fenton for sixty years, remainder to the right Heirs of the Baron; the Baron dies, the said Alice being then his Feme survives, and disclaims to have any thing in the Land; Edward Egerton enters, and lets to the Defendant; she takes another Baron, and they make a Lease to the Plaintiff. Upon all these Matters disclosed, three Points were moved: First, Whether this contingent remainder to his Wife, who should be, &c. were good? For, although such a contingent remainder may be by way of Limitation of an Estate of Land in Esse, yet it cannot be of an Use: For the Statute of 27 H.8. ^{Ante 765.} doth not execute Uses, but those only, which are in Esse, and preserves not any contingent Uses; for no Seisin continues to preserve them. And of that Opinion was Anderson. But Walmesley and Warberton e contra: for it was good at the time of the Limitation, and stood with the Rules of the Common Law, and for the benefit of the Common-Wealth, that such Limitations for Joyntures should be good; and therefore the Law preserves, and regards them, unless there be some mean ad afterwards ^{Ante 439.} done to destroy them. But an Use limited to J.S. until a Præcipe be brought, and then to the use of J. D. this contingent Use to J. D. is against Law and Justice, to defraud a Præcipe, and therefore is void. Secondly, Whether by the Joynder in this Fine the Feme hath given her possibility, so as she cannot afterwards claim it? Walmesley held, that she had not: For she hath not any Estate nor was there any certain person, who might have it; for it is unto her, who shall be his Wife at the time of death; and it is not known who that shall be. But where the Person is certain, although the Estate be but in possibility, there peradventure she might have excluded her self thereof. Thirdly, Whether by this Waiver in the Country, she hath excluded her self to have the Estate? To these two matters the other Justices spake not, by reason of a default in the pleading: Wherefore the Demurrer was waved, and the parties pleaded to Issue, that there might be a Special Verdict. And a Special Verdict was found and adjudged for the Plaintiff.

Peck *versus* Channel. Hill. 43 Eliz. rot. 1709.

Ejectione firmæ. Upon a special Verdict, the Case was such, Dne (32)
William Burley was seised in Fee of divers Lands in Shalford, ^{Moor. 129.}
holden in Socage; and by his Will devised all his Lands in S. to ^{Moor 634.}
his Feme for life; and further devised All those my Lands in Shalford,
called Somorsby, to William Burley his Cozen in Tail, Remainder to his
right Heirs, and died; the Feme, and William Burley, who was in
Remainder, entermarry, and levy a Fine to a Stranger, for
Conuſance de droit come ceo, &c. who renders it to the Feme for
Life, the Remainder to the Baron, and his Heirs. Afterward,
Anno 12 Eliz. the Baron and Feme suffer a Recovery with single
Voucher to the use of the Baron and his Heirs: The Feme dies,
the Baron dies without Issue. The right Heir of the Devisor enters
within the five years after the death of the Baron, and
letts to the Plaintiff, who is ousted by the Heir of the Baron,
and thereupon he brought this Action, Et si, &c. The first Question
was, Whether this Fine levied by the Tenant for Life, and
him

Co. 1. 76. a.

Sect. 615.

Co. 3. 5. b.
Ante 670.

Ant. 670.

him in remainder in tail, be a Discontinuance: And all the Court resolved (nor would suffer it to be argued) that it was not any Discontinuance: for when he, who hath a remainder in tail, or a Reversion in tail expectant upon an Estate for life, levies a Fine by himself, or joyns with the tenant for Life in the Fine; this is not any Discontinuance, but passeth that only, which he might lawfully grant, and none shall make a Discontinuance, but he, who is seised of an Estate tail in possession, as Littleton saith. Secondly, Whether this recovery be any Barr to him in remainder in Fee, or a Discontinuance thereto to take away his Entry? And all the Justices delivered their Opinions severally, that it was not any Barr, or Discontinuance: It cannot be a Barr, because that he, who suffered the recovery, was not seised of the same Estate tail at the time of the recovery suffered: for by the Fine levied the Estate in Fee passed, although there was not any Discontinuance of the remainder in Fee: And by the Render a new Estate is given back, and they are in of a new Estate, so that the recompence upon the recovery shall go to that new Estate, and not to the ancient remainder. And Walmisley said, although there was not any discontinuance of the Estate tail, nor of the remainder by the Fine; yet he conceived, that by the Fine levied by Tenant for Life, with him in remainder in tail, the remainder in Fee was divested, and it was a forfeiture of the Estate for Life: And therefore there is a difference between a Fine levied by Tenant for Life, and him in remainder in tail, and a Fine levied by Tenant for Life, and him in remainder in Fee, who hath the entire Estate. For in the first Case it is a forfeiture, but not in the other: and then recompence shall never go to an Estate, which is not in Esse at the time of the recovery; and a recovery shall never take away an Entry, which is by consent, and Quasi a conveyance: And therefore it shall not bind the Entry of him, who hath right, and is not like to a recovery against Tenant for Life by Title, and without consent; as 5 Ed. 3. Entry congeable, 5 Ed. 4. 2. 44 Ed. 3. 45. 10 H. 6. 2. 34 H. 6. 2. 24 H. 8. Entry congeable 115. And here this recovery is out of the Statute of 32 H. 8. because that he in remainder joyned with the Tenant for Life: Wherefore they all agreed for the matter in Law with the Plaintiff. But Anderson took an Exception to the Verdict, that it was not good, because it was not found, that these Lands in the action are called Somersby: For nothing is given in remainder, but those Lands. But all the other Justices held, that forasmuch as the contrary is not found, it shall be intended that he had not other Lands in Shalford, then those, which were called Somersby, although that name be not at first given them. Wherefore it was adjudged for the Plaintiff.

Speccot versus Sheres. Pasch. 42 Eliz. rot. 106.

(33)
Moor. 636.

DEbt upon an Obligation. The Case was, that the Defendant granted a Rent-charge out of his Land to the Plaintiff, of 20 s. per annum for ten years, and was obliged in 10 l. with a Condition, that if he performed the Covenants, and Agreements in the said Deed, Ita quod the Obligee might have, and enjoy the Annuity, according to the intent of the Deed, that then,

then, &c. The Annuity was arrear at such a Feast; but not demanded by the Grantee, nor tendered by the Obligor: And if hereby the Obligation be forfeited, was the Question. And it was holden, that it was not: For the Obligation being for the performance of Covenants generally, &c. shall not alter the nature of an Annuity: But that it is payable, as if there had not been any Obligation. Vide 12 Ed. 4. 10. 22 H. 6. 57. 6 Ed. 6. Tender Br. 11. But because the Defendant had pleaded generally *Quod perimplevit omnes conventiones*, &c. Which implies a payment of the Annuity. And the Plaintiff assigns for breach, that it was arrear such a day: And the Defendant thereupon demurred, whereby he confesseth, that it was not paid; and so contradicts his Plea, all the Court (absente Anderson) held the Plea to be ill: For if one covenants to make such assurance of Land, as the Plaintiffs Counsel shall advise, and he pleads performance of Covenants, he cannot afterwards say, *Quod Consilium non dedit Advifamentum*: Wherefore, &c. But no Judgment was given: But the Plaintiff, by motion of the Court, accepted the arrearages of the Annuity with Costs. Note, That for this cause it was afterwards adjudged for the Plaintiff, and entered in the Roll.

2 Cr. 76. 77.
Ante 332.
Hob. 8.

1 Cr. 75.
Hob. 8.

Norton *versus* Palmer. Pasch. 42 Eliz. rot. 1316.

Action upon the Case; for that he was possessed of an House and Garden for twenty years, and the Defendant being a Butcher, had a Slaughter-house and Yard next adjoyning to the Plaintiffs Garden, that the Defendant had exalted his Yard, and made a Ditch, whereby he conveyed the filth and the Offal of his Beasts which he slaughtered, into the Plaintiffs Garden. Wherefore, &c. After Verdict, upon Not guilty pleaded, it was found for the Plaintiff, and now moved in Arrest of Judgment, that the Writ was variant from the Declaration: For the Writ was only for the raising of the Yard, and the Declaration is for the exalting of the Yard, and for making a Gutter therein: And so there is more comprised than is in the Writ. Wherefore, &c. And for this cause the Court held it to be ill, and not aided by the Statute of 18 Eliz. for that helps only, where there is not any Writ, but not where the Writ and Declaration varies in Substance: For then it is out of the Statute.

(34)

Scavage *versus* Tatcham. Hill. 43 Eliz. rot. 1831.

Faux Imprisonment in London from the 10 September unto the 29. of September. The Defendant justifies, for that he was Mayor and Justice of Peace in Pomfrait. And that Robbery was done there, and the Plaintiff was thereof suspected, and brought before him. Et quia videbatur suspectuosus, he detained him in his House, during that time in the Declaration mentioned, to examine him and one Pole, who was not apprehended, concerning the said Robbery: And afterwards upon the 29 of September delivered him over to the new Mayor, and traverseth the Imprisonment in London. And it was thereupon demurred, and adjudged, that the Inducement to the Travers was not good; for a Justice of Peace cannot detain a Person suspected in Prison, but during a convenient time, only to examine him, which the Law

(35)

Law intends to be three days: And within that time to take his Examination, and send him to Prison: For he ought not to detain him as long as he please, as he here did eighteen days; neither ought he to detain him in Prison in his own house, but he is to commit him to the Common Gaol of the County: For otherwise, when the Justices come to deliver the Gaol, he is not in the Gaol, and may not be delivered, and so should lie longer than is reasonable. Vide Statute 5 H. 4. cap. 10. 2 Ed. 4. 8. and here he took not any Examination, but delivered him over to the new Mayor, without Examination, which was not lawful. And therefore it was adjudged for the Plaintiff.

Sir Thomas Tresham *versus* Ford. Hill. 43 Eliz. rot. 1706.

- (36) **A** Ccompt, supposing him to be Receiver of 120 l. of his Money, by the hands of Vavasor, ad compotum reddendum. The Defendant pleaded, Nunques Son Receiver, &c. and the Jury finde, that he was Receiver of such a Sum. The Defendant before the Auditory pleaded, that he was possessed of divers Obligations, wherein Francis Tr. Son and Heir of the Plaintiff, was obliged unto him in 400 l. and that the said Vavasor paid unto him this 120 l. in satisfaction of those Bonds, and thereupon he delivered unto him the said Bonds, to the use of the Plaintiff, which he accepted. And thereupon the Plaintiff demurred, and it was held by the whole Court to be no Plea: For it is contrary to the Verdict, which found him to be Receiver to render, &c. And the Plea amounts to no more, but that he was not Receiver to accompt.

Coke *versus* Brainforth. Pasch. 43 Eliz. rot. 1405.

- (37) **D**Ebt upon an Obligation. The Defendant pleaded, that the Plaintiff was indebted unto him, & concessit solvere, and pleadeth a Forein Attachment in London. The Plaintiff protestando, quod non habetur tale Record. pro placito dicit, that he pro diversis Denariis Summis per ipsum præfatum R. prius debitis, non concessit solvere the said Sum, modo, & forma, prout, &c. whereupon the Defendant demurs, and adjudged to be a good Bar, for the Debt is well traversable. Wherefore it was adjudged for the Plaintiff.

Shaw *versus* Barbor.

- (38) **I**N Ejectione firmæ, upon Evidence it was agreed per totam Curiam, and so delivered for Law to the Jury, that if Tenant at will makes a Lease for years, and the Lessee enters, he is only the Disseisor: And a Release or Confirmation to the Tenant at will afterwards is void, because the Privy is determined. And Walmsley said, that so it had been resolved against the Opinion in 12 Ed. 4. 12.

R. 354.
Co. Lit. 57. 2.
1 Cr. 304.
Ante 306.

Cutler *versus* Brewster. Mich. 42, & 43 Eliz. rot. 1255.

- (39) **D**Ebt upon an Obligation upon an Indenture. The Conditions were of three Parts: First, If he well served the Plaintiff, Secondly, If he duly accompted. Thirdly, If he should make

make satisfaction within three Moneths, after notice of all losses, which he should sustain by the apprenticeship, and that then, &c. the Defendant pleads performance specially. The Plaintiff assigns for breach, because upon account he was found in arrears of 60l. of Polish-Money, which he received, and converted to his own use: And so he had not well served him, &c. and thereupon the Defendant demurs, for it is a breach of the third part of the condition, and therefore he ought to have alledged notice, and no satisfaction after it, and this Enducement tends to it, and not to the first part. Sed non allocatur; for every part is severally by it self: and although he might have alledged it as a breach in the third part, yet he may alledge it also, as an ill service in converting it to his own use. And although it be not alledged, that he received it as Apprentice, yet it may be very well intended; for it is Marchandize. Wherefore it was adjudged for the Plaintiff.

Termino

Termino Trinitatis
 Quadragesimo tertio ELIZABETHÆ,
 in Banco Reginae.

Pain *versus* Malory. Mich. 42, & 43 Eliz. rot. 586.

(1)
 Ant. 43.
 Pl. 6. p. 805.

2 *Sand.* 369

Pl. C. 171.

THe Case was recited to be; The Abbot of Sawtry made a Lease for 120 years of the place, where, &c. *inter alia*, rendering rent annually, during the term, to him, or his Successors at such Feasts, upon such conditions, *ut antea*; and afterwards the reversion of the places where (*inter alia*) was conveyed to J. S. who granted it by Fine to Doctor Belay, who, before any Attournment, granted it to Thomas Belay his Son, to whom the Lessee attourned, and afterwards for the Condition broken entred, *ut supra*; and after a Distress for Damage feasant, the Lessee brings a Replevin. Et si, &c. And hereupon two Questions was moved, First, Whether this Reservation of this rent to the Abbot, or his Successors (being in the disjunctive) shall go to the Abbot and his Successors, or that it shall be void to the Successors, because there was not any Election by the Abbot, who made the Reservation, how it should go? And all the Court resolved, that it should be to the Abbot and his Successors in the Copulative: For when it is reserved annually during the term, that cannot be unless it goeth to both: And then the express intention, and reservation at the first, shall not be destroyed by the subsequent words, but they shall be construed that both may stand together. As in Hill and Granges Case, a Lease made upon the 10. of August for years, reserving rent annually during the term, at the Annuntiation and Michaelmas, yet it shall be first paid at Michaelmas, otherwise it cannot be paid annually during the term: So if one covenants, that he, and his heirs shall assure such Lands, this Covenant is always taken in the disjunctive, that he, or his heirs shall assure it: for they cannot assure it together, and therefore it shall be construed, that the one part may stand with the other. Secondly, Whether the Grantee can take advantage of this Condition, for that his Grantor might not? And they held, that he should; for the Statute is, that he shall have such advantage, as the Lessor, or Grantor might have had: And here the Lessor might have had advantage thereof, as also the Grantor, if he had had Attournment: but in defect thereof he could not have it, which defect is supplied by the Attournment, which gave advantage to the Grantee, to have the advantage of the Rent, and by consequence of the Condition.

And

And Popham said, That it was resolved in one Knotsforde's Case three years since; where a Reversion was granted by fine, and he before Attornment bargained, and sold the Reversion by Deed enrolled; that without Attornment the Bargainee should not have advantage of the Condition, for he shall not be in better condition than his Grantor, without express Attornment. Wherefore they resolved to give Judgment accordingly for the Defendant. But it was then moved, that the Avowant had not entailed himself to the entire Reversion, and so could not take advantage of the Condition; for the Lease is pleaded of the places where (inter alia) &c. And that the Reversion is granted unto him of the places, where (inter alia) so he doth not plead that the Reversion of all the things lett was granted unto him. And of that Opinion were all the Justices, besides Popham, who said, that it should be intended accordingly. Et Adjournatur. 5 Co. 111, b.

Haynsworth *versus* Pretty. Hill. 41 Eliz. rot. 1060.

TRESPASS. Upon a special Verdict, the Case was; One seised of Lands holden in Socage, had Issue two Sons and a Daughter, and devised to his second Son and Daughter, Legacies of 20 l. to be paid by his eldest Son, and devised his Lands to his eldest Son in fee, upon condition, that if he paid not those Legacies, that his Land should be to his second Son and Daughter and their heirs. The eldest Son fails of payment; Whether the younger Son and Daughter shall have the Land: was the Question. And, after Argument, It was resolved by the Court clearly, that they should have it; for the first Devise to his Son and heirs in fee, being no more than what the Law gives, is void; and it is but a future Devise to the second Son and Daughter, upon the eldest Son's default of payment. And the Case is no other, but as if one had devised, that if his eldest Son did not pay all Legacies, that his Lands should be to the Legatees, and there is no doubt, but that in default of payment the Land should best in them. And Gawdy and Fenner held, that if it were a good devise to the eldest Son, yet this Condition is a Limitation of his Estate, and shall give it to the second Son and Daughter, upon default of payment. Wherefore it was adjudged accordingly for the Plaintiff.

(2)
1 Rol. 411.
Mo. 644.
Post. 919.

Ant. 205.
R. 693.
1 Rol. 411.

Lane *versus* Hodges. Mich. 40, & 41 Eliz. Rot. 406.

Error of a Judgment in the Common Bench, in debt upon an Obligation for performance of Covenants. The Error assigned was; Because there was not any breach of the Covenant; for one by Indenture bargains and sells to the Obligee all his Lands in Upminster, and covenants, that he will make further assurance of all his Lands. The breach assigned was, because he did not make further assurance of those Lands. And it appears by the pleading, that the Bargainor had enfeoffed the Bargainee before of all his Lands there, so as he had not any Lands at the time of the bargain and sale; and, if he then had not, the breach is not well assigned; and so held all the Court. But if one enfeoff another of his Lands, and afterwards bargains and sells them by name, and covenant to make assurance,

(3)
Post. 45.
1 Rol. 427.

Do o o o

ye

he is bound to make assurance accordingly. Wherefore they were of Opinion to reverse the Judgment. But the Matter was referred to Compromise.

Lovet versus Hawthorn.

(4)
1 Rol. 73. 83.
Ante. 786.

Action for these words; I am sure, that *James Loves* did burn my Barn (innuendo a Barn full of Corn) I will have a Bont with him for it; if my Lord Chief Justice would have done me right, I had hanged him for it. After Verdict, it was moved, that an action lay not for these words: and of that Opinion was Popham, Clinch, and Gawdy; for if the words without the Innuendo were not sufficient to maintain the action, this will not help, and the burning of a Barn, unless there be Corn in it, is not Felony, and the last words be not sufficient to enforce that he had burned a Barn with Corn. And therefore Popham said; If one saith J. S. hath broken my house, I will hang him for it; this will not maintain an action. But Fenner conceived, that although it was not Felony, unless the Barn was with Corn, yet the wilful burning of any Barn is an odious act, and a great slander to any, if it be not true, and therefore the action maintainable. But the other Justices said, It was clear, that, if the words did not charge him with Felony they were not actionable. Et adjournatur. 4 Co. 20. a. Barhams Case.

East versus Thoroughgood. Hill. 43 Eliz. rot. 397.

(5)

Error of a Judgment in Bedford, in an Assumpsit, where the Plaintiff declares; That there was Communication betwixt him and the Defendant, concerning the Sale of certain Land to be made by the Defendant unto him, whereupon he delivered to the Defendant 20 l. in consideration whereof, the Defendant promised to the Plaintiff, that, if he liked not the Land, he would repay that 20 l. within a fort-night; and alledgeth in fact that he did not like the Land, and the Defendant had not repaid unto him the said 20 l. &c. And Judgment being there given for the Plaintiff, Error was assigned, that the Declaration was not good for three causes. First, Because that here he ought to have had an action of debt, and not an action upon the case. Sed non allocatur, Secondly, Because it is not alledged, that he gave notice of the dislike within a fort-night, for that is a thing secret to him self, whereof the Defendant cannot take notice to pay the money. But the Court held, that he ought to take notice thereof at his peril, for he hath bound himself thereto by his express promise. Thirdly, Because it is not alledged, that he disliked thereof within the fort-night, for otherwise the Defendant is not bound to pay it. But the Court held, that, it being alledged generally, it is well enough; for it shall be intended to be within the time, unless it be shewn to the contrary; and if it were otherwise, the Defendant ought to shew the dislike to be after the time, and have traversed the dislike before, &c. And to that purpose Gawdy cited the Case 22 H. 6. 11. where an Obligation was made to two, and the one brought the action, and alledgeth, that his Companion was dead, that sufficeth without shewing, that he was dead before the Writ purchased. So 16 Eliz. Dy. 338. between Wotton and Coke. Wherefore the Judgment was affirmed.

Dormer

Dormer versus Smith.

Information for him, and the Queen against Smith, upon the Statute of Liveries for retaining in his service twelve men who were not his domestick servants, nor officers, giving to every of them a Livery; and that he retained them in his service for twelve months, viz. from the 12 Decemb. 42 Eliz. unto the 10 Decemb. 43 Eliz. The Defendant pleaded Not guilty, and the Jury found him guilty for 12 months. And it was now moved in arrest of Judgment, That if the months shall be accounted at 28 days to the month, then within the time of the Information are 13 months, and the Jury hath found him guilty but of 12 months; And it appears not for which of these they excuse him, so there cannot be any Judgment; and if the months should be otherwise accounted, as twelve months in the year, then there wants two dayes of the year, and so the Information is insufficient. But the Court held, that it should be taken at 28 dayes to each month, and so there be 13 months in the year; and it is not material, although it be not found in which of the months he offended not in year. But they would advise thereof. Et adjournatur.

(6)

Hawkland versus Gatchel, Posch, 42 Eliz. rot. 522.

Debt Upon an Obligation. The Defendant pleads, that he delivered that Obligation to the Plaintiff, as an Escrow to be his deed, if he performed such a Condition, viz. to permit him to enjoy such Corn, and alledgeth, that the Condition was not performed, and so not his deed. And hereupon the Plaintiff demurs. Clerk for the Plaintiff argued, that one cannot deliver a deed to the Party himself, to be an Escrow, and to that purpose cited the 19 H. 8. 43 Ed. 3. 28. where it is said, that this Condition cannot be averred upon the delivery to the Party himself in avoidance of the deed, without shewing a deed thereof. Gawdy; There is not any difference; where it is delivered to the Party himself, as an Escrow, and where to a Stranger; And the Case of 19 H. 8. is so: because the deed was delivered to the Party himself first, as his deed upon Condition, &c. in which Case the deed is absolute, and takes effect, as his deed, upon the first delivery, and it cannot be avoided by the Condition. But when it is first delivered, as an Escrow, although it be to the Party himself, it is clear, that it is not his deed, until it be performed. And so is 29 H. 8. Dy. 34. in Morris, and Leighs Case. Popham accord; for if upon the delivery the words spoken by the Obligor purport, that it shall not be his deed, it is clear, it is not: as where one causeth an Obligation to be written, and sealed in my name, and brings it unto me, and prays, that I would deliver it as my deed, and I say Do you such a thing, and take it as my deed, otherwise not, It is clear, that it is not my deed until the thing performed. So if the Obligor saith, Take it to you, I will not deliver it, as my deed. It is not his deed: Wherefore in the principal Case, when the Obligation is delivered, as an Escrow, by express words, it is not possible, that it should be his deed, for the words are not sufficient to make it so, until the Condition be performed; But, if it be once delivered as his deed, It cannot afterwards be defeated by a Condition, if

(7)
Co. 9. 137.
2 Rol. 27.
Ant. 520.

Co. Litt. 36. a

Post. 884.

Co. 9. 137. b.
Post. 884.

the Condition be not in writing: But here the Condition is precedent, so as it was not his deed, until it were performed, and therefore a Conditional delivery may be altered without writing. Wherefore, &c. Fenner to the same intent; for although difference hath been taken, that a deed shall not be delivered to the party himself, as an Escrow, but to a stranger, and the reason hath been alledged, because, when it is delivered to the party himself, there cannot be a second delivery, whereupon the writing should take his effect, as a deed, that seemeth to be no difference: For when it is delivered to the party, as an Escrow, the words be not sufficient to make it to be his deed, until the Condition be performed. Wherefore, &c. And of that Opinion was Clinch. Wherefore it was adjudged for the Defendant. Vide ante, Whyddons Case, Mich. 38, & 39. Placito 47.

Bray *versus* Patrid.(8)
Noy 23. 37.
1 Rol. 102.Ant. 197.
Hob. 206.
Ant. 794.
a Cr. 134.

Hob. 267.

1 Rol. 34.

Hob. 267.
Ant. 197.

Action sur le Case. Whereas the Defendant was Vicar of Lanham, and the Plaintiff a Parishioner there, and the Tithes appertained to the Defendant, the Plaintiff had paid him his Tithes in the presence of two witnesses, the one of those witnesses being dead, the Defendant had again sued him for those Tithes paid unto him, well knowing, that the proof of payment by one witness is not sufficient in the Spiritual Court, &c. The Defendant pleaded Not guilty, and found, that the Plaintiff had paid his Tithes, but one of the witnesses named was dead before they payment, &c. and found all the residue, ut supra; Et si, &c. And all the Court held, That upon this matter the Action lies not; for an Action lies not for prosecuting at the Common Law without cause, the same Law is for prosecuting a Sute in the Spiritual Court. For Popham said, when a man complains in Court, which hath power to give him remedy for the same cause, although his Sute be without cause, yet the Plaintiff shall not be punished by an Action upon the Case: But if a man libels in the Spiritual Court for a temporal matter, there peradventure an Action upon the Case will lie; So it is where a man brings an Appeal in the Common Bench, Action upon the Case lies: whereto Gawdy, and Fenner agreed, and said, how 8 Ed. 4. 13. is, that an Action upon the Case lies, where he sues one for Tithes, who ought to be discharged; yet that is not like to this Case; for by the same reason, if one hath paid a debt upon an Obligation, & is sued for it again, an Action upon the Case lies, which is not Law. Wherefore they all agreed against the Plaintiff. Sed Adjournatur.

Winchcomb *versus* Goddard.

(9)

Error of a Judgment in the Common Bench. After Assignment of the Errors, and In nullo est Erratum pleaded, Walter moved, That there was a manifest Error in the awarding the Ven. fac. and prayed a Certiorari to certify it. Popham held, That it was not grantable; For although sometimes in affirmance of a Judgment it is used in such Case to award a Certiorari to inform their Consciences, because they would not reverse a Judgment, if it could be helped, yet never was it grantable to avoid a Judgment;

ment; For it is the folly of the party, that he did not procure it to be removed before the Errors assigned. But the other Justices held e contra, That it is grantable, as well in the one Case, as the other. Wherefore, at another day being again moved, it was awarded accordingly, and the Writ removed thereupon. Then Error was assigned in hoc, That in the Replication the place, where, &c. was alledged to be forty Acres in Henwick Parsonage infra manerium de Thackam in Parochia de Thackam. And the Issue was, whether the Plaintiff was Demurrant at Henwick Parsonage? and the Ven. fac. was awarded de vicineto de Thackam; Where it was alledged That it ought to have been from Henwick Parsonage, which is the place known, and a Will per se. But the Court held it well enough, for it shall be intended, that Henwick Parsonage is a place known, and the Will of Thackam, & Parish of Thackam be all one in Intendment; As 39 H. 6. is for the Parsonage of Stoke. And if a thing be alledged to be done at the Mannor in a Will, the Will shall be from the Will, which is the most notorious. Wherefore the Judgment was affirmed.

Ante 84.

Post. 398.
2 Cr. 263.

Middleton *versus* Trot. Hill. 41 Eliz. rot. 872.

Error of a Judgment in the Common Bench in Debt. The Error assigned, for that the Plaintiff declares, That he sold twelve dozen of Stockings for such a Sum, and shews not what stuff the Stockings were; viz. Silk, Woollen, &c. As where one brings Debt, supposing that he sold forty quarters Frumenti, or forty yards of Cloth, and shews not of what kind, it is not good. But Gawdy and Fenner held it to be well enough, and yet agreed to the Cases before; For when a Contract is made for a thing, which never was converted out of its nature, he ought to shew of what nature it is. But when it is for a thing converted out of its kind, it is otherwise. As if an Action be brought upon a Contract for so many loaves of bread, he needs not shew of what Corn they were made. So of an Action for the taking of Shooes. And therefore, *ceteris absentibus*, the Judgment was affirmed. (10)

Co. 5. 34 b.

Gage *versus* Shurland.

Scire facias of a Judgment. The Defendant pleads, That before the Judgment, and hanging the Sute, the Plaintiff covenanted with him by the Deed now shewn, That if he obtained Judgment, and the Defendant upon such a day paid unto him one hundred pound, that he would not sue Execution, and the Judgment should be void, and pleads, that he had paid the one hundred pound accordingly, and demanded Judgment. And thereupon the Plaintiff demurred. And the Opinion of the whole Court was, That it was not any Plea; For he cannot make a Defeasance of a Judgment, before it be given. Vid. 19 H. 6. 62. Wherefore they said, his Remedy is only by Writ of Covenant upon his Indenture. And it was adjudged accordingly. (11)

Chard

Chard *versus* Bird, Hill. 41 Eliz. rot. 939.

- (12) **E**rror of a Judgment in the Common Bench. The Error assigned was; For that the Plaintiff brings Debt, as Administrator, and suppoſeth the Administration committed unto him by ſuch a Biſhop, and doth not ſay *Loci illius Ordinarius*, nor *cui Administration pertinet*. And it was holden to be no Error; for in a Declaration it is well enough, but not in a Bar; for in the end of the Declaration the Letters of Administration are ſhewn. Wherefore the Judgment was affirmed.

Ante 791.

Kenton *versus* Wallinger.

- (13) **A**ction Upon the Caſe. Whereas Sentence of Excommunication was againſt one Harris, the Inſtrument whereof was delivered to the Defendant, being Curate of the Pariſh, where the ſaid Harris, and Plaintiff inhabited, to publiſh in the Church; that he maliciously had razed out the name of Harris, and put in the Plaintiffs name, and read it in the Church, whereupon he was enforced to be abſent from Divine Service, and to be at the Expence to procure a diſcharge for himſelf. The Defendant pleaded Not-guilty, and found againſt him: And it was moved in arreſt of Judgment, that an Action lay not for this matter: For it is Spiritual, whereof the Temporal Law takes not any regard. But the whole Court reſolved, that the Action was maintainable; for although the Excommunication be Spiritual, and ſo is the denouncing thereof, yet the Razing, and Alteration thereof, is meerly Temporal, for which an Action well lieth at the Common Law. Wherefore it was adjudged for the Plaintiff.

Ante 794.

Riſden *versus* Inglet. Paſch. 42 Eliz. rot. 519.

- (14) **D**ebt Upon an Obligation of 100 l. conditioned to ſtand to the Award of T. R. and J. L. for, and concerning ſeven ſeveral things, So as the ſame Award be made, and delivered in writing before ſuch a day, &c. The Defendant pleads, That the Arbitrators made ſuch an Award before the day, and ſhews in certain what, and that they made not any other Award. Et hoc, &c. The which Award for ſome of the things compriſed within the Submission was void, becauſe it was not purſuant to the Submission, and for others, they were directly according to the Submission; And becauſe he did not plead performance of that part of the Arbitrament, which was according to the Submission, the Plaintiff demurred; for it was moved for the Plaintiff, That although the Award be not made of all the things ſubmitted, yet becauſe the words be not, So that the Award be made of the Premises, there the Arbitrament ought to be made of all; or otherwiſe, the Defendant is not bound to performance, becauſe it is a Conditional Submission tied to all the Premises; As 4 Eliz. Dy. 216. 18. But the words not being a Conditional Cy to all, he ought to perform that, which was well awarded; As 17 Ed. 4. 5. An Arbitrament, that he, and two Sureties ſhall be bound, is void to compel him to find Sureties, but he himſelf ought to be bound.

But

But all the Court held, as this Case is, that he is not tied to perform any; for it is all one, where the words are, So that that award be made of the Premises, &c. And, So as the same award be made before, &c. For the words The same award refer to all the things before mentioned, so that if any part be omitted in the award, it is void for all. And Popham said, that this very point was adjudged within a year after he was Chief Justice; where the difference was agreed, that if a man be bound to stand to the award of J. S. concerning divers things, so as the same award be made before such a day, here, if the award be not made of all the things, the Obligor is not bound to perform it in any part. But if the Condition be to stand to the award of J. S. of divers things to be made and delivered before such a day, if he makes an award of any parcel, and not of the remnant, the Obligor ought to perform that which is awarded; for the submission is not conditional, as in the first Case. Wherefore it was adjudged for the Defendant.

Ant. 809.

Co. 8. 9^b. b.

Ant. 809.

Drury versus Dominam Reginam.

Mich. 42. & 43 El. rot. 213. Vide antea, Mich. 41, & 42 Pl. 56.

Error of a Judgment in the Common Bench. The Error assigned was in point of Law. But all the Court resolved after argument to affirm the Judgment: for they all agreed, that although an Earl or Baron by the Statute may have two Chaplains, which shall have the privilege to have two Benefices, yet he may retain as many Chaplains as he will, but the first two are only the Statute-Chaplains, who shall have that privilege by the retainer, that they are enabled to take a second Benefice, which shall not be taken from them, as long as they remain Chaplains, nor any others retaining afterwards shall not prevent them. But it was then moved, that in regard the Lives of the two first Chaplains be not averred, it shall be intended that they be dead, or that the one of them was dead at the taking of the second Benefice, for it is averred, that they were alive at the time of his retainer, but not at the time of his taking the Benefice, and then he is a Chaplain enabled to take a second Benefice. But Popham, Clinch, and Fenner held, that it is sufficient to aver the lives at the time of the retainment; for when he is not enabled at the time of the retainment, the death of the others afterwards shall not help him; for he hath not the privilege by his retainer, and the retainment as to this purpose is meerly void: for without a new retainer, after the death of the other two, he shall not be enabled to have this privilege. But Gawdy held, that the retainer was sufficient to give unto him the privilege to have a plurality, after the death of the other two, but not before: wherefore their lives ought to be averred. But, notwithstanding his Opinion, the other three resolved, ut supra. And it was adjudged accordingly, and the Judgment affirmed. Co. 4. 89.

(15)

Ante 723 4.
21 H. 8. c. 13

Brown *versus* Holland.

(16)

Mo. 697.

DEbt upon an Obligation. The Defendant pleaded, that he made it per minas de vita, &c. The Plaintiff saith, that he did it spontanea voluntate, and traverseth the minas, &c. And at the Nisi prius the Defendant confessed the Action. And the Entry is Quod non potest dedicere, but that he made it being at large. And it was assigned for Error; because he ought to have confessed, that he did it not per minas, &c. For he doth not alledg, that he did it per Duress de Imprisonment. But all the Court held, that in regard, that it is entred Quod cognovit Actionem, all which was pleaded, before it was waived, and it is not necessary for him to acknowledge the Point in Issue, and that which comes after the Cognovit Actionem is but surplusage. And Kemp said, the antient course was to enter, Quod, relicta verificatione, cognovit Actionem, nec potest dedicere quin debitum, &c. & not to acknowledge the Point in Issue. Wherefore the Judgment was affirmed.

Spark *versus* Spark.

Ante, Pasch. 41. Pl. 19. Hill. 43 Eliz. rot. 503.

(17)

Yelv. 9.

1 Rol. 603, 916

Mo. 666.

Noy. 32.

Ante. 658. 660.

Co. Litt. 31. b.

DEbt. Upon Demurrer, the Case was Grace Spark, as Administratrix of William Spark her Husband, brings Debt against Nicholas Spark for Rent reserved upon a Lease for years by the Intestate; and declares, that one Robert Spark was seized in Fee, and lett it by Indenture to Wilmot Jule for Life, and afterwards by another Indenture lett it to William Spark the Intestate for 99 years, if he should live so long, to begin after the death of Wilmot Jule, who was Tenant for Life; and further by the same deed vult & concedit, that after the decease of the Survivor of the said Wilmot Jule and William Spark, or other determination of the said Estates, that the said Land should remain to the Executors and Assigns of William Spark for forty years. Afterwards Wilmot Jule died. Will Spark enters, and lett it to the Defendant for years, to begin after his death, and died; and for Rent arrear the Plaintiff brings this action in the Detinet. And, all this matter being disclosed by the Declaration, the Defendant demurred. And none being present there on the Defendants part, Doderidg for the Plaintiff moved, that there were two matters to be considered. First, Whether this action may be brought in the Detinet by the Administrator, or it ought to have been in the Debet and Detinet; because it never was an action given to the Intestate, nor did the Term commence in the time of the Intestate? And as to that all the Court resolved clearly, that the action ought to be brought in the Detinet; for the title to the action is derived from the Intestate, and by the Intestates Contract only, and he is to have it in his Right: and when he hath recovered, it shall be Assets in his hands; and in proof hereof was cited 19 H. 8. 8. 11 H. 6. 36. and 9 H. 6. 11. Secondly, Whether this Lease for forty years did vest in William Spark the Intestate, or not? or whether it shall vest in his Executors or Assigns by purchase? for if so, it is clear, that the Administrator cannot claim this remainder.

As

as to that it was moved, That this was an Estate, and Interest vested in the intestate himself: so that he had authority to dispose thereof and in proof thereof see 19 Ed. 2 Covenant 25. 16 Ed. 3. 20 Ed. 3 Quid Juris clamat, 22. 31. 17 Ed. 3. 29. 11 H. 4. 34. The Court did not deliver any opinion certainly herein, because none was there to argue on the other part. But they all agreed, That if the Case were, as it was put at the first; that the Lease was made to W. Sp. for ninety nine years, if he lived so long: and if he died within the term, that it should be to his Executors, and Assigns for forty years, that in this case this Term for forty years shall not Vest in W. Sp. but in his Executors by purchase, because it is a Conditional limitation, and a meet possibility to Vest. For there is a Condition precedent, that it shall not be a Lease, unless that he died within the term, which peradventure should not be, for he might survive the term. And Popham said, That a stronger Case was adjudged 17 Eliz. where a Lease was made to two for life, remainder to him, who should survive of those two, and to his Executors for forty years; they both joined in a Grant of this, yet the Grant was meerly void, because the term was not vested in any of them. But in the principal Case Gawdy seemed to incline, That this term did not Vest in the Intestate. But it was to be to the Executor as a purchase, and relied upon the reason in 3, and 4 Ph. & Mary, Dy. 150. Graveners Case, & 14 Eliz Dyer. 309. 10. And he said, That in many of the books the term was given to him, and his Executors: so it first vested in the Testator. Et adjournatur,

Ant. 666.

Goodwin *versus* Cornelius Mountenaugh Ante, P. 33 Pl. 10.

The Case was now moved again, as to the matter, That the Tales being awarded de circumstantibus generally, it was held to be well enough; for there being no exception afterward by the Defendant, it shall be intended to be well awarded. And it was said to be so resolved in the Case of Doctor Cesar against Curfyny, and especially as this Case is: for Eleven of the Principal appeared, and but one of the Tales was sworn. And it was not possible to have it de medietate Linguae. Wherefore, &c. A second Exception was taken, that the Ven. fac. was Quorum quilibet habet 4 l. Sed non allocatur. For so is the Form. And although one of the Parties is an Alien, and cannot have Land, yet the course is alike, and shall not be changed for such a special cause. Thirdly It was moved, That the return was not good, because it appears not who were Aliens, and who Denizens. And all the Justices, besides Fenner, held it to be insufficient for this Cause: but that it was a mis-return only, which was aided by the Statute of 18 Eliz. Wherefore, upon Affidavit made, that six Denises, and six Aliens were sworn, the Plaintiff had Judgment.

(18)

Ant. 818.

Ant. 305.

Co. 10. 104. 2

Ant. 273.

Ante 272. 305.

Ant. 305.

Ante 818.

Hall *versus* Dean, Wood, and his Wife. Trin. 42 Eliz. rot. 1812.

Action sur Trover, and Conversion of 40 l. by the Feme, dum sola fuerit. The Defendants pleaded Not guilty, and found against them. And it was moved in arrest of Judgment, that the Action lay not; because it was for the conversion of Honey out of a Bag. But notwithstanding, after divers motions, it was adjudged for the Plaintiff.

(19)

Own 131.

Ant. 819.

P p p p p

Gaulin

Gaulin *versus* Simonds. Mich. 42, & 43 Eliz. rot. 109.

(20)
Co. 8. 88. b.

Formedon in Descender. The Tenant pleads in abatement, that the Donees had issue a son, who after their death entered, and was seised by force of the Tail, who is not named in the Writ: and the Plaintiff demurred. Quære the cause. And, without argument, it was adjudged to be a good plea: and the Writ was abated.

Purset *versus* Hutchings. Pasch. 43 Eliz. rot. 728.

(21)

Trespas of Battery in London. The Defendant pleads, that the Plaintiff assaulted him at D. in the County of Sussex. Et si quod Damnum, sive de insultu suo proprio, and in his defence; & traverseth, that he is guilty in London. And it was thereupon demurred. For, this Trespass being Transitory, he ought to have justified in London; and ought not to have traversed the County. And of that opinion were Anderson, and Warberton; for, if he will justify at another place in the same County, he cannot traverse the place alledged. So when he justifies in another County, unless the cause of his justification be local, as if he be a Justice of Peace, or Constable, or because the Defendant offered to enter into his house, or such like, which are local, and cannot be pleaded in another place; there he may justify in the place, where it was, and traverse every other place, or County; but a Battery in his defence is not local, but may be justified in every place, and therefore he cannot plead it in another place, and traverse the place, where it was alledged. And Warberton said, it was so adjudged Hill. 32 Eliz. rot. 317, between Alder and Walden. And 26 Eliz. between Patridge and Pool. Vid. 21 H. 6. 9. 21. H. 6. Tresp. 46. Wherefore, &c. Walmley and Kingmil contra; who agreed, That al autre lieu was no plea in the same County; for, being all in one County, he ought to agree with the Plaintiff: And he ought not to traverse the place, unless the justification be local in the same County; but being in another County, the Plea is good, and he shall traverse the County. For those of the one County need not take notice, but at their election, of things done in another County; and if they will not, there lies not any attain against them; as Primo Mar. Bro. Attaint. 104. Wherefore he well may plead this Justification, where the Cause arose. Vid. 34. H. 6. 15. But afterwards it was adjudged to be no plea, for the reasons before alledged.

Post. 860.
Co. 6. 47. a. b.

Ante 99.

Kettle *versus* Piddington, Mich. 42, & 43 Eliz. rot. 1230.

(22)
Co. Lit. 35. a.

The Case was; J. S. seised of two houses, and Land, having a Feme, alieneth all, and dies. The Alienee aliens part, and assigns a Rent out of the residue to the Feme for her Dower of the whole, and afterwards she brings Dower against the second Feoffee. And, whether this Rent were a barr? Was the question. Quære 31 Ed. 3. Scir. fac. 99.

Robinson *versus* Mellor.

Action for these words, Thou art a Bankrupt Knave, a Vagabond, and Rogue. After Verdict for the Plaintiff, it was moved in arrest of Judgment, that an action lies not for these words. And it was held clearly by all the Court, That none of them were actionable, but only the words Bankrupt Knave, and of those they doubted. (23)

Stephenson *versus* Case.

Prohibition. The Question was; If one, who hath Lands in a Till, but doth not inhabit there, should be compelled to be contributory to the reparation of that Parish Church. And it was resolved, That he should: Whereupon, Consultation was awarded. (24)
Ant. 659.

Hodges *versus* Cox, Pasch. 43 Eliz. rot. 1905.

Debt by an Administrator, upon an Obligation of 26 l. made to the Intestate. The Defendant pleaded, That he had commenced an action of debt of 30 l. against the Plaintiff, by the name of Administrator to her Husband, before the Sheriff of London, and upon Nihil returned, &c. that debt was attached in his hands, and pleaded all the Custom of foreign Attachments in London, and that by Judgment this debt was attached in his hands, &c. And it was thereupon demurred, and adjudged to be no plea. First, because the Plaintiff sues here as Administratrix to her Husband. Et non constat by the barr, that the debt recovered in London was the Intestates debt, but only that she was sued there by the name of Administratrix: And that might be, although she were sued for her proper debt; as the book is, that one may be sued by the name of Heir for his proper debt, and then the Intestates debt cannot be attached for the proper debt of the Administratrix. Secondly, it is not shewn, that the debt recovered in London, was a debt by Specialty. Otherwise, it is not demandable against an Administrator. Thirdly, It is not shewn, that the custom is, that if the Intestate was indebted to the Plaintiff there, and the Plaintiff was indebted to the Intestate, that by an Action brought by the Plaintiff there against an Administrator, that this debt might be attached in the hands of the Plaintiff there: But it is shewn, That if it be testified, that the Plaintiff was indebted to the same person whom he sued; that then he might attach: But here the Defendant, now being Plaintiff in London, was not indebted to the Plaintiff here, who was there Defendant, but was indebted to the Intestate. Fourthly, the Judgment in London was de bonis propriis, which cannot extend to bonis Intestati. Wherefore it was adjudged for the Plaintiff. (25)
R. 98.
Ant. 409.

Blackwels Case.

Prohibition. The Case was, That a Parishioner severed the Tithes from the nine parts; but being in a close, the Gate was locked, so as the Parson could not come at them, and he sued. (26)
P p p p p 2

Ant. 602.

sued in the Spiritual Court: And there the question was, whether the Gate were locked or open; and thereupon a Prohibition was brought, supposing this to have been a temporal matter; for the Tithes being severed are Lay Chattels. But the Court said, That although the Tithes be severed, yet by the Statute they remain suable in the Spiritual Court; and then the other is but a consequent thereof, and therefore is there triable: And if they refuse to allow his proofs, as it was surmised, (but not within the Prohibition) it was said, That he ought to appeal.

Butler *versus* Delt. Trin. 42 Eliz. rot. 2818.

(28)

DEbt, for debt, and damages and costs recovered by Butler, and his wife modo superflite, against the Defendant in this Court. and because the Feme was not named in this Action, the Defendant demurred, and adjudged for the Plaintiff without argument, that the Action well lay.

Green *versus* Walter Dennis and his Wife.

(29)
Mo. 895.
Co. Lit. 157.b.

After Issue joyned, the Plaintiff tendered a Challenge; that the Defendant was Cozen to the Sheriff, and prayed a Ven. fac. to the Coroners, the Defendant denied the challenge. And how the Plaintiff might have an indifferent trial, the Challenge being true, was the question. And the Justices said, That the challenge lies not on the Plaintiffs part: But if he mis-doubts the Sheriff, he ought to stay until he were out of Office.

Downing *versus* Bayward.

(30)

Co. 7. 1.b.

Ant. 574.

ERror, For that in Faux-imprisonment in Suff. the Defendant justifies, That a Commission of Rebellion issued out of the Chancery in Midd. against the Plaintiff, directed to one B. and the Defendant, as his servant, and by his Command, arrested the Plaintiff, &c. The issue was joyned de son Tort demesne. And it was tried in Suff. and thereupon Error assigned; because this Issue ought as well to have been tried by a Jury of Midd. as of Suff. For one principal part of the Cause; viz. the awarding of the Commission is here in issue, for the root of the Justification ariseth from thence, and without that the Command is of no value. And for this cause all the Justices and Barons held it to be an ill Trial. For although the Commission be matter of Record yet it is part of the Cause, and the Jurors, who tried it, ought to take Conulance thereof, but the most apt issue had been to Travers the Record, or the matter in fait, and not both together. Wherefore the Judgment was reversed.

Walker *versus* Hancock. Trin. 42 Eliz. rot. 304.

(31)

ERror, For that in debt the Defendant pleaded the Plaintiffs Release, and the Plaintiff denied it to be his Deed. And it was found to be none of his Deed, and the Judgment was, Quod sit in misericordia: Where it ought to have been Quod capiatur. But all the Justices, and Barons held it to be well enough; because it was the Deed of another, which he pleaded, which although

thought it be false, he shall not be imprisoned: But where he denies his own Deed, it is otherwise. Wherefore it was affirmed.

Co 2.60.a.

Cantrel versus Church.

Error. For that in action upon the Case; the Plaintiff declares, that he was seised in Fee of an House and Land in D. whereto he had common appurtenant in such a place. And that he, and all those, whole, &c. had had a way from the said place, wherein, &c. And that the Defendant totaliter hath stopped up his way, whereby he could not come to his Common, but had altogether lost the use thereof, &c. The Defendant pleaded Not guilty, and found against him, and Judgment given for the Plaintiff: And Error assigned, because he ought not to have had an action upon the Case, but an Assise of Mulfance; in regard the Inheritance is in question; And so upon the first motion held divers of the Justices, and Barons: But after divers Motions and Considerations had of the books of 8 Eliz. Dy. 250.b. Ante 466.520. 11 H. 4. 2 H. 4. and others. They resolved, That the Action was well brought; for he hath Election to bring either the one, or the other. For although there had a difference been taken, where the way is so stopped up, that he loseth the use thereof altogether, and thereby his Common; there an Assise shall lie: But where it is estopped but in part, and not totally; that there an Action upon the Case lies, and not an Assise: They conceived it not to be any difference; for he hath election to have either the one or the other Action; especially as this Case is, where it appears not, that the stopping was made by him, who is the Tenant of the Free-hold; but it might be done by a stranger, who hath nothing to do with the Land; or by one, who hath but a Term therein. Wherefore they all resolved, that the Action was well brought; thereupon the Judgment was affirmed.

(32)

Gages Case.

Memorandum, Upon an Order entred in the Exchequer 12 Maii, reciting, That two parts of Lands of Thomas Gage a Reculant were seised into the Queens hands; for Non-payment of 20 l. per mensem, and he, being dead, Thomas Gage his Heir suggested, that part of that debt due by his Father was levied of the two parts of the Land; and that he had payed the residue thereof since his Fathers decease, and thereupon obtained the Order above-mentioned; surmising, that other Presidents were in the same manner in Court; that part of the debt being discharged with the profits of the Land (viz. of the two parts) and the residue being paid in; that the debt was entirely discharged, and that the Heir should have his Land again, Whereupon complaint being made betwixt Felton and Gray, and referred to the Chief Justices, and to Periam chief Baron to certify their opinions therein, they resolved, that this Order was not warranted by the Law, and was against the Statute, for the Queen shall have the two parts forfeited for Reculancy, as a Pledge, and a Nomine poenæ, and the profits thereof shall not be accompted to go to the payment of any part of the debt, but shall be retained until the debt of 20 l. by the Moneth shall be satisfied.

(33)

Lit. Sect. 327.

satisfied in some other manner, and so they delivered their opinions under their hands. And Periam said, That the Law had been taken to be so, upon former conference amongst the Justices; and that he was not privy to the entering of this Writ. Note also, That at the same time, it being questioned, whether if a Reculant, Tenant in tail, doth not pay his 20 l. for the Honeth, and two parts of his Intailed Land be seised for that cause, and he afterwards dies; whether his issue in Tail shall have the Land out of the Queens hands, before that debt be satisfied? And the said Justices conceived, that he should not. But that he ought to be charged with the said debt. Sed dubitatur.

Termino Michaelis.

Anno Quadregesimo tertio & quarto

ELIZABETHÆ, in Banco Reginae.

William Coulston *versus* Edw. Carr.

Trin. 41. Eliz. rot. 202.

Assumpt by the Plaintiff, as Executor of Tho. Coulston, (1)
 Whereas the Defendant 9 Octob. 16 Eliz. was oblig- Noy. 38,
 ed to one Ann the Wife of William Carr; by the name
 of Agnes Carr, the Wife of William Carr. in 300 l. with
 condition for the payment of such an Annuity, not
 exceeding 20 l. per annum, unto the said Ann (which
 William Carr Granted, or Debited unto her for her life) at such
 days as she should appoint; and whereas the said William Carr devi-
 sed unto her a Rent of 20 l. per annum for her life, payable at such
 Feasts, and died; and the said Ann married with Tho. Coulston the
 Testator; and they (in regard the Defendant knew, that he was
 not chargeable with the Penalty of that Bond, because that Ann
 was therein mis-named Agnes, refused to pay that Annuity) exhib-
 ited their Bill in Chancery against the Defendant, upon this
 matter: And whereas in 33 Eliz. by decree made in Chancery, it
 was ordered: That, notwithstanding this Misnomer, The Defen-
 dant should pay the arrearages of the Annuity of 20 l. per annum,
 with the Annuity it self, until the arrearages were paid which
 were due for eight years, and the Annuity it self, during her life,
 at the days mentioned in the Will; and whereas the Defendant
 had failed of the performance of this decree within two years af-
 ter the decree made, and the Testator thereupon intended
 to have taken forth an Attachment for this contempt: That
 the Defendant 7 Maii 25 Eliz. in consideration that the said
 Tho. Coulston would not take forth a Writ of Attachment for
 this Contempt; and in consideration that he promised unto him
 on the behalf of the said T. C. and Ann his Wife, That no ad-
 vantage should be taken of an Obligation of 200 l. agreed to be
 made by the Defendant for the payment of that Annuity, as long
 as the said Annuity should be paid according to the Will; and
 that the said T. and A. had consented to convey her Title of Dower
 to such persons, as the Defendant should appoint, if by the Law it
 might

might be: That the Defendant super se Assumpsit, that the arrearages of the Annuity should be paid modo, & forma sequente, viz. That the Defendant with J.S. and J.D. should make to the said T. Coult. an obligation for the payment of 40 l. of the said arrearages to the said T.C. at Christmas 1594. And that he with the said J. S. and J.D. should be obliged by several obligations to the said T. C. in several sums of 20 l. until the arrearages were paid; and that he would be obliged in 200 l. to T.C. and Ann for the payment of the said Annuity during the life of the said A. and alledges in fact, that neither the said T.C. in his life, nor the Plaintiff after his decease, had not pursued an attachment for the said contempt; and that the Defendant was not obliged for the payment of the said 40 l. & c. nor for the 20 l. & c. And hereupon the Defendant demurred. First, it was moved, That none of these considerations were of value, and that none of them were certainly alledged: As to that, that he would not prosecute an Attachment; it is not material; for it is but matter in Conscience, whereof the Common Law takes not any regard. For the staying of a Sute in Chancery, or in Court of Equity, is no consideration at the Common Law, whereupon to ground an Action. Vid. Dy. 356. But after divers arguments, and upon the President betwixt Dowdenay, and Oland, in Trin. 42. Plac. 10. in this Court, it was held; That forasmuch as the cause was well examinable, (as it was agreed by them, that it was) and for the breach whereof the party is punishable, which is to be done at the Sute of the party grieved, and by the non-prosecution of this Contempt, he had ease, and benefit: That it was a good consideration to ground this action. Secondly, they all agreed, that if two, or three considerations be alledged in a Declaration, and there be one of them sufficient, although the others be insufficient in Matter, or Form, yet the one being sufficient, it is well enough. But if two Considerations be alledged, and one of them is found false by the Jury, the Action fails. Thirdly, it was resolved, That whereas the Declaration is, That the Defendant super se Assumpsit, and mentions not to whom, nor saith & eidem Querenti fideliter promissit, as the usual course is: Yet, it being to enter into Bond to the Testator, it is as sufficient a promise to the Testator, as if it had been Super se Assumpsit prædicto, T.C. For it is tant amount. And so it was resolved in the Case between Wichhal, and Johns. But if it had been Super se Assumpsit to be obliged in 20 l. and shews not to whom, there peradventure all had been uncertain, and void. Fourthly, The Assumpsit is, That the arrearages shall be paid, modo & forma sequenti (viz.) That he with two others should be obliged, &c. It was held, That it was a sufficient Assumpsit to be obliged, although it came after the viz. But Fenner e contra therein. But, notwithstanding these Exceptions, it was adjudged for the Plaintiff.

Brown versus Street.

- (1) **A**ction upon the Case for words, Whereas the Plaintiff was the last year Sheriff of the County of Northampton, and being discharged from his Office, a Writ issued out of the Exchequer directed to the Sheriff of the County of North: to attend & execute certain

certain Services for the Queen; which Writ was delivered to the Defendant, to deliver to the said Sheriff: Which he not delivering, the Plaintiff thereupon sent one White-acres (his Servant) unto him, for the Writ, to deliver it unto him; or that he himself would deliver it to the Sheriff: That the Defendant said unto him Your Master must not look to have such Hudling and Shuffling up of Matters this Year, as he had the last Year. After Verdict, upon Not Guilty pleaded, it was found for the Plaintiff: And, upon motion in Arrest of Judgment, resolved, that the Writs were not actionable; and adjudged for the Defendant.

Rippon versus John Norton.

Assumpsit. Whereas there were debates betwixt the Plaintiff, (3)
and one Rich. Norton Son of the Defendant; and the said
R. Norton had assaulted the Plaintiff, and beat him at N. in the Yelv. 1. 2.
County of Northampt. whereupon he complained to Sir Anthony Post. 881.
Mildmay, a Justice of Peace there, and required the Peace, and
made Oath, &c. That the Defendant knowing thereof, in con-
sideration the Plaintiff would desist his complaint, and that his
said Son should not be vexed for that cause, assumed to the Plain-
tiff, that the said R. N. his Son should keep the Peace against
the Plaintiff, and Walter Rippon, the Plaintiffs Son; and alleg-
eth in fact, that he thereupon desisted his Complaint; and that
the Defendants Son was not vexed, &c. And yet notwithstand-
ing that the said R. N. the Defendants Son had assaulted the said
W. R. his Son, and beaten and wounded him, whereby he lost
his service, and was at great charges in his Cure, whereupon
he brought this action. The Defendant pleaded Non Assumpsit, &
found against him, to his damage of 20 l. and it was now alleg-
ed in Arrest of Judgment, that an Action lies not for the Fa-
ther; because the Battery of the Son is not any ground of action
to the Father, unless he had shewn, That he was his Servant
which is not done. And to this purpose was cited the Case be-
twixt Lever and Haws, Hill. 41. Plac. 11, where one promised to the
Father, to give 100 l. to his Son in Marriage with the Defen-
dants Daughter, in consideration of a Joynture assured by the
Plaintiff. The action being brought by the Father for non-pay-
ment of the 100 l. to the Son, it was adjudged not to be main-
tainable. So here, because there is not any damage to the Fa-
ther, by the Battery to the Son, an action lies not for the Fa-
ther. And although it were objected, that the Father was at the
charge for the curing the Son of his Wounds, yet because it
was a thing he was not compellable unto, it is no cause why he
should maintain this action. Wherefore by all the Justices (it
being moved at several times) it was adjudged for the Defen-
dant. Vide postea Pasch. Plac. 13, Ant. 369.
Ant. 619. 652.
Ant. 369.
Post. 881.
Yelv. 1. 2.

Hutton versus Hun.

Trespas. At the Nisi prius fifteen Jurors appeared, and all (4)
were challenged propter Hundred. And thereupon Tales de
circumstantibus was awarded, and upon it four Hundredors
were sworn. And then it was resorted to the Principal Pa-
nel, and eight of them were sworn, and found for the Plain-
tiff,
D q q q q

ill. And it was now moved in arrest of Judgment, that this Trial was ill: For by the Statute 27 Eliz. there needeth not above two Hundredors, then the Trial, by more of the Tales then it ought to be, there being sufficient of the principal Panel, is ill. And of that Opinion were Gawdy and Clinch. Fenner doubted thereof. Popham was absent: Wherefore Adjournatur, and in Pasch. 44 Eliz. and it was moved again, and for this cause resolved to be an ill Trial. And a Ven. fac. de novo was awarded.

Michel *versus* Woodroff. Hill. 41 Eliz. rot. 449.

- (5) Error of a Judgment in Lynn-Regis. The Error assigned was; because the Court was holden before J. S. Mayor, and John Harvard, and two other Capital Burgesles. And, the Parties being at Issue, it was tried by Verdict, and found for the Plaintiff. And this John Harvard who was one of the Judges, was one of the Jurors also. And the Defendant pleaded *In nullo est erratum*. And all the Court, absente Popham, held it to be erroneous, being confessed, by pleading *In nullo est erratum*, to be one, and the same Person. Wherefore, by the assent of Defendant in the Writ of Error, it was reversed for this cause.

Shaw *versus* Cutteris. Trin. 41 Eliz. rot. 1158.

- (6) Debt against an Administrator, upon a Judgment against the Intestate in the Common Bench. The Defendant pleaded, That after the Judgment the Plaintiff sued there against the Intestate a Capias ad satisfaciendum, and thereupon an Exigent, so as the Intestate was outlawed, and that afterwards he sued a Capias Utlagatum, and thereby he was taken and died in prison. Et hoc, &c. And hereupon the Plaintiff demurred. First, It was moved, whereas the Intestate was taken by a Capias Utlagatum, whether it should be said to be an Execution for the Plaintiff, without the Plaintiffs prayer to have it so? And Popham and Fenner held, that it was not: For it is a Writ for the King, and the Writ is *Ad recipiendum quod Curia consideravit*. So although the Plaintiff sues it out, yet it is not any Election in him to have the party in execution, until he prays it, and the Court awards it. But, before his prayer, he is in Execution at the Plaintiffs Election: So that if the Sheriff suffer him to go at large, before the Plaintiff hath determined his Election, it is an Escape against the Plaintiff, if he will, and he might have Debt thereupon. Gawdy doubted thereof, for he conceived, that in regard the Plaintiff hath pursued his Capias Utlagatum, although it be a Writ for the Queen, yet, being at his Suite, the Law shall adjudge it to be an Execution for him without other prayer. Secondly, It was moved, admitting, That it was an Execution for the Plaintiff, without other prayer, whether, the party in Execution dying before satisfaction made, he may now have a new Execution of this Judgment? And all the Court held, that he could not: For although it were said, that he had his Body in Execution, but as a pledge for his Debt, and the party dying, the Debt is never a whit the more satisfied; and if two be taken in Execution, and one of them dies, the other shall remain in Execution: For the Debt is not satisfied by his death;

As

2 Cr. 136. 143.
1 Rol. 895. 902.
3. 4. 12.
2 Rol. 806.

Co. 5. 88. b.
Post. 910.
Ant. 706.

Co Lib. 5. 87. 2.
Hob. 59.
2 Cr. 143.
1 Rol. 903.
1 Cr. 75.
2 Cr. 143. 338.
136.
Hob. 59.
F.N.B. 246. b.
136.
Ant. 478.

As 33 H. 6. 48. is, and it was so cited to be adjudged 26 Eliz. in the Common Bench, betwixt Jons, and Wilcoks: Yet they held, That in regard the Plaintiff hath elected this Execution (which is the highest Execution) and the Defendant died therein; The Law will adjudge it as a satisfaction, when there is but one, who is taken. But where two are condemned, the taking of one in Execution, and his death, is no discharge for the other. Vide N. Br. 246. 47 Ed. 3. Execution 41. Thirdly, it was moved by Noderidge for the Defendant (which he only insisted upon) That for as much as the Intestate is pleaded to be Outlawed at the time of his death, which is yet in force, as it was averred, and as by the Demurrer it is confessed, that the Administrator is not chargeable, for he cannot have any Goods to satisfy any Debt: Yet all the Court resolved, that it was not any Answer; for he might well be Administrator to a Person Outlawed, who might have Goods, which were not forfeited; as Debts upon Contracts, or Goods taken for Trespasses before Outlawry, he may have Trespass, and Recover the value of the Goods, which should be Assets in his Hands. Wherefore they resolved, that the Plaintiff should have Judgment, unless other matter were shewn, &c.

Co. 5. 86. 6.

1 Rol. 903.

2 Cr. 143.

1 Rol. 912.

Ante 575.

West versus Lassels. Trin. 43 Eliz. rot. 243

DEBT upon a Lease for years, and Declares, That one Remington was seised in Fee, and Lett it to the Defendant for years, rendering Rent of 40 l. per annum, and held it of the Queen by Knights Service in Capite, and that he devised it, and died, his Heir within age. Whereupon the Queen, under the Seal of the Court of Wards, granted unto him the third part of the Reversion, and Rent, durante minore etate of the Heir; And for three years Arrear he brought the Action. And upon this Declaration it was demurred: First, Whether a Lease for years durante minore etate, may be under the Seal of the Court of Wards, or ought to be under the Great Seal. And the Court held it to be well enough under the Seal of the Court of Wards, and so hath ever the practise been since the erection of the said Court: And they held, That a Lease of the Land might well be before Office; But of the Body it cannot be granted, but under the Great Seal, and after Office: But an Office finding the Tenure in one County sufficeth; And for the other Counties, it sufficeth, to add them by Survey, for it is only for the Governance of the Land. Secondly, It was held, That the Rent might well be apportioned, and divided; For it is a Contract real, which is well apportionable: For if the third part of a Reversion be granted of a Lease for Life, or years, and the Tenant attorns, the Rent is apportionable, and he chargeable to two Distresses by his own Act; As 5 Ed. 3. Quid Juris clamat is. So upon the Queens Grant, where Attornment is not necessary: For the Law is as if there had been Attornment. Vide 9 Eliz. Dyer. 263, & 326. where a Rent shall be apportioned by Act in Law, and Collings, and Hardies Case, quod vide ante, and Bracebridges Case in Plowd. Wherefore Rule was given, That Judgment should be entered for the Plaintiff, unless, &c. But at another day, for an Imperfection in the Declaration, the Judgment was stayed. Note, It was held in this Case, that a Lease of the Wards Land made by

(7)

Ant. 652. 772.

Cor. Litt. 148. a

2 Inst. 504.

Ant. 651.

Ant. 606. 7. 772.

Ant. 651.

the Queen, before Office found, was good: The Statute of 8 H. 6. & 18 H. 6. is, That those Estates do not extend to Leases under the Seal of the Court of Wards, by vertue of the Statute of 32 H. 8. And so the Law hath been construed to be since the Statute.

Boles versus Lassels. Trin. 42 Eliz. rot. 107.

(8)
Noy. 59.
1 Rol. 807.8.

Action upon the Case against a Sheriff. Whereas he had sued a Latitat against J. S. directed to the Sheriff of the County of Nott. which Writ was delivered to the Defendant, being then Sheriff to execute, by force whereof he arrested the said J. S. and let him at large, and yet notwithstanding returned Languidus in Prisona, whereby he was delayed in his Sute, &c. The Defendant confesseth the Receipt of the Writ, and the Arrest: But that he afterwards let him at large upon Bail, according to the Statute of 23 H. 6. Et hoc, &c. And hereupon the Plaintiff Demurs; because he answers not to his false return, that he was Languidus, &c. But the Court held it to be well enough: For when he executed the Writ, and took Bond according to the Statute, (which he was compellable to do) and returned, that he took him, it is not material to the Plaintiff, although he returns Languidus, &c. For that is only for his excuse, that he had not the Body, and he is only finable by the Court, if he brings not in the Body, and the Party shall not have any remedy against him. Wherefore it was adjudged for the Defendant.

Ant. 624.

Blackbourn versus Michelbourn. Mich. 42, & 43 Eliz.
Rot. 1073.

(9)
Noy. 39.

Debt upon an Obligation of 40 l. made to the Plaintiff, as Sheriff of Norwich. The Defendant pleaded the Statute of 23 H. 6. and that by vertue of a Latitat, at the Sute of J. S. he was arrested, and this Bond was made to the Plaintiff for the appearance, according to the Writ by the Defendant, and one May; The Defendant, nor May, having any thing within the County; nor being Inhabitants within the County, and so the Bond void: Wherefore, &c. And it was thereupon demurred, and now argued for the Defendant, That this Bond is not according to the form of the Statute, and therefore void: For it ought to be of Persons, having sufficient within the County; for that it is as well for the benefit of the Party Plaintiff, as of the Sheriff; For otherwise the Plaintiff should never have any appearance, and of that Opinion was Montague, in Dive and Mannings Case. But all the Court held the Bond to be good enough, notwithstanding this Exception: For the Statute doth not make void any Bonds, but what are made in other manner, in oppression to the People, which the Statute appoints shall be void. And the Words, In other Manner, and Form, are to be intended of the Matter of the Bonds, as to the Sheriff, and not for the sufficiency of the Sureties: And therefore, if he takes Bond with one Surety, it is good enough, and not against the Statute, and to that purpose the Preident of Sir Gervale Cliftons Case (quod vide ante) was shewn, which the Court held to be all one with this Case: For there one of the Sureties was insufficient, and here both: Wherefore Rule was given to have Judgment entered for

Ante. 808.

for the Plaintiff. Sed postea adjournatur until the next Term, and afterwards adjudged accordingly, Mich. 43, & 44. C.B. Plac. 38.

Dighton *versus* Bartholomew. Pasch. 42 Eliz. rot. 269.

Error of a Judgment given in Natio habendo. The Error assigned was; Because the Plaintiff, tempore judicii rediti, was an Infant, and appeared by Attorney, and not by Guardian, or Prochein-amy, and the Defendant pleaded thereto In nullo est erratum. And the Court doubted, whether it could not be assigned, the Plaintiff at present being of full age, so as his Nonage could not appear upon view. A second Error assigned was; Because Judgment final was given, whereas the Plaintiff never declared, but was Non-sued before the Declaration. Quare,

(10)

Perkinson *versus* Bowman.

Action for these Words, Thou hast made false Writings thereby to get my Land from me. After Verdict it was moved, That an Action lay not for these Words: For it is not an express Averment, That he forged any Writings; And false Writings may be Miniments without Seals, for which one is not punishable as a Forgerer. And of that opinion were Gawdy, and Clinch: But Fenner e contra; Because he cannot get Land by them, unless they be forged Writings. Adjournatur.

(11)
Post. 881.

Bond *versus* Tricket. Trin. 43 Eliz. rot. 564.

Replevin. Upon Demurrer the Case was; That a Parson, having a Benefice of the value of 8 l. per annum, took a second Benefice without any Dispensation, and the Queen presented by Lapse. And all this being disclosed by pleading, the principal Question was; it being averred, that it was of the annual value of 8 l. and not averred, that it was of such value in the Queens Books. Whether that were sufficient? Popham, Gawdy, and Clinch held, That it was sufficient to aver it to be of the annual value of 8 l. which shall be taken to be according to the true value thereof. Although it was said, that there hath been two Taxations of Benefices: The one in the time of Ed 1. The other in Anno 26 H. 8. where the Tenths, and first Fruits were given to the King, and according to this Taxation the value shall be adjudged. But the Court said, They took not only Conulance thereof, but regarded only the true value Vide 7 Eliz. Dyer 237. Secondly, It was moved, that the Statute of 21 H. 8. is miscited: For it is recited to be made at Westminster, whereas it was begun in London, and so it ought to have been pleaded, unless there had been divers Sessions, wherein Bills had been Signed; as 33 H. 8. B. Parliam. 86. The Court said, That as to that they would advise, and see the Roll, whether it were so, Et ideo Adjournatur.

(12)
Noy. 38.

Percival Willoughby *versus* Egerton.

Error of a Judgment in Chester. The Errors assigned, First, because, the Parties being at Issue, a Ven. fac. was awarded to the Sheriff: And at the Day of the return it was entred, Quod Vicecomes non misit Breve. And then the Plaintiff prayed a Ven. fac. to the Coroners, for Cousinage betwixt him and the Sheriff which was awarded accordingly: And, at the day of the Trial, the Defendant made Default, and Judgment was given, &c. The first Error Because, that after the Plaintiff had admitted the Sheriff to Execute the Writ, he could not pray a Ven. fac. to the Coroners, without some cause de puisne temps. Sed non allocatur; because

(13)
Cr. 35.

cause there was nothing done upon the first writ, and it is not now material, having made default. A second Error was because the Judgment appears to be in a Formedon, upon Default of the Tenant: And yet the Entry is not, Ideo recuperet per defaultam as the course is, that it ought to be: And as to that the Court would advise, Et adjournatur.

Geeve *versus* Copshil. Mich. 41. & 42 Eliz. rot. 85.

(14)

Action for these Words, Thou art as Cozening a fellow, as any is in the Country: The last time thou wert Under-Sheriff, as now thou art, thou didst serve an Execution for a neighbor of mine, and didst keep the Money in thy hands. Hereupon the Defendant Demurred, and, after Argument at the Bar by Snag for the Plaintiff, it was adjudged Maintenance, That the Words were not Actionable: For, for calling one Cozening fellow an Action lies not. Then the last Words be not Actionable; For it is not expressed how long time he kept the money in his hands, and it may be he kept it only but until return of the writ, or by assent of the Party Plaintiff. Wherefore it was adjudged for the Defendant.

Wright *versus* Wheatley.

(15)
Noy. 37.

Ejectione firmæ de pomario. After Verdict it was moved, That an Ejectione firmæ lies not thereof, no more then a Præcipe quod Reddat. Sed non allocatur; For this Action is but personal, wherein Damages are the principal: And although it is usual in this Case to award an Hab. fac. possessionem, yet it is well enough, and compriseth sufficient certainty. Wherefore it was adjudged for the Plaintiff.

Ant. 622.

Burper *versus* Baker. Trin. 42 Eliz. rot. 1308.

(16)

Trespas of assault, Battery, and Wounding. The Defendant Quoad the Wounding pleaded Not guilty: Quoad residuum justifies by Warrant to Arrest. The Issue was de son tort Demesn; and as to that the Jury found, That he assaulted, Beat, and Wounded him de son Tort demesn, and finds not any thing upon the Issue Not Guilty by it self, but included it in the former Verdict. And whether it were a good Verdict, or not: Was the Question: And resolved to be good enough.

Folt. 866.

Wood *versus* Reingold. Ante, Trin. 42. Plac. 3.

(17)
2 Rol. 793. 4.
Ante 764.
2 Cr. 168.

The Case was now moved again, and Gawdy, Popham, and Clinch held, That the Lease made (whereout the Use did arise) was good, and should bind the future use, as a Lease by Feoffees made upon good consideration shall bind cestuy que use at the Common Law, but it shall not destroy the whole future Use: But shall stand for the Free-hold, because the Seisin is not changed. And Popham said, That he had conferred with divers of the other Justices at Serjeants Inn, who agreed in this Opinion. But Fenner e contra; Because the Lease did not disturb the Free-hold, when the Use is executed, this shall relate to the Limitation, and shall bind all mean acts, and therefore shall not bind the Feme, as to her Joynture. Wherefore it was adjourned.

2 Cr. 169.

Burky (an Attorney of this Court) *versus* Challenor.

(18)

Trespas of an Ox taken at D, in Comitatu Kancie. The Defendant Justifies, because the Land is holden of him, as of his Manor of Walked in the County of Sussex; and that the Custom there is, that every Tenant should pay the best Beast for an He-riot, and that the Lord might Seize it in any place, &c. The Issue

due

sue was upon the Custom, and a Ven. fac. was de vicineto of the Hannoꝝ, and found for the Plaintiff; and now Exception taken: because it ought to have been awarded as well from the Landholden, as from the Hannoꝝ. Sed non allocatur: For the Issue being upon the Custom, the Venue shall be from the Hannoꝝ only, and it was thereupon adjudged for the Plaintiff. Ant. 620.

Parflow versus Corn. Trin. 42 Eliz. rot. 641.

T Respass. Upon a Special Verdict it was found, that the Queen made a Lease for Life to the Plaintiff of an House and Land in D. in Comitatu Salop, rendering Rent to the hands of the Bailiff of the Hannoꝝ, or to the Receiver for the County, with a Condition upon non-payment of the Rent within forty days, &c. that it should be void: And that a Commission under the Erchequer Seal was awarded to Commissioners of the County of Middlesex, to enquire there of the payment of this Rent; reciting therein the Lease to be of an House cum pertinentiis, and mentions not any Land. The Jury found, that the Rent was not paid by the Lessee; and that the Queen, upon this Inquisition returned, made a new Lease to the Defendant, who entered. Et si, &c. First, It was moved by Harris for the Plaintiff; that this Commission to enquire of a Rent reserved upon the Lease of an House cum pertinentiis, is not sufficient to enquire of this Lease made of an House and Land, &c. Secondly, it is found, that the Lessee did not pay it: And it may be, that it was paid by his Assignees; and so it is not precisely found, as it ought to be: For, if it were paid by his Assignees, the Estate is saved. Thirdly, This Inquisition found in Middlesex, and by Commission under the Erchequer Seal, is not sufficient to find a Condition broken of Lands in the County of Salop, upon a Lease for Life, as the better Opinion was in a Case, Pasch. 27 Eliz. rot. 127. in the Common Bench, between Knight and Breech; wherefore, &c. Popham, Clinch, and Fenner, (absente Gawdy) agreed, for all the Exceptions with the Plaintiff, and principally for the last: For, it being a Lease for Life the Queen cannot be entituled thereto, unless by Office found in its proper County to avoid it. But such a Condition reserved upon a Lease for years may be found by Office in another County, and it is but an Office to inform the Queen, which in whatsoever County found is sufficient. And this difference was agreed by all the Justices in the Case of Sir Thomas Hennage. Whereupon it was adjudged for the Plaintiff. (19)

Mo. 199.
Co. 5. 54. b.

Ant. 221.

Kilbourn versus Trot.

Error of a Judgment in the Common Bench, in a Scir. fac. upon Bail. The Error assigned; because the action was brought for 23 l. 18 s. and the bail was bound in a Reconuſance of 23 l. 18 s. according to the course of the Court. The Judgment being against the principal, and he not rendering his body, a Scir. fac. issued against the bail; supposing it to be for 23 l. 10 s. 8 d. and so mistook the Sum. And for this variance it was held to be a manifest Error, and not amendable. Wherefore it was reversed. (20)

Atwaters

Atwaters *versus* Birt.

(21)
1 Rol. 331.
Noy. 38.

Ant. 26.

R. 604.
Dyer 96. a.

Ejectione firmæ. Upon a Special Verdict the Case was: One Robert Stanton, seised in Fee of the Land in Question, infeoffed thereof Thomas Molyns and three others, to the use of himself for Life, and after to the use of Richard his second Son in Tail, Remainder to George his eldest Son in Tail, Remainder to his right heirs: with a Proviso, That if he paid 12d. at any time to the said T.M. and the three others, and good, and sufficient cause was shewed unto them by the said R.S. the Father, of the abuses by Richard the Son, and that so by the said T.M. and three others (reciting their Names) shall be thought convenient, That then the foresaid uses shall cease, and then to be to the use of him and his Heirs. The one of the four Feoffees died, He paid the 12 d. to the other three, and shewed cause of abuse by Richard his Son, which was approved by the three: And then declares by a new Deed, that the said T.M. and the other two Feoffees, for good consideration expressed in the Deed, should stand seised of the said Land, to the use of himself for Life, and after to new uses, &c. And, whether these uses should take effect, or not? Was the Question. First, Whether this be a good revocation of the first uses, one of the Feoffees being dead? Secondly, admitting, that they be revoked, whether it be a good new limitation of the last uses? And as to the first all the Court resolved, that it was not a good Revocation: For it is but an authority, which is given to revoke, and it is to be done by the assent of the four, and any of them being dead, the authority is determined, and shall not survive, And for this reason, as Popham said, the Common Law before the Statute of 21 H. 8. was, that if one devised his Land to four to sell, and one of them dies, the Survivors, because they have an Interest, may sell: but if he had devised, that three should sell his Land, and one of them dies, the Survivors, because they have but a meer authority, cannot sell. Vid. 49 Ed. 3. 16. 2 Eliz. Dyer 177. 189. 217. Secondly, Admitting, that the first uses are well revoked: yet they held, that this second Indenture is not a sufficient Limitation of the new uses, and raising of them: For, although the consideration therein be sufficient (viz. blood and affection) yet he doth not covenant to raise them out of his own possession: But that his Feoffees shall be seised, &c. and none other, but they shall stand seised, And he hath not any Feoffees, and therefore no use can arise. And although it were said, that it shall be expounded as a Will, according to the intent of the parties, forasmuch as he hath not Feoffees, that he himself shall be seised, &c. It shall not be so in Construction of Deeds: and so there did not any uses arise, and therefore the Lessor of the Plaintiff hath not any Title. Whereupon it was adjudged for the Defendant.

Pursand

Pursand versus Whytier.

DEtinue for an Obligation of 200 l. The Defendant pleads, (22)
 That the Obligor and Obligee delivered it unto him sub
 certis conditionibus custodiend. and he knows not whether they be
 performed, and prays Garnishment, &c. The Plaintiff Traverses,
 that it was not delivered sub certis conditionibus, &c. And they were
 thereupon at Issue, and found for the Plaintiff. It was moved
 in arrest of Judgment, that the Trial was ill; for the Issue sub
 certis conditionibus is uncertain: As also, because there was not Gar-
 nishment before the Trial of the Issue. Sed non allocantur. For, as to
 the Issue, it is helped by the Statute of Jeofayls. Wherefore Rule
 was given, that Judgment should be entered for the Plaintiff.

Robins versus Franks, Trin 43 Eliz. rot 2061.

Action for these words; Thou art a Rogue, and a Thief. After Ver- (23)
 dict, it was moved in arrest of Judgment, that an Action
 lies not for these words; for they are too general. But the Court
 held, that for the word Thief, it is maintainable, unless it be coup-
 led with other words, which prove it to be no Felony intended.
 Wherefore it was adjudged for the Plaintiff.

Garford and his Wife versus Clerk and his Wife.

Action; For that the Defendants Wife spake of the Wife of (24)
 the Plaintiff quædam falsa, & scandalosa verba, quorum Tenor sequi-
 tur in hæc verba; Thou art an arrant Whore, & an old worm-eaten Jade, &
 one of thy sides hath been eaten out with the Pox. The Defendants
 pleaded Not-Guilty, and found against them. And it was moved in
 arrest of Judgment, that the words should not maintain an Action,
 and that the Declaration was not good; because it is not an
 expresse Allegation, that she spake the same words. And for this
 Cause, the whole Court held the Declaration to be ill; for some
 thing might be omitted in the Quorum Tenor, &c. which was within
 the words which would cause the words not to be Actionable; and
 although it be an usual Course to plead a Deed, or Record, Cujus
 Tenor, &c. That is, because the Deed, or Record might be viewed,
 whether it agrees with the Recital. Wherefore the Judgment
 was stayed. But as to the words themselves, the Court held
 them to be Actionable.

*Riddlefden versus Cicely Wogan, alias dict. Cicely, late**Wife of John Inglebert, Trin. 43 Eliz. rot. 145.*

DEbt upon an Obligation. The Defendant pleaded, that (25)
 at the time of the making of the Bond he was wife to John
 Inglebert, who as yet in plena vita existit; Et sic non est factum, &c.
 The Plaintiff shews, how that after this Bond made, there
 was a Sute in the Spiritual Court, concerning the Marriage
 between

R r r r r

between the said Inglebert, and the Defendant; And, for that he had another Wife alive at the time of the Espousals with the Defendant, the Defendants Marriage was by Sentence adjudged void, and to be Null, and avers the Life of the first Wife at the time of the second Marriage with the Defendant. And it was hereupon demurred, and adjudged for the Plaintiff; For this Divorce is but Declaratory, because the Marriage was meerly void, and therefore there needed not any such sentence of Divorce; for it was void ab initio, and the always sole. Wherefore it was adjudged for the Plaintiff.

Barnes versus Greenwel. Trin. 43 El. rot. 1447.

(26)
1 Rol. 257.
Hob. 190.
1 Cr. 216.

DEbt upon an Obligation conditioned to stand to the Award of certain persons, of all Sutes, Quarrels and Controversies stirred, and depending, untill the day of the date of the Bond (which was 4 Sept. 42 Eliz.) so as the Award be made of the Premises before such a day. The Defendant pleaded, Quod nullum fecit Arbitrium, &c. The Plaintiff shews, that they made an Award of all matters untill the third day of Sept. And hereupon Issue was joyned, that no such award, &c. and found for the Plaintiff. And it was now moved in Arrest of Judgment, that this Arbitrament was void; because they had not pursued their Authority, which was to make an end of all matters, until the fourth day of Sept. and they made their award only of matters until the third day of Sept. And there is not any Averment taken, that these were all the matters depending at the time of the Obligation made. But the Court held it to be well enough; for Now depending cannot be, unless they had been in Sute before the fourth day; for it cannot be said to be begun, and depending, all upon the same day; And it shall not be intended, that there were any other matters depending, unless they had been shewn. But if Arbitrators award for one thing, and say, that they will not meddle with the rest, all is void, because they have not pursued their Authority. Wherefore it was adjudged for the Plaintiff.

Ant. 301.
1 Cr. 216.
Ante. 344.
301.
Hob. 199.
Mo. 885.
Mar. Arb. 186.7.
Co. 8.98. 2.
2 Cr. 353.

Godfrey versus Woodward and Woodward, Executors.

(27)

DEbt upon an Obligation of 100l. The one of the Defendants was outlawed, the other pleaded, that he, who was outlawed, was made Executor, and solely proved the Will, and Administred, and that the Defendant, as servant unto him, took divers of the Testators Goods by his delivery, and by his Appointment had sold them, Absque hoc, that he administred, as Executor, or in any other manner. And it was thereupon demurred, and adjudged to be an ill Plea; because he doth not say, that he refused before the Ordinary, nor confesseth any Administration; for that, which he confesseth, is not any Administration, and so no answer to the Plaintiff. Wherefore it was adjudged for the Plaintiff.

Clerk.

Clerk *versus* Palady. Trin 40 Eliz. rot. 544.

A *Sumpsit*. In Consideration, that he would permit the Defendant to enjoy such Land for a year, the Defendant assumed to give 10*l.* unto him for that year, and alledgeth in fact, that the Defendant enjoyed it by his Permission, &c. After Verdict, it was moved in arrest of Judgment, that the Action lay not; because it is not shewn what Right or Title he had to the Land to Licence the Defendant to enjoy it, otherwise there is not any Consideration or cause of Action; and for this cause the Court held it to be ill: As also, for that if it had been sufficiently alledged, then it had been a Demise, and an action of Debt, and not an *Assumpsit* had then lain upon it. Wherefore the Judgment was stayed. (28)

Ant. 242. 786.

Harvy *versus* Newlyn, Trin. 43 Eliz. rot. 1842.

Action upon the Case. Whereas Sir James Allington was seised in Fee of the Mannor of Milbourn, and of another Mannor, and granted to the Plaintiff by Deed to be his Bayliff of the said Mannor for his Life, and that the Defendant had distrubed him in the said Office, viz. in his Collecting of Rents, viz. of the Rents of J. and D. &c. The Defendant confesseth the Seisin of Sir James Allington, and his Grant to the Plaintiff, but that afterwards he sold the said Mannor to J. S. who appointed the Defendant to the Bayliff there, whereupon he collected the Rents, &c. And it was thereupon demurred, and all the Court were of Opinion, that the Purchaser of the Mannors might discharge the Plaintiff, and revoke that Grant, although it were for Life; because he sheweth not that there was any Fee granted for the Execution thereof, nor that he had any other Profits by exercising of it; For without Profit it is but an Office of Trouble, and then the Plaintiff hath not any cause to complain, when he hath not any Loss: but if he were to have had a Fee, or other Profit in certain for executing thereof, it had been otherwise. Wherefore it was adjudged for the Defendant. (29)

Ante 335. 6.

Gybson *versus* Brook Executor of Brook,

Trin. 43 El. rot. 1822.

Debt. Upon Demurrer, the Case was; Gybson had a Judgment against Brook, as Executor, to recover 60*l.* de Bonis Testatoris, and 6*l.* for Damages de Bonis Testatoris, si, &c. Et, si non de Bonis propriis. Whereupon a Fieri fac. was awarded, and the Sheriff returned Nulla habet Bona. And afterwards upon a Testatum, that the Executor had Assets in London the day of the Writ purchased, which he had since wasted, a special Fieri facias was awarded to the Sheriff of London to enquire thereof, who returned an Inquisition, whereby it was found, that he had Assets upon the day of the Writ purchased, and that he had wasted them, whereupon a Scire facias was awarded against the Executor. (30)

Owen 132.
Post. 886.

Ann. 530.
1 Cr. 519.

R r r r 2

Quare

Quare Executionem habere non debet de Bonis propriis Defendentis. The Defendant quoad the 6 l. for the Damages confessed, the Plaintiff ought to have Execution; And quoad the 60 l. Quod plene Administravit before the day of the first Writ purchased, Et quod non convertit bona, &c. ad usum suum proprium. And it was hereupon demurred, and resolved, that this Return and Inquisition taken by the Sheriff shall not conclude him, but that he may well travers it: for otherwise he should be without remedy; For he cannot have an Action upon the Case against the Sheriff, for he returned but that which was found by the Jury. And an Attaint lieth not; because it is but an Enquest of Office, and he is brought in by a Scire facias to Answer, and other answer he cannot have. And as to the double-ness of the Plea, whereto Exception was taken, it was held to be single enough; for there be two matters objected unto him, both which he ought to answer. And the Plaintiff hath Election to take Issue upon any of them. Wherefore it was adjudged for the Defendant. Note, That the Case of Wiltney, and Whitmore, in 33 Eliz. in *Banco Regina* was cited to be adjudged accordingly.

Johnson *versus* Burton, & Shut.

Trin. 43 Eliz. rot. 1041.

(31)

Ant. 842.

TRESPASS of Battery in such a Parish, and Ward in London. The Defendant Justifies in the County of Cambridge, and arresting him there by Warrant from the Sheriff there, and Traverseth the Battery in the Parish, and Ward in the County mentioned: And for this cause it was demurred, and adjudged for the Plaintiff, that the Travers was ill to Travers the Place, but he ought to have Traversed the County.

Austen *versus* Willward, and two others.

Hill. 43 Eliz. rot. 1694.

(32)
Co. 11, 7. 2.

2 Cr. 118.
1 Cr. 243.
Co. 11. 7.
1 Cr. 55.

TRESPASS of Battery. Two of the Defendants plead de son Assault Demesn. The third pleaded Not-guilty. Both Issues were found for the Plaintiff, and several Damages found against them, who pleaded severally, and Ruled to be ill: For it is one joynt and entire Offence by the Plaintiffs Action; And when all are found equally guilty, the Damages ought to have been entire. But if in Trespass against divers, the one be found guilty in part, and the others in all, there the Damages shall be several. 2 H. 4. 11.

Monnop *versus* Thomas. Pasch. 43 Eliz. rot. 837.

(33)

SECONd Deliberance upon a Distress taken for an Amercement in a Leet. The Parties were at Issue, whether C. and H. were Afferratores Curie predictæ, and tried per pais. And for this Cause Exception taken; For it was said, that it ought to have been tried by the Record: And of that Opinion was the Court

Court upon the first Motion; because a Lete is a Court of Record. Vid. 27 H. 6. Trial 11.

Taylor versus How.

Action for these Words, He (innuendo the Plaintiff) is not worthy the Office of a Constable; For he, and his Company, the last time he was Constable, stole five of my Swine, and eat them. After Verdict for the Plaintiff, It was moved by Yelverton, That the Declaration was not sufficient; For the words, He is not worthy, &c. may be spoken of any other, and the innuendo will not help it; Also he doth not say, that he spake the words, in præsentia, & auditu aliorum, and if it were otherwise, it is not any slander. But all the Court held, that the Action well lay; For hic & ille make a Demonstration, what person he intended; and it is also alledged, that he spake de Querente those Words, &c. The word also Quod palam, & publice promulgavit, simply, quod fuit in præsentia, & auditu, &c. For it is not palam, unless it be in in præsentia, & auditu aliorum. Wherefore it was adjudged for the Plaintiff. (34)

Johnson versus Barley.

Grantee for life of a Rent takes a Lease for five years of the Land, the five years expire. The Question was, Whether the Grantee might afterwards distrain for the Arrearges incurred during the five years? And all the Court held, that he could not. (35)

Sir Hugh Portman versus Sir Gervase Clifton.

IT was held by the whole Court, That upon a Warrant against Feoffor, and his Heirs, or J. S. and his Heirs, or the Grandfather, or great Grandfather of the Feoffor, and his Heirs, no Warrantia Chartæ lies, unless that Dedi be within the Deed, which implies a general Warrantia, Post. 864. (36)

Goodman versus Fountain. Hill. 43 El rot. 2709.

Assumpsit. Whereas on the second of July, 42 Eliz. in Consideration of 6. pence given by the one to the other, they assumed, &c. to stand to the Award of J. S. for all Matters and Controversies depending between them, so as the Award be made before the last day of Septemb. following. And alledges in fact, That J. S. 20 Septemb. 42 Eliz. made an Award de, & supra præmissis, viz. That all Actions and Controversies betwixt them should cease and the one should pay to the other 40 s. &c. Upon Non assumpsit, pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment, that this Arbitration was void; Because the Award is made of more, then was submitted; For nothing was submitted, but the Actions, and Controversies depending at the day of the Submission, and they have made an Award for Controversies depending at the day of the Award, which is long time after. But without Argument (absente Anderson) it was resolved to be good; Because it is de, & supra præmissis, which were the things, whereof the Submission was; And although the Award seemeth to extend to (37)

1 Rol. 258.

Ante 13. 344.
Co. 10. 132.

Ant 344.
2 Cr. 359

to

to more then the Submission, yet the words, de & supra præmissis, restrain it to the thing submitted. Wherefore it was adjudged for the Plaintiff.

Cotton *versus* Wale. Hill. 38 Eliz. rot. 1603.

(38)
Moor. 636.
2 And. 175.
St. 23 H. 6. c. 19.

Ant. 808.

DEbt upon an Obligation of 40 l. made unto the Plaintiff, Sheriff of the County of Cambridge, for the appearance of a Stranger arrested upon a Capias out of the Common Bench. The Defendant pleaded the Statute of 23 H. 6. cap. 10. and, that he had not sufficient within the same County, and therefore the Bond was void. And it was thereupon demurred, and, after Argument, the Obligation was adjudged to be good enough; for at the Common Law the Sheriff was not compellable to take Bayl of any; And the Statute compells him to Lett to Bayl, so as Sureties sufficient within the same County be tended him. But that is for his own Indemnity, that he may have the body of the Prisoner at the day, otherwise he is amerceable, and he by this means may have recompense against the Sureties; so the sufficiency of the Sureties is only for his benefit, which he may waive, if he please, and may take what other Surety he thinks fitting; and therefore it hath been adjudged, that if he takes but one Surety, it is well enough, and that is the benefit of the Party arrested: And therefore it is not reason, that the Obligation should be void for this cause; and the Statute is, That any Obligation, taken in any other form then is there prescribed, shall be void for this cause; within the Statute are three forms to be observed. First, That it shall be made to the Sheriff himself. Secondly, That it shall be made unto him by the name of his Office. Thirdly, That it shall be only for appearance at the day. But here the sufficiency of the Surety is Matter, & not Form; For defect whereof the Statute wills not, that the Obligation should be void, Wherefore it was adjudged for the Plaintiff. Vide ante, Sir Gervase Clystons Case *versus* Web, and Blackbourn *versus* Michelbourn, Mich. 43 & 44. B. R. Pl. 19.

Ante 808. 352

Cooper *versus* Gooderich, Trin. 40 El. rot. 1259.

(39)

REplevin. Upon a special Verdict, the Case was; The Defendant, as Bayliff of the Master, and Fellows of Emmanuel College, made Conuſance for Rent granted unto them in Fee by Indenture; Where the Issue was Non concessit, and the Jury found, that the Grantor granted it by the Deed, and delivered that Deed to a Stranger to their use, and they sealed the Counter-part of that Indenture. The Question was, Whether a Stranger, without Letter of Attorney from them to receive it, might receive the Deed to their use? And it was held by all the Court, that he might, and that this Ensealing of the Counter-part was a sufficient Argument, and as well as if they had made a Letter of Attorney; And if they had not sealed the Counter-part, but had brought an Action upon it, that had made the Grant perfect. Wherefore it was adjudged for the Defendant.

Lewes *versus* Ridge. Trin. 43 El. rot. 3401.

Covenant. The Case was such; The Defendant, being seised of Land in Fee, Lett it for Life, Remander for Life, rendering Rent, and afterwards acknowledged a Statute, and after that by Indenture bargained, and sold the Reversion, and Covenanted with the Bargainee, his Heirs, and Assigns, that it should be discharged within two years of all Statutes, Charges, and Incumbrances, excepting the Estates for Life. The Statute is extended, and thereupon this Reversion, and Rent was extended. The Bargainee grants this Reversion to the Plaintiff, who, for not discharging of this Statute, brings Covenant. And, all this matter being disclosed by the Count, it was thereupon demurred. The Question, principally moved, was, Whether the Plaintiff, as Assignee, shall have benefit of this Covenant made to the Bargainee by the Common Law? or by the Statute of 32 H. 8. But, because the Covenant was broken before the Plaintiff's Purchase, the Land being then in Extent, and so a thing in Action, which could not be transferred over, it was adjudged for the Defendant, that the Action was not maintainable against him. And here the Court held clearly, that the Statute of 32 H. 8. doth not extend to Covenants upon Estates in Fee, or in Tail, but only upon Leases made for Life, or for Years, and therefore this Assignee was out of the Statute. But for the other matter principally, it was adjudged *ut supra*. (40)
32 H. 8. c. 34.

Co. Litt. 215. a.

Brome *versus* Carr. Hill. 42 El. rot. 621.

Ejectione Firmæ upon a Lease of one Thimblethorp. Upon Not guilty pleaded, a special Verdict was found, that it was Covenanted by Indenture, that a Fine should be levied of such Land to the Use of Thimblethorp, upon Condition, that if he paid not such a Sum, upon such a day, that it should be to the Use of Chetham, and his Heirs. The Fine was levied, and before the day of payment Chetham released to Thimblethorp all his Right in the Land and all Demands. But they found, that the Release it self was not shewn unto them, but a Copy thereof. And whether the finding of this Release by the Jury in this manner (it not being shewn unto them) were good, or not? was the principal Question. And all the Court held, that this Release might well be found in this manner to defend a Possession; As Tenant in Dower may plead a Release to her Baron without shewing it; and the Jury in Assise may find a Condition for the avoiding of a Free-hold without Deed. A second Question was, Whether this Release by Chetham, before the Condition broken, be sufficient to discharge the future Use to Chetham? Quære 7 H. 5. 5. (41)

Co. Litt. 225. b
227. b.

More and Baker, *versus* Morecomb.

Trin. 43 Eliz. Rot. 1159.

(42)
Moor. 645.

Ante 399.

Ant. 716.

DEbt upon an Obligation, Conditioned to deliver to the Plaintiff, before such a Feast, such a Ship, and all the Tackling thereto, or in default thereof, to pay at the same Feast such a Sum, as John Norris, and J. S. shall value them to be worth. The Defendant pleaded, that before the said Feast, the said J. N. and J. S. did not make any valuation of them. And it was thereupon demurred, and resolved by all the Court for the Plaintiff; for, although he hath Election to do the one, or the other, yet, the Condition being for his benefit, he ought to provide that the value should be assessed, otherwise he is to deliver the Goods themselves; for if one be obliged to make such an assurance of such Land, as the Counsel of the Obligee before such a day shall advise, or to pay there, and then 100 l. if the Counsel devise not any Assurance, he ought to pay the 100 l. For, it being to his advantage, when it is performed, he ought to provide, that he performs the one. And Walmisley said, if one be obliged to pay 20 l. before the first day of May, or to marry A. S. before the first day of August next ensuing, if he doth not pay the 20 l. before the first day of May, and A. S. dies before the first day of August, so as the Condition is become impossible by the Act of God in this part, yet the Obligation is forfeited, because he hath undertaken to perform the one of them, and it was his folly, that he did not perform it when it was in his power and election to have done it. Wherefore, &c. And afterwards it was adjudged for the Plaintiff. Vide ante, Mich 41 & 42 Eliz. Lamb *versus* Brownwent. Pl. 41.

Rant *versus* Cock. Mich. 43 & 44 Eliz. rot. 226.(43)
Ante 861.
Co. Litt. 384. a.

W. Arrantia Chartæ. And counts upon the Warrant of Dedi, & Concessi tantum. The Defendant demanded Oyer of the Deed: And it appears, that in the Deed there is also a special Warranty against the Feoffor, and his Heirs, and against the Heirs and Assignes of the Father of the Feoffor. And it was demurred upon the Count. The Question was, Whether the special Warranty shall control the Generality, and expound it, or not? And it was resolved, that it should not. Wherefore it was adjudged for the Plaintiff.

Mich. 43 & 44 Eliz. in Camera Scaccarii.

John Morgan Wolf *versus* Stepney.

Hill. 42 Eliz. rot. 693.

(44)
Heb. 327.

Error of a Judgment in an Action upon the Case for Words. The Error assigned was, Because the Action was brought
versus

versus John Morgan Wolf, and the Judgment was, *Quod recuperet versus* prædictum Morganum, whereas that was neither his Christian, or Surname: For Johannes Morgan is his Christian name, and Wolf is his Surname. But all the Justices besides Anderson and Walm-^{2 Cr. 632.}ley (who held it to be Error for this Cause) resolved it to be ^{Hob. 327.} well enough: For it is his name whereby he is known, and parcel of his Surname, or his entire Surname; and Wolf is but an addition, and therefore good enough, and Judgment well given: and if it were not good, it is clear that it is amendable; for it is ^{2 Cr. 632.} but the fault of the Clerk, which is amendable by the Common ^{Ant. 497.}Law, or at least wise by the Statute of 8 H. 6. And to that purpose ^{Hob. 327.} Presidents were shewn, where in point of Judgment there had been the like amendments, viz. Hill, 39 Eliz. rot. 103. betwixt Ognel, and Joyner; where the Judgment was *Quod Henricus Joyner recuperet* 10 l. assessed per Juratores, & 5 l. eidem Henrico Skinner de incremento: So his Surname mistaken, and it was amended by order. Also Mich. 33 & 34 Eliz. rot. 236. betwixt Thomas Wylde, and John Wheeler, The Judgment was *Quod prædictus Tho. recuperet versus prædictum Thomam*, where it should have been *Johannem*, and it was amended. And Mich. 32 & 33 Eliz. rot. 2140. Mally *versus* Read Stafford. Wherefore upon these, and other Presidents shewn, it was awarded to be amended, and the Judgment was affirmed.

Price versus Jenkins.

Action for Words, and declares, that the Defendant spake these words in Welsh (reciting them particularly) signifying *hæc Anglicana verba*, Thou hast murdered thy Wife. After Verdict, & Judgment for the Plaintiff, Error was brought, and assigned in hoc, that it is not averred, that the words were spoken in the company of Welshmen, or of such, who understood the Welsh tongue. But it is alledged, that they were spoken in præsentia, & auditu quamplurimorum subditorum Domine Regine. And the Action was brought in the County of Monmouth, which was once parcel of Wales, but was now an English County. And all the Justices, and Barons held, that for this Cause it was erroneous: For it shall not be intended that any there understood the said Tongue, unless it had been shewn, & then it was not any slander, no more then if one spake slanderous words in French, or Italian, an Action lies not, unless it be averred, that some there present understood those Languages, as it was held in the Case betwixt Johns, and Daux, Mich. 38 & 39 Eliz. in B. Regine, quod vide ante, Plac. 16. But because the Damages were found to 50 l. and if the Plaintiff should begin *de novo*, he might not have peradventure so great Damages, they moved him to accept of 10 l. & to make an end without further Proceedings; And so it was done, and no Judgment entred.

Gramvel versus Rhobotham.

Action sur Trover of divers Goods, &c. The Defendant pleaded Not-guilty: And after Verdict, and Judgment for the Plaintiff, Error was thereof brought. And the first Error assigned was, Because he declares *inter alia de uno quater, grani; Anglice* ⁽⁴⁶⁾
S S S S S
Milne

Co 5. 34. B.

Ant. 854.

Milne corn, where it ought to have been Quarterium; for Quarter is not any Word. Secondly, he alledgeth, that he was possessed de una parcella piscium Anglice Lings, and it is not alledged what parcel: And for these Causes it was held to be ill. And Damages being intirely given reverfable in all. Thirde, because the Issue being Not-guilty, the Jury did not find that he was Guilty: But Quod detinet, and converted them to his use, which Tant amount, but because it is not found according to the Issue; It was held to be ill: But it was conceived by some of the Justices, that it was amendable, if it might appear by the examination of the Clerk of Assise, that the Verdict was found generally for the Plaintiff. But they would advise.

Comb *versus* Carew, and Day. Trin. 42 Eliz. rot. 806.

(47)

Ante 544.
Ante 57.

T Respass of Battery: One of the Defendants pleaded Not guilty: The other Justified. The Issue against him was de son Tort Demeln, and one Ven. fac. was awarded to try these Issues: And it was found for the Plaintiff, and Judgment accordingly, and Error thereof brought: The first Error assigned was, because but one Ven. fac. was awarded to try these two Issues. Sed non allocatur: For it is usual, &c. Secondly, because the Plaintiff declared to his damage of 40 l. and the damages assessed by the Jury were 35 l. and the Costs increased by the Court, were 6 l. So the Plaintiff had Judgment to recover 41 l. which is more, then whereof he declares. Sed non allocatur: For the Damages found by the Jury, being less then he counts, although the Costs amount to more, it is not material. Thirde, because a Juror was returned in the Ven. fac. and Distringas, John Wescot: And in the Nomina Juratorum who were sworn at the Nisi prius, he was named Philip Wescot, so another Person then was returned upon the Ven. fac. And this Error was assigned ore tenus, and it was held to be a manifest Error: And that it is not examinable, whether he were one and the same person, or not, there being a Dispersion in the Christian name. Wherefore it was Reversed.

Wright *versus* Wright.

(48)
R. 43.

Ejectione firmæ, Of a Lease made apud Abingdon of an House in Burgo de Abingdon. The Defendant pleaded Not-guilty, and a Ven. fac. was awarded de vicineto de Burgo de Abingdon, and thereupon a Trial had, and Judgment for the Plaintiff: And the Error assigned, because the Ven. fac. ought to have been de Abingdon. Sed non allocatur; for it shall be intended to be all one. Wherefore the Judgment was affirmed.

Batemans Case *versus* Elman. Trin. 39 Eliz. rot. 416.

(49)

Detinent, and Counts, That he 16 Febr. 36 Eliz. delivered to Defendant divers parcels of Plate, viz. a Bason and Ewer, a silver Bowl, and divers other parcels to be restored upon the 17 May, ensuing. And that the Defendant detained them, &c. The Defendant plead Non Detinet. The Jury find a special Verdict, That the Plaintiff was possessed 16 Febr. 36 Eliz. and by Indenture betwixt him, and the Defendant, bargained, and sold to the Defendant

Defendant divers parcels of Plate, modo & forma, prout in the Indenture, cujus tenor sequitur in hæc verba, and found it verbatim, wherein the Basen and Ewer, the silver Bowl, and all the parcels expressed in the Declaration are mentioned upon Condition, That if he paid such a Sum upon the 17 May following, That the bargain and sale should be void. They found payment of the Money at the day; but that there was then a Memorandum indorsed upon the Indenture, by the assent of them both; that if the Plaintiff paid such a Sum the 1 June 36 Eliz. that he should have them again: But the payment of the Sum upon the 1 June 36 Eliz. was not found. And they found, that the Defendant had the Goods. Et si supra, &c. The first Error assigned was, That the Ven. fac. was in Placito Debiti, Sed non allocatur. For so is the usual course to enter Warrants of Attorney, or Essoyns upon this Writ in Placito Debiti, which proves it to be all one. A second Error assigned was upon the matter in Law, because here is not any delivery by Bailment, but by Bargain and Sale. But it was held to be well enough: For, the Condition being performed, he ought to have them again, and then detaining is a Tort. A third Error was, because the Jury did not find the Parcels in the Declaration to be the same with the Indenture, but only that he sold divers parcels, which, although they be all one in name, may notwithstanding be several, and intendment will not help it: And of that Opinion was all the Court. Wherefore the Judgment for this cause was reversed.

Savil versus Roads.

DEbt upon an Obligation in London, against John Savil of Wakefield in Comitatu prædicto, Conditioned for the payment of 100l. at Wakefield. The Defendant pleaded payment of the 100l. at Wakefield prædict. in Comitatu Eborum. The Plaintiff saith, Non solvit. And thereupon they were at Issue, and the Tryal was de vicineto de Wakefield in Comitatu Eborum. And for this cause the Error was assigned, for that he is named of Wakefield in Comitatu prædicto, which is to be intended in London: And when he pleads payment at Wakefield prædictum, It is to be intended at Wakefield in London: And when he adds in Comitatu Eborum, they be idle, and void Words, because repugnant to the first. Wherefore the Tryal is ill, and for this cause it was Reversed.

(50)

Termino Hillarii,
 Quadregesimo quarto ELIZABETHÆ,
 in Banco Reginae.

Waldo *versus* Lambert.

Pasch. 43 Eliz. rot. 276.

(1)
 Noy. 40.
 2 Cr. 419.
 Moor. 852.

Action upon the Case against the Defendant, Sheriff of South-hampton; For that, whereas the Plaintiff had sued a Latitat against one Arthur Lake, who was indebted unto him in such a Sum by Bond, to the intent that he being arrested, and having put in Bail, according to the course of the Court, he might declare against him for that Debt; And that this Writ being delivered to the Defendant, being Sheriff of the County of South-ampton, for that intent, and he arrested him, and afterwards at Westminster, in the County of Middlesex, suffered the said Lake to escape. The Defendant pleads, That he arrested him according as the Plaintiff hath declared: But that afterwards in the same County, he rescoussed himself there per gentes de County, absque hoc, that he suffered him to Escape at Westminster. And it was hereupon demurred, and adjudged to be no Plea: For the Sheriff at his peril ought to keep his Prisoner, and may take sufficient power of his County, to Arrest any one upon mean Process: And although it was allowed a good return here, and Process shall be awarded against the Rescoussers to punish them; Yet this is no answer in an Action brought against him for such an escape: Also the Travelling of the Place of the Escape is not good; For he cannot by the Travellers make the place material. Wherefore it was adjudged for the Plaintiff. Nota, Hill. 14 Jacobi, *Mays Case* adjudged, that where the Sheriff returneth Rescous upon a mean Process, this is a good Plea in an Action upon the Case.

2 Cr. 419.
 1 Rol. 807.
 Moor. 852.

2 Cr. 420.
 Ante 99.
 2 Cr. 419.

Dell *versus* Fereby.

(2)
 Ante 561.

Error of a Judgment in Norwich in an Assumpsit. The first Error assigned was for that the Consideration is not sufficient to maintain the Action: For it was, whereas the Plaintiff had prosecuted such a Sute in Norwich; and they were at Issue, That in consideration he would stay ab ulteriori prosecutione Sectæ prædictæ. The Defendant promised him to pay all his Charges, and Expences laid out therein. And alledgeth in fact, That he no further proceeded in that Sute: And that he had expended there-
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in such Sums, and that the Defendant had not paid them. It was moved, That this matter was not sufficient to ground an Action: For, although he hath not proceeded in the Sute, yet he may when he please, so there is not any cause to bind the Defendant to pay any thing for it. And to that purpose cited a Case to be adjudged, Trin. 36 Eliz. rot. 52. in the Common Pleas, between Morfe, and Ross, That such a Consideration was adjudged insufficient to ground an Action: But all the Court here held it to be good enough; For the staying of the Tryal of a Cause is sufficient to ground an Action, especially for the Charges expended, and denied the Law to be so in the Case before cited. Secondly, It was moved, that the Declaration was ill, because there was not any Place shewn, where the Expences were laid out. Sed non allocatur: For, it being in prosecutione sectæ prædict. It shall be intended to be in the same Court. This also is but an inducement to the Action, wherefore the Judgment was affirmed.

Ante 61.

Ant. 561.

Heyward *versus* Lypson.

Action upon the Case against the Defendant, naming him Mercatorem extraneum. The Parties were at Issue, and a Ven. fac. awarded, and all Deniens returned, because the Defendant did not pray it to be de medietate linguæ. And at the Nisi prius in London, before Popham, Chief Justice, Exception was taken to this return for this Cause: And he held it to be good cause of Exception, and therefore would not try it. And it was now moved in the Queens Bench; And Gawdy and Fenner held clearly, that the Ven. fac. was well awarded, and returned of all Indigenis: Because the Defendant, in whose advantage the de medietate linguæ should be awarded, did not except thereunto at the awarding of the Wit, nor prayed, that it might be awarded de medietate linguæ; for the Court without his prayer cannot take Consuance, that he is Alienigena. But Popham held that it was not well awarded, because the Plaintiff in his Declaration hath named him Marcator extraneus: So as he, having taken Consuance, that he is a Stranger, ought at his peril to take his Ven. fac. accordingly, as it is where a Baron, or Peer of the Realm is sued, if no Knight be returned, he may take advantage thereof at the time of the Trial: And peradventure the Defendant here did not know of the manner of the return, until the time of the return; wherefore it is reason, that he now should take advantage thereof. But Gawdy and Fenner held, That the Cases were not alike: For there the Defendant might not pray such a return: And the Plaintiff might take Consuance, how the return ought to be, and that it is a priviledge for the Defendant, whereof he may take advantage at the time of the Trial. And the naming of him Merchant Stranger is not material, if it should not have been so done, if such Addition had not been. Wherefore they awarded the Ven. fac. to be good, and the Trial, to be thereupon. And Gawdy said to the Defendants Counsel, That if they conceived the Law to be otherwise, they might try it in a Wit of Error, so as the Law might be certainly known. And it was ordered accordingly. Vide 19 Eliz. Dyer, 357.

(3)

Co.Lit. 156.2.

Waller versus Croot, Trin. 43 Eliz. rot. 674.

- (4) **D**Ebt upon an Obligation Conditioned, That if the Plaintiff enjoyed such Land until the full age of J. S. and if J. S. within a Moneth after his full age, made an Assurance to the Plaintiff of the same Land, that then, &c. The Defendant pleads, that J. S. is not yet of full age: And because he did not answer, whether he had enjoyed it in the mean time, and the Condition is in the Copulative, it was adjudged for the Plaintiff.

Clerk versus James, Hill, 43 Eliz. rot. 455.

- (5) **E**rror of a Judgment in the Common Bench, The Error assigned was, because in an Action of the Case for Words, for calling him Thief, apud D. in Com. Essex. The Defendant Justifies, because the Plaintiff had committed a Robbery apud Worthington within the same County. The Issue was de son Tort demesne sans tiel cause. And the Ven. fac. was awarded from D. where the Words were spoken, and a Trial thereupon, and held to be ill: And a new Ven. fac. awarded from the Aisne of W. where he Justified, and a Verdict thereupon for the Plaintiff, and Judgment thereupon: And now Error thereof brought, because the Ven. fac. was as well to be awarded from D. as from W. Sed non allocatur: For by the Justification the Words are confessed, and the Issue is only upon the Cause. Wherefore the Trial is good, and the Judgment was Affirmed.

Yelv. 49.
2 Cr. 43.
Ant. 195.

Ledesham versus Lubram, Hill. 40 Eliz. rot. 116.

- (6) **A**ction sur Trover of ten Angels, and converting them. The Defendant pleads, That there was a Wager betwixt the Plaintiff, and one Currance, concerning the Quantity of Pards of Velvet in a Cloke: And the Plaintiff, and the said Currance, each of them delivered into his hand ten Angels, and each of them agreed, That if there were ten Pards of Velvet in the Cloke, that then they should be delivered to the said Currance, and if not, to the Plaintiff: And alledgeth in fact, that upon measuring of the Cloke, it was found that there were ten Pards of Velvet therein: Whereupon he delivered them to the said Currance, which is the same Conversion, &c. And it was thereupon demurred, and agreed; First, that an Action of Trover lies of Honey out of a Bag, or Chest: But for the Plea, Gawdy held it to be good enough: For the measuring thereof is the fittest way for the trying it: And when it is so found by the measuring, he had good cause to deliver them out of his hands to him, who had won the Wager. But Fenner and Popham held, that the Plea was not good: For it may be, that the measuring was false, and therefore he ought to have averred in fact, that there were ten Pards, and that it was so found upon the measuring thereof. And he might well have pleaded the General Issue, and given all the matter in Evidence: For it is but Evidence: And when he delivered it according to the intent of the Bargain, it is not any Conversion. Wherefore by the assent of Gawdy (absente

Ant. 819.

te

te Clinch it was ruled, That Judgment should be entred for the Plaintiff, unless other matter were shewn, &c.

Pain versus Rochester, and Whitfield.

Trin. 41 Eliz. rot. 379.

(7)
Conspiracy for procuring him falso, & malitiose, to be endicted of such a Robbery, and to be detained in Prison until he were acquitted, &c. The Defendants pleaded, that they were robbed upon the High way by persons unknown, whereof one of them rode upon a Brown Gelding; and that they made Hue, and Cry and could not find them: And that afterward, Whitfield, one of the Defendants, came to such a Town, where the Plaintiff was, and he well observing him, suspected him to be the Felon, who was upon the Brown Gelding, and went to the other Defendant Rochester, and shewed him his Suspicion: And he coming, and seeing him, had the same Suspicion: Whereupon they repaired to one Sams a Justice of Peace adjoyning, and obtained his Warrant to bring the Plaintiff to be examined, who having notice thereof, absented himself, so as he could not be apprehended, and that afterward Justice Gawdy, upon complaint unto him by some of the Plaintiffs friends, examined the matter, & thereupon committed the Plaintiff to Gaol in Essex, and advised the Defendants to exhibit a Bill of Endictment for that Robbery. Whereupon they exhibited the Endictment in the Declaration, upon which he was Endicted, &c. *Quæ est eadem conspiratio & procuratio de Endict. &c.* And it was thereupon demurred. Hobart for the Plaintiff moved, that the Plea was not good: First, because they do not alledge any sufficient cause of Suspicion, but their own Jealousie. Secondly, because it is not shewn, what Evidence was given to the Endictors (*viz*) whether it was more then was shewn before. Thirdly, because in their Plea they spake nothing of the Imprisonment. But all the Court resolved it to be good enough: For their causes of Suspicion, and absenting of himself, after notice of the Warrant, are causes sufficient, and he need not shew what Evidence was given: And the Imprisonment need not be answered, when the Endictment is grounded upon good Cause. But Gawdy doubted whether it were a Plea, because it amounts to a Non Culp. For it is not any Conspiracy at all. But the other Justices held, that it was a good Plea per doubt del lay gents: For that he confessed the procurement of the Endictment, and avoided it by matter in Law; especially the Demurrer being general, he shall not take advantage thereof. Wherefore it was adjudged for the Defendant. Mich. 44, & 45. Plac. 4.

PL.C. 46.2

Colgate *versus* Bachelor.

Mich. 43 & 44 Eliz. rot. 3217.

(8)
Ow. 1434

Co. 11. 53. b.

Co. 11. 53. b.

DEbt upon an Obligation Conditioned, That if R. B. Son of the Defendant do at any time on this side, or before the Feast of St. John Baptist, which shall be in the year 1604, either as Apprentice, or Servant, or for himself as Master, or otherwise, use the Trade of an Haberdasher, within the County of Kent, Cities of Canterbury, or Rochester, if then the within bounden R. B. do upon request pay unto the Plaintiff 20 l. That then the Obligation shall be void. The Defendant after Oyer of the Condition pleads, that the Obligation and Condition were against the Law, whereupon it was demurred in Law, and after argument it was resolved by the Court, that this Condition is against Law, to prohibit or restrain any to use a Lawful Trade at any time, or at any place: for as well as he may restrain him for one time, or one place, he may restrain him for longer times, and more places, which is against the benefit of the Common-wealth: For being Freemen, it is free for them to exercise their Trade in any place. And although it were alledged, that here he is not prohibited or obliged absolutely, that he shall not exercise the Trade of an Haberdasher: but that if he exercise it, that he shall pay to the Plaintiff 20 l. And so it differs from the Case 2 H. 5. 5. b. Yet the Court said, it was all one: For he ought not to be abridged of his Trade, and Living. Wherefore it was adjudged for the Defendant.

Flud *versus* Penington.

Mich. 43 & 44 Eliz. rot. 834.

(9)
Ant. 860.

SCire fac. Upon a Judgment in Debt against Terr-Tenants, The Sheriff returns, Quod Scire feci J. B. tenenti unius Messuagii, &c. And the said J. B. comes, and pleads, That he is not Tenant, against the return of the Sheriff. And it was thereupon demurred, and adjudged for the Plaintiff, that it was not any Plea, and that the Plaintiff might have taken Execution at his Peril.

Sir William Clerks Case,

Action upon the Case; for that one J. S. being Out-lawed at the Plaintiffs Sute, and a Capias Utlagatum alwarded against him, directed to the Defendant, Sheriff of the County of Bucks, returnable at such a day, &c. And because he did not return the Writ, The Action was brought, and Judgment against the Defendant, by Non sum Informatus; and upon a Writ of Inquiry of Damages, Damages found to 40 l. And now Williams moved in Arrest of Judgment, That an Action lies not for not returning of the Writ: But he should be only amerced for his contempt. And of that Opinion were Walmsley, and Warberton. For in not returning this Writ the Queens Command is neglected, which she ought to punish. But by Walmsley, if the party, who sues that Writ, shews to the Sheriff the party, who is to be arrested, and delivers unto him the Writ, requiring him to make the Arrest: If he doth it not, an Action upon the Case lies against him. But here Non constat, whether the Party was Arrested, or that the Sheriff could find him. Wherefore, &c. King's nil; although the Queen may punish the contempt; yet the Party, having loss by not returning of the Writ, may have his Action also. And the Clerks said, there were many Presidents, that such Actions have been brought. Wherefore, absente Anderson, Adjournatur.

(10)

Ant. 624. 5.

Ant. 624. 8. 5.

Robinson, Vicar of the Church of Kimbolton, *versus* Bedel;

TRespass, For taking of certain Loads of Wood, set out for Cithes: The Defendant pleaded Not-Guilty. The Plaintiff for Evidence shews, that in the time of King Ed. 3. the Rectory was Impropriated, and the Vicarage then Endowed, and (inter alia) the Cithes of Wood were allotted to the Vicar. The Defendant shews, that for 160 years last past, there had not been any Vicar presented there, until the Plaintiff obtained a Presentation from the Queen by color of Lapse. And so pretended, that in regard it had continued so long in this manner, That it reunited again to the Rectory. But the Court informed the Jury; That although a Vicarage is always taken out of the Parsonage, and for the necessity thereof may be reunited to supply the Parsonage; yet by continuance of time in not presenting a Vicar, which is the Default of the Parson himself, it ought not to be adjudged to be a discontinuance of the Vicarage: But somewhat ought to be shewn of the reuniting thereof, Wherefore by the Courts direction the Jury found for the Plaintiff.

(11)

Mellows *versus* May, Trin. 43 Eliz. rot. 402.

TRespass upon a Special Verdict, The Case was; Ralph Mellows and his Wife were Tenants for Life. Afterward the Lessor by Indenture betwixt him, and the said Lessees, and J. their Son, Dated 30 July 21 Eliz. Lett it to the said Baron, and feme, and their Son Habendum a die Datus Indenturæ for their Lives, and made Liberty 23 Eliz. secundum formam Chartæ. And whether this be a good Lease,

(12)

Moor 636.

C t t t t

Lease,

Ant. 585.

Lease, or void? And if it be void, Whether, notwithstanding, it be a Surrender of the first Lease? Were the Questions. And it was resolved by all the Court, That the second Lease was void: For as much as it is Habendum a die Datus. And the Livery made so long time after it will not help it: But yet they held, that it was a Surrender of the first Lease: For the acceptance of the Indenture in the Contracting, and agreement to have a new Lease, made a Surrender of the first Lease: As if Lessee for Life, or years, takes a Lease at Will of the same Land; and, (as Walmesley said) if Lessee for Life, or years, takes a Grant of a Rent-charge to be Issuing out of the same Land to begin presently, it is an Immediate Surrender of the Estate, according to 21 H. 7. 7. And it was adjudged accordingly.

The Bishop of Hereford *versus* Scory.

Trin. 43 Eliz. rot. 1039.

(13)

Ant. 707.

R. 52. 103.

A. 41.

Co. Lit. 45. 2.

SECOND Deliverance. The Defendant avows for Damage: Fesant; for that the Bishop of Hereford, Predecessor to the Plaintiff, Lett the place where, &c. 14 Eliz. to the Defendant, and two others, for three Lives, rending 13 l. 6 s. 8 d. Rent, and that this Lease was the same year confirmed by the Dean, and Chapter: And avers, That it was the usual, and ancient Rent, and the Land usually demised, &c. The Plaintiff replies, That this Land was parcel of the Demesns of such a Mannor, and usually before that Lease, retained in the hand of his Predecessors for Hospitality, and confesses the Lease, and how his Predecessor died, and himself created Bishop, &c. And Traverseth Quod fuit magis usualiter dimissa, &c. modo, & forma, &c. prout, &c. And it was thereupon Demurred. For it was alledged by the Defendant, That the Travers is to a matter not material: For by the Common Law a Bishop, with the confirmation of the Dean, & Chapter, may demise any Land without reserving any Rent. And the Statute of 32 H. 8. takes nothing from the Common Law, but adds more, (viz.) That the Bishop only may demise Land usually demised, rending the auncient Rent, and that it shall be good without Confirmation, &c. And the Statute of primo Eliz. restrains the Common Law; That no Lease, or Grant, &c. by Bishops (unless to the Queen) except Leases for twenty one years, or three Lives, whereupon the Ancient Rent is reserved, shall be good. And this Statute is not a Restraint to any Land: And therefore it is not necessary by this Statute, that the Land should be usually demised, & therefore it continues as at the Common Law; it being then a Lease confirmed, is good, and the Travers ill. But all the Court resolved to the contrary. For although at the Common Law any Lease by a Bishop with the Confirmation of the Dean & Chapter were good: And the Statute of 32 H. 8. makes Leases good by the Bishop only, which are made according to the Statute without any Confirmation. Yet the Statute of primo Eliz. ordains, that no Lease shall be good, unless it be warranted by the Statute of 32 H. 8. and ousts all Grants and Leases at the Common

mon Law, and is a Prohibition against them. And whereas the Statute appoints, that the ancient Rent shall be Reserved, It is thereby Limited, and Intended, That the Land should have been usually Demised; for otherwise the ancient Rent cannot be paid for it. Wherefore the Travers is good, and to a point material. And Rule was given; That Judgment should be entred accordingly. Unless, &c.

Tit t 2 Termino

Termino Paschæ,
Anno Quadragesimo quarto ELIZABE-
THÆ, in Banco Reginae.

Bellew *versus* Langdon, Pasch. 43 Eliz. rot. 434.

(1)
Owen 114.
1 Rol. 405.

TRespals for breaking his Close, and killing there two hundred Conies. The Defendant Justifies; For that he there had Common Appurtenant to such an House by Prescription. And because the Conies were there Damage-Felant, he killed them: And it was thereupon demurred. Godfrey for the Plaintiff, That it is not any Plea. For the Owner of the Soil hath Interest in them against all Estrangers, and the Commoner hath nothing to do, but to take his Common with the feeding of his Cattle there, and he ought not to destroy the profit which the Owner hath therein. And as the Owner of the Soil may have other Cattle there; so may he have Conies, and may make Fish-ponds, and the Commoner cannot destroy them, 22 H. 6. 59. 3 H. 6. 55. And for this point in Question, It was adjudged 29 Eliz. betwixt Old, & Cony in this Court: That a Commoner cannot justifie the killing of Conies there, &c. *Wyas* e contra, & that it is a good Plea. For the Commoner hath no other means to help himself but by killing them, for they be harmful to his Common, and dig, and undermine the Soyl, and take from him all the benefit of his Common, if he suffer them to encrease; And they are such Creatures, whereof no man hath a property; and being esteemed as harmful Beasts, the Commoner may well kill them, as he may kill Foxes, or other Vermine. Wherefore, &c. But all the Court, (Popham absente) resolved, that the Plea was not good: for the Cony is a Beast of Warren, and profitable, as Deer are, and are not to be compared to Vermine. And therefore the keeping of them by the Owner of the Soyl is lawful, and the killing them unlawful, and not Justifiable. And it was adjudged for the Plaintiff.

Ant. 548.

Yelv. 105.
2 Cr. 195.

Holdringshaw *versus* Rag, Trin. 43 Eliz. rot. 1295.

(2)
Owen 114.

Ant. 246.

TRespals for entring into his House, and taking of his Goods. The Defendant pleads, Quoad the taking of his Goods, Not Guilty; Quoad Residuum, that the Plaintiff was indebted unto him in such a Sum: And by Licence of the Plaintiffs Servant, the Door being open, he entred to demand his Debt, which is the same Trespass: Whereupon the Plaintiff demurred, and adjudged to be no Plea; For the Servants Licence is not to any purpose, and one cannot enter into another mans House by color to demand his Debt, especially it being not averred, That the

the Master, who was the Debtor, was then within the house. But ^{Pl. C. 71.} Gawdy conceived, That if it had been averred, That the Master was then within the house, the Plea had been good; As in the Case of 19 H. 6. where one entred into the Plaintiffs Park, to shew him his Evidence to avoid a Sute betwixt them, it was there allowed to be a good Plea. Wherefore it was adjudged for the Plaintiff.

Eden *versus* Lloyd.

Error of a Judgment in the Common Bench. Action upon the Case tam pro Regina, quam pro seipso; For that whereas he had a Judgment to Recover such a Debt against J. S. And upon a Capias ad satisfaciendum he was out-Lawed, and upon a Capias Utlagatum the Defendant, being Sheriff, took him, and after suffered him to escape, the Plaintiff not being satisfied, &c. The first Error Assigned was, because the Action is brought by him and the Queen, whereas it ought to have been brought by himself only. ^{1 Rol. 1.} Sed non allocatur. For the person out-lawed being suffered to Escape. It is as well in contempt to the Queen, as in prejudice to the Plaintiff, and therefore the Action brought by them both Warrantable, ^{30 Aff. 27 Aff.} Secondly, Because he recites not the whole Record, but begins at the Judgment, Quod cum recuperasset, &c. Sed non allocatur. For it is but a Conveyance to the Action, and therefore not necessary to shew the whole Record: But it sufficeth to begin at that, which is the Cause of the Action, 19 H. 6. 34 H. 6. Thirdly, Because the Action is brought in Suff. against the Sheriff of Suff. for Arresting the Defendant in the first Action, upon the Cap. Utlagatum, and suffering him to escape: And the Defendant in the first Action is named of S. in the County of Norff. and the Arrest is supposed apud S. prædict. So the Arrest is supposed in the County of Norff. and then it is Tortious, and there cannot be any Escape thereupon: And this was held to be a manifest, and incurable Error. And therefore the Judgment was Reversed.

Cox *versus* Humphries, Hill. 44 Eliz. rot. 349.

Action for these words spoken of the Plaintiff His Boy (innuendo one Ambrose Latham, the Plaintiffs Wives Son) hath cut my Purse, and he, knowing it, hath received it. It was moved, That an Action lay not for these words. But adjudged, That it was maintainable, Vide Postea, Trin. 44 Pl. 4. ⁽⁴⁾ ^{Post. 389.}

Sir Edward Cleer *versus* Parker, Mich. 42 & 43 El. rot. 96.

Error of a Judgment in an Assise, upon a special Verdict in Suff. The Case thereupon was, One having three Mannors, conveyed two of them for a Joynture to his Wife, and for the preferment of his Children. And afterward made a Feoffment of the third Mannor, to the uses and limitations of his last Will: All the Mannors being of equal value, and holden of the Queen by Knight-service in capite. And afterwards by his Will devised this Mannor. And, whether it were a good Devise of the Entire Mannor, or of no part thereof: Was the Question. And it was Resolved, That it was a good limitation of the Entire Man. ⁽⁵⁾ ^{Moor 746.} ^{2 Cr. 31.}

Ant. 442.
Co. Lit. 111. b.
12. a. 271. b.
Moor. 567.
Ant. 442.

Hannoꝝ, and that he shall take it not as Devisee by the Will; But, the Feoffment being to the use of his Will, he shall take it by the limitation, and not by the Devise. For he cannot Devise any part, having before limited two parts in Joynture. And therefore (the Case being before Popham and Clerk Justices of Assise) Popham took this difference, if he had made a Feoffment of all his Land to the use of his last Will, and after had devised that Land by his Will, the Land being holden in Capite, it is a good devise for two parts, and the Devisee shall take by the Will, & the Law shall construe it as a disposing thereof by his Will, as Owner, and it shall be good for two parts, and no more; For when the Will may be construed to take effect in any part, it shall be good for that part. But when a Will is utterly void to convey an Interest, (as it is in the Case in Question) because he had before disposed of two parts by an Act executed for the benefit of his Wife, and Children, and the Statute doth not give him authority to dispose of more by his Will, the Construction shall be, that the Will shall not be altogether void; But that it shall be a limitation of the use upon the Feoffment, and the Devisee shall take by the Feoffment; for otherwise he should not take at all. Wherefore it was resolved, and adjudged accordingly against Sir Edward Cleer. And he brought a Writ of Error, and Assigned Error in this matter in Law; And it being moved, and no other Error opened then this matter in Law, Popham, Fenner, & Yelverton (Gawdy absente) held, that the first Judgment was good, and gave Rule accordingly; That the first Judgment should be affirmed, unless other matter were shewn by such a day. At which day Saig moved other Causes, and it thereupon was adjourned, Vide postea, Trin. 2. Jacob. f. 31, & 6 Co. 17. b.

2 Cr. 31.

Fountain versus Rogers.

(6)
Ante 621.

Action for these words, Thou art a Rebell. It was demurred upon Declaration, and without Argument adjudged for the Defendant, That the words be not Actionable.

Brook versus Wise. Mich. 43, & 44. Eliz. rot.

(7)

Action for these words, Thou art a pocky Knave, Get thee home to thy pocky Wife, her Nose is eaten with the Pox. It was moved after Verdict, that the words were not Actionable; For it shall not be intended by them, that he is infected with the French Pox, and otherwise the Action lies not. But all the Court held the Action was maintainable; For the word cannot be otherwise intendable, but that he hath the French Disease; For it is to be intended he is accused to have the same Disease, which his Wife hath: And that the words purport, that he hath the French Disease, by saying, that his Wives Nose was eaten with them. Wherefore it was adjudged for the Plaintiff.

Pays Case.

(8)
Noy. 43.

Upon a special Verdict, the Case was; That one devised his Land to J. S. from Mich. following for five years, Remainder after to the Plaintiff, and his heirs: He died before Mich. The

The Question was, whether this were a good Remainder: Because it could not Enure instantly by his death? For it may not begin until the particular estate, which was not to begin till after Mich. And a freehold cannot be in expectancy. But all the Court held, That it very well might expect; For, in Case of a Devise, the Freehold in the mean time shall descend to the Heir, and Vest in him. Wherefore without argument it was adjudged accordingly, and that the Remainder was good.

Skidmore versus Winston.

DEbt by an Administrator. After Verdict, it was moved in Arrest of Judgment, That the Declaration was not good; because he counts, That administration was committed unto him by the Bishop of St. Davids, And he saith not *Locum illius Ordinarius*, nor *Cui Administratio pertinet*, Sed non allocatur. For it is intended, that he is the Ordinary, and so is the Common course of Declarations, unless the Administration is alledged to be committed by one, who hath a peculiar Jurisdiction. Secondly, it was moved, that the Ven. fac. is awarded to Richard Hancock Coroner, where a Challenge was put in against J.S. another Coroner there. And it may be there be more Coroners there besides him, who is challenged. So it ought to be awarded *Coronatoribus generally*, with a Clause, that the Coroner, who is challenged non se intromittat, Sed non allocatur. For it shall not be intended, there were any more Coroners besides them two, unless it were shewn, and then the Wit awarded unto him by his proper name is good. (9)
Post. 907.
Ant. 791.
Pl. C. 277. 2.

Baspool versus Long, Trin. 42 Eliz. rot. 289.

UPon a Special Verdict, The Case was found; That the Custom of the Manor of N. was, That if any Copyholder surrendered to the use of another, and his Heirs, and he, to whose use the Surrender was made, did not come at the next Court before three Proclamations made thereof, to take it; That he should be barred, and that the Lord should Seise it as Forfeited. And they further find, That one L. was Copyholder in Fee, and surrendered it to the use of himself for Life, and after to the use of the Plaintiff, and his Heirs; And that at the next Court there were three Proclamations made, &c. and none came to claim it; whereupon the Lord seised it as forfeited: And at the next Court granted it to the said L. in Fee, who was admitted accordingly, and died seised; and that it descended to the Defendant, upon whom the Plaintiff being admitted, as in his Remainder entered. And if, &c. The sole Question, Whether this Custom to barr an Estate in Fee for default of claim after Proclamations, shall extend to barr an Estate where the Remainder is expectant upon an Estate for Life? And the whole Court, without any great Debate, held clearly, That this Custome, which goes in Deprivation, or in barr of an Estate shall be taken strictly; And that the Non-claim of the Tenant for life shall not prejudice him in Remainder, nor shall make a forfeiture of his Estate. But Popham said, That a Custome, which goes in making, and maintenance of a Copyhold Estate, shall be taken favourably. And therefore it was Resolved, That where the Custome was, that he might (10)
1 Rol. 568.
Yelv. 1.
Noy. 42.
Godb. 369.
Co. 9. 107. 2.

Ante 598.

might Surrender to the use of one and his heirs; a Surrender there to the use of himself for life is good enough. For it is for the benefit of his Estate, to which the Custom may well extend, And another Case was cited, Trin. 39 Eliz. rot. 413. betwixt Redsal, and Lacon, That, if a Copy-holder for Life commits Waste, it shall not forfeit the Estate of him in Remainder. Wherefore it was adjudged for the Plaintiff.

The Lady Shandois *versus* Simpson, Trin. 43 Eliz. rot. 587.

(11)

Ant. 715.

Error of a Judgment in the Common Bench, where the Plaintiff declared in Debt for 256 l. upon several Retainers to embroyder divers Gownes. The first Error was, That the Plaintiffs Declaration was not good, because he Declares (inter alia) That the Defendant Retained him such a year, day, and place to embroyder a Satten Gown for a Paid-Servant of her Daughters, and to take for the same 40 s. And the Embroydering of anothers Gown is not a good Consideration. Sed non allocatur. For in as much as he did it upon her Request, it is a sufficient Consideration. Secondly, it was alledged, That Debt lies not in this Case, but an Assumpsit only. For here is not any contract betwixt them, Nor Quid pro quo; and therefore Nelsons Case 28 Eliz. was cited, That where one Retained Nelson to be Attorney for another in such a Sute, and agreed that he should have so much for his labour: And he brought Debt against him, who retained him, and not against him, for whom he was retained; and it was adjudged, That it lay not, for it is not any contract between them; but an Assumpsit lies only because he became at his Request the other mans Attorney, Sed non allocatur. For here the Embroydering of the Gown at her Request is sufficient, and it is at his Election to have Debt, or Assumpsit; As 37 H. 6. 8. 3 Ed. 4. 21. 7 Ed. 4. 26. Dyer 347, and 337. Woottons Case. Thirdly, because there is not any place alledged, where he should embroyder it; Nor that it was done before the Action brought. And it was Traversable, That he did not embroyder it; And then there is not any place for the Venue. Wherefore the Declaration is not good. Sed non allocatur. For he cannot Travers, but ought to have pleaded Non Debet. And he need not alledge the place, where he did it. For it may be done in divers places; And it shall be intended to be done, where the Retainment was. And it is not requisite, that the time of the Embroydering thereof ought to be precisely alledged. For it shall be intended to be before the Action brought; Otherwise he could not have had his Action. And the Prothonotaries of the Common Bench certified, that it was not their course to alledge the day or place of the performance of a contract. Wherefore the Court held it to be well enough; especially as the Case is here, where the Party Defendant did not take Issue thereupon; But let pass the advantage thereof, and is condemned by a Nihil dicit, as here she was. Fourthly, because he declares, That the Defendant retained him such a day, year, and place, to embroyder a Gown of Black Velvet, taking for it 10 l. and he alledgeth, That he embroydered it, but saith not that it was the Defendants Gown, or what Gown he made. And it may be, that it was the Plaintiffs Gown, and then there is not any cause of Action. Sed non allocatur. For the Plaintiff need not take notice whose Gown it was;

was: But it sufficeth for him to Embroyder the Gown shewn him, And it shall never be intended, That it was the Plaintiffs Gown, which he was hired to Embroyder. Wherefore the Judgment was affirmed.

Dighton *versus* Bartholomew, Pasch. 42 Eliz. rot. 269.

Error of a Judgment in *Nativo habendo*. The Error assigned was; (12)
for that the Plaintiff sued a *Nativo habendo*, & after a *Pone facias Loquelam*; and, at the day of the return thereof, the Plaintiff appeared not, and a final Judgment was entred against him, and that the Defendant should be quit for ever, where it ought to have been only a *Misericordia*, where the Plaintiff is *Non-sued* before Appearance, and so be the Presidents *Hillarii* 12 H. 6. rot. 317. where the Judgment in such Case was in *misericordia* only, and not Final. And of that Opinion were the whole Court. Wherefore for this it was Reversed, Vide 6 Ed. 2. 12 Ed. 2. & 19 Ed. 2. tit. Villanage, 26. 28. 32.

Rippon *versus* Norton.

A *Sumpsit*. Whereas one J. N. the Defendants Son assaulted the Plaintiff, and offered to Stab him; and also assaulted one Richard the Plaintiffs Father, and offered to beat him, whereupon the Plaintiffs Father complained to Sir Anthony Mildmay, Justice of the Peace, and required the Surety of the Peace, and offered his Oath, That he feared bodily harm, &c. That in consideration the Plaintiff, and his Father would desist from any further complaint, and that the Defendants Son should no further be troubled concerning it, the Defendant assumed, that his Son should keep the Peace towards the Plaintiff, and also towards his Father. And alledgeth in Facto, that they, trusting to this promise, did not proceed in their complaint; And that notwithstanding the Defendants Son had assaulted the Plaintiff, and beaten him, and wounded him. Upon *Non Assumpsit* pleaded, and found for the Plaintiff. It was now alledged in arrest of Judgment, That the staying, and forbearance of the complaint was not a sufficient Consideration. As also that the complaint was made by the Father, and not by the Plaintiff, and therefore he had not any cause of Action; and that the Defendants promise for his Son should not bind him. But all the Court Resolved, that the Declaration was good. For there being cause to procure the Surety of the Peace, the staying thereof is a sufficient Consideration; and the complaint of the one is sufficient for the other. And that the Father hath good cause to make that promise for his Son. And if a meer Stranger had made such a promise in behalf of the Defendants Son, the Plaintiff relying thereupon, did forbear the prosecution of his complaint, and he is afterwards damnified, it had been good cause of Action: A multo fortiori, against the Father, who made the promise for his Son. Wherefore it was adjudged for the Plaintiff, Vide Antea, Mich. 43. & 44 B. R. Pl. 3. (13)
Yelv. 1.
Ante 849.
Co. 9. 94.

Eaton *versus* Ap Harry.

- (14) **E**rror of a Judgment at the Sessions apud Denbigh. The Error was assigned in hoc, That in an Ejectione Firmæ of Land in Denbigh Lewelling, and Istred-Canon, Not-guilty being pleaded, a Ven. fac. was awarded de vicineto of all the Aills; And the Sheriff returned it in this manner, Executio istius Brevis patet in quodam Pannello huic Brevi annexa, and the Panel was made in this manner, Nomina Juratorum de vicineto de Denbigh-Lewelling, & Istred (omitting Canon) inter, &c. And it was alledged to be an ill return. For from one of the Aills (viz. from Istred-Canon) no Juror is returned. But Gawdy, and Yelverton held it to be well enough: For when the Writ is Endorsed, Executio istius Brevis, &c. It shall be intended to be duly Executed in all points; and Istred, and Istred-Canon shall be intended to be all one. The Addition also of the Vishes upon the top of the Pannel is not usual, and it is but Surplusage, and shall not hurt: But Fenner e contra. For although, that if there had not been an addition upon the top of the Pannel, the Writ should have been intended to be well returned, by reason of the words Endorsed thereupon; Yet when now it appears to the Court, of what Aills he returned it, and he did not do it according to the Writ; It is as ill, as if he had omitted one altogether. And Istred shall not be taken for Istred-Canon, but for another Aill. Wherefore he conceived it to be ill. Et adjournatur.

Chambers *versus* Hubberd.

- (15) **A** Shumpfit. In Consideration, That he, with J. S. would become bound for the payment of 10 l. to the Defendant, That the Defendant assumed to do such an Act, and alledgeth in Facto, That he with J. S. became bound in 20 l. cum Conditione Subscripta, pro solutione decem librarum. The Defendant pleaded, Non devenerunt Obligati modo & forma, &c. The Jury found, Quod devenerunt Obligati in this manner, Noverint Universi nos, &c. obligari to the Defendant in decem libris Solvend, &c. Et si defecerimus in solutione, tunc obligamus nos in 20 l. &c. So it is quasi a Condition inscribed in the Obligation it self; and not subscribed. And whether it was found for the Plaintiff, or not? Was the Question. Popham and Gawdy held, that it was found for the Plaintiff: For the Substance of the Declaration is found, and the Modo, and the Forma be not much material, although it be alledged in the Declaration, They were obliged in Conditione Subscripta: As where the Condition of an Obligation is, that he shall not commit Waste, In Debt brought, &c. The Waste was assigned in succidendo 20 Quercus. The Issue was, Non succidit 20 Quercus, modo, & forma, &c. and the Jury found, Quod succidit 10 Quercus; It is found for the Plaintiff. And the Substance being, whether they were obliged to pay 10 l. That being found, it is well enough. Wherefore, &c. But Fenner and Yelverton e contra. For in an Action upon the Case he ought to Declare the Truth of the Case, and not to vary therefrom in any point: And if he varies, he fails. And there is not here any such Obligation as he Declares, for that Inscribed was parcel of the Obligation it self. But the Condition Subscribed, or Endorsed is no parcel thereof. Wherefore it is not the same Obligation, whereof he Counts, Et adjournatur.

Dyer 115.b.

Co. 10. 131. a.

Chichely *versus* Barker.

Action for these words, Thou hast forged a Reconuſance taken before Fisher, and others: And adjudged, That the Action lay. For Forged ſhall be intended Falſly certified. And Taken ſhall be intended for Acknowledged. And, the Plaintiff being a Juſtice of Peace, who had authority to take Reconuſances, it is a great ſlander unto him. And adjudged for the Plaintiff. (16)

The Lord St. John *versus* Brandring.

Debt; as Executor to the Lord St. John, who is dead, againſt the Defendant Executor of the Heir, who was to pay a Relief. After Verdict, the Iſſue being upon the Tenure, and found for the Plaintiff, it was moved in arreſt of Judgment, that the Executor of the Lord, neither by the Common Law, nor by the Statute of 32 H. 8. may maintain an Action of Debt for a Relief due to the Teſtator. But the Court held clearly, that he might by the Letter, and Intent of the Statute; it being a duty to the Teſtator, although it be not an Annual Service. Secondly, it was moved, That Debt lies not againſt the Executor of the Heir, it being a Perſonal duty by the Teſtator, no more then Debt lies not againſt the Executor of the Warden for an eſcape of the Wardens. But the Court held, that the Action well lay; and the Caſes be not alike. For in the one Caſe the Teſtator was chargeable for a perſonal wrong, which died with his Perſon, and is chargeable by the Statute Law: Which charge ſhall not fall upon his Executor. But in this Caſe the Teſtator was charged as for a duty due by him, for which he might not have waged his Law. Wherefore his Executors are alſo chargeable. And it was adjudged for the Plaintiff. Vide 26 H. 7. 1. 28 H. 8. Dy. 24. 7 H. 6. 13. 11 H. 6. 15. (17) Noy. 43. Co. Lit. 162. b.

Cox *versus* Crapnel, and his Wife.

Action ſur Trover againſt them, ſuppoſing the Trover by both, during the Coverture, and the Conversion by the Feme only. The Defendants plead, Quod ipſi non ſunt inde culpabiles, & after Verdict for the Plaintiff, it was moved in arreſt of Judgment, That, in as much as the Declaration doth not charge the Baron with any Tort, but only the Feme, The Iſſue ought to have been, Quod ipſa non eſt inde culpabilis. And of that opinion was all the Court. Wherefore it was awarded, that the Iſſue was ill, and that they ſhould Replead: And ſo they did. Note, a Repleader after a Verdict. (18) Noy 45. 2 Cr. 5. R. 585. Ant. 823. Ant. 318.

Riches *versus* Bridges.

Aſumpſit. For that he was indebted to J. S. in twenty Combs of Barley, to be delivered unto him at ſuch a day, in Conſideration that he would deliver it to the Defendant before the day, the Defendant aſſumed, and promiſed to deliver it at the day to J. S. and alledgeth in fact, That he delivered it to the Defendant; and the Defendant had not delivered it to J. S. It was moved in arreſt of Judgment, that this was not any Conſideration to deliver the ſame Corn, which he had received, for he cannot have any uſe of it, nor any benefit by it. But the whole Court held it (19) Yelv. 4. 2 Cr. 667

A u u u 2

to

2 Cr. 668.
Ant. 218.
Ant. 380.
Yolv. 128.

to be a good Consideration: for in regard he received it, and made such a promise, it shall be intended that he had some benefit thereby, viz. That he had the better Credit to retain it in his hands: or, otherwise he would not make such a promise. And if by any Intendment it can be, the Law will well intend it. Wherefore it was adjudged for the Plaintiff. Note, afterwards upon a Writ of Error in the Exchequer-Chamber, it was reversed for this Cause: for that there was not any sufficient Consideration, whereof the Law takes any regard.

Devent versus Popham, Trin. 43 Eliz. rot. 157.

(20)

T Respass of Battery, wherein he Declares against the Defendant nuper de C. in Comitatu S. Chandler. The Defendant pleads in abatement of the Writ, That he, the day of the Writ purchased, was a Gentleman, &c. Et hoc, &c. And it was thereupon demurred; and held by all the Court, that the Plea was ill, because he did not Traverse, that he was a Chandler. For if a Gentleman will occupy any Trade, he may be called and written by the name of his Trade, and not Gentleman. Wherefore it was adjudged for the Plaintiff.

Williams versus Green, Trin. or Pasch. 43 Eliz. rot. 1431.

(21)
2 Rol. 27.
Moor 642.

Co. Lit. 362.
2 Rol. 26.
2 Cr. 86.
Ant. 836.

Debt upon a Bill. The Defendant pleads That the said Bill was delivered to the Plaintiff as a Schedule upon Condition; That if the Plaintiff delivered unto the Defendant an Horse upon such a day, That then it should be his Deed, otherwise not. And that the Plaintiff had not delivered the said Horse unto him, and so Non est Factum. And it was thereupon demurred, and resolved by the whole Court, to be no Plea: For a Deed cannot be delivered to the Party himself as an Escrow, because then a bare averment without any writing would make void every Deed. Wherefore it was adjudged for the Plaintiff.

Gravenor versus Mete, Trin. or Pasch. 43 Eliz. rot. 431.

(22)

Action of the Case upon Deceit. For that he sold unto him two Oxen, and warranted them to be sound, & absque infirmitate, ubi revera non fuerunt, &c. The Defendant pleaded Not-Guilty, & the Jury found him Guilty for the one, and not Guilty for the other. And it was now moved in Arrest of Judgment, because the Warranty alledged was joynt, and now he is found Guilty but of the one, and therefore it is not the same Warranty. But the Court held it to be well enough; for the Action is not founded upon the Contract, but upon the Deceit. Wherefore it was adjudged for the Plaintiff.

Colbrook versus Forster, Pasch. 44 Eliz. rot. 3012.

(23)
Ant. 455.

Debt upon an Obligation of 200 l. The Defendant pleaded, That after the day of the Writ purchased (viz. such a day) apud D. he paid unto the Plaintiff 60 l. Parcel thereof, which he received. Judgment de brief, &c. And a special Demurrer was thereupon; Because he shewed not any Acquittance, or Release testifying it. And, without Argument, it was adjudged for the Plaintiff.

Hungate

Huntgage *versus* Mease, & Smith. Trin. 42 Eliz. rot. 1804.

DEbt upon an Arbitrament. The Case was, that the Plaintiff on the one part, and the Defendants on the other, submitted themselves to the Arbitration of J. S. so as the Arbitrament be made, and published utrique partium prædict. before such a day. And it was made, & published to the Plaintiff, and to Smith, one of the Defendants; but it was not delivered and published to Mease. And whether this were a sufficient Publication thereof? Was the Question upon a special Verdict. And the whole Court held it to be no sufficient Publication of the Arbitrament according to the submission: Because it ought to have been delivered Omnibus partibus: for it ought to be performed by every Party. And this word Utrique shall be expounded Separatim, and not Conjunctim. Wherefore it was adjudged for the Defendant. 5 Co. 103.

(24)
Moor. 642.

Ante 797.

Docket *versus* Voyel. Mich. 43 & 44 Eliz. rot. 954.

A Sumpsit. Whereas the Defendant 10 Maii, 40 Eliz. in Consideration, that the Plaintiff at a certain day, then past, at the Defendants Request, had lent unto him 30 l. for such a time; That the Defendant assumed to lend unto the Plaintiff upon request 30 l. for a year, or otherwise to give him 40 s. The Plaintiff alledgeth, that the Defendant did not lend him 30 l. licet requisitus, &c. nor pay the said 40 s. And it was thereupon demurred; because the Consideration was past, and executed, and the Consideration and Promise ought to go together: Or else it ought to be a Consideration continuing. Wherefore for this Cause it was adjudged for the Defendant.

(25)
Moor. 643.
Owen 144.

Ant. 715.
Ant. 442.

Parham *versus* Norton. Mich. 43, & 44 Eliz. rot. 915.

REplevin. The defendant made Conusance as Bailiff of Sir Folk Grevil, for 10 s. for an Amercement, and for 20 s. for Rent, and for 20 s. for a Relief. The Plaintiff Quoad the 10 s. for the Amercement saith De injuria sua propria, & Craverleth the Prescription to hold Court, and to Amerce. And Quoad the 20 s. for the Rent, Quod paratus fuit, & obtulit J. S. Ballivo Dni. F. G. who refused it, and that he yet was ready. And Quoad the 20 s. for a Relief he saith, that the Tenant died seised, and the Land descended unto two Daughters, who together with their husbands enfeofed the Plaintiff; And that the Lord, knowing of that feoffment, had accepted the Rent from the Plaintiff at such a Feast, and demanded Judgment whether now he should have a Relief. The Defendant Quoad the first Plea for the Amercement demurs. Quoad the second Plea for the Rent, Craverles the Refusal, and Issue was joyned thereupon. Quoad the third for the Relief he demurred. And all the Court Resolved, That the barr for the Relief was insufficient; And that the acceptance of the Rent was not any Conclusion to have the Relief: Because the Relief is not any Service; but a Fruit ancient, and adhering to the Services. And the Court held, That the Avowry for the Amercement was insufficient; because it was not alledged in fact, that the Plaintiff did not appear after

(26)
Moor. 643.

Co. 3:66.2.

after Summons; But Quod præsentatum fuit per Homagium, That he did not appear: And that the Issue Joyned upon the refusal was ill; but it ought to have been joyned upon the Tenure. Wherefore a Repleader for that point was awarded.

Hardman, Executor of Agnes Hardman, *versus* John

Hardman, Hill. 44 Eliz. rot. 427.

- (27) **D**Ebt upon a Bill Obligatory; for that the Defendant Cognovit se debere, & promississet solvere eidem Agneti 10 l. at any time after the Feast of Saint Bartholomew, which should be in Anno 1600. quandoque the said A. should require it, if the said A. at tunc. esset superstes & that the Defendant, licet sæpius requisitus by the said A. after the said Feast, viz. such a day, &c. had not paid it. The Defendant demanded Oyer of the Bill, which was; *Memorandum*, That I *John Hardman* the younger, do acknowledge my self to owe, and do promise to pay to my Mother *Agnes Hardman* the Sum of 10 l. at any time after the Feast of S. *Bartholomew*, whensoever she shall require the same, if my said Mother shall be then in Life; For the payment whereof, I bind my self, my Heirs, Executors, & Administrators to *John Hardman* the Elder my Father, by these presents, &c. In witness, &c. And it was thereupon demurred, and adjudged for the Plaintiff; and that it was a good Bill to Agnes by the words in the first part of the Bill; and the words, which oblige him to John Hardman Senior, in the last part of the Bill, are void.

Gibson *versus* G. Brook, Executor of Will. Brook.

Hill. 44 Eliz. rot. 1324.

- (28) **S**Cire facias; Upon a Judgment given against an Executor in Debt, & Damages de bonis Testatoris, si, &c. Et si non, pro Damnis, de bonis propriis. The Defendant pleaded, Quod alias post primum Judicium redditum, the Plaintiff had sued a Fieri facias against him upon that Judgment, upon which Writ, the Sheriff had returned Nulla bona Testatoris, &c. nec aliqua bona propria. And afterwards, upon averment made to the Court, Quod devastavit bona in London, a Special Writ of Fieri fac. was awarded to the Sheriff of London, to enquire si devastavit, and the Sheriff returned the Inquisition, Quod bona Testatoris devenerunt to the hands of the Defendant after the Testator's death, to the value of 100 l. which he had converted to his proper use. Whereupon a Scire fac. was awarded against him to shew cause, Quare Executionem, &c. And he appeared upon it, and pleaded quoad Damna, Quod non potuit dedicere Executionem, & Judicium super inde. Et quoad the Debt, Quod Riens enter mains. And it was thereupon demurred & adjudged for the defendant (Quod vide ante, fol.) prout per Recordum prædictum remanent in suo robore minime reversat. plenius apparet. And avers the Debt in this Record, & in the said Record, & the persons to be all one. Et quod nulla alia bona, quæ fuerunt Testatoris, after the day of the purchase of the first Writ of Scir. fac. huc usque devenerunt unto his hands. And it was thereupon demurred, & held by the whole Court, That this general Scire fac. upon the first Judg-

Judgment was not good; for it is barred by the Judgment ^{Ante 592} in the first Scir. fac. But if that afterwards any Goods had come to his hands, he ought to have had a Special Writ rectifying this matter; That after this Judgment Assets had come to the Defendants hands, and to have prayed Execution of them: As upon plainment Administravit Assets is found for part, and afterwards Assets came unto them. Wherefore it was adjudged for the Defendant.

Termine

Termino Trinitatis,
 Quadregesimo quarto ELIZABETHÆ,
 in Banco Reginae.

Dawes *versus* Bolton, Hill. 44 Eliz. rot.

(1)
 Yelv. 4.
 1 Rol. 68.
 R. 201.

Ante 6.

Co. 4. 15. 4. b.

Action Upon the Case for these Words; Thou art a Knave, and hast received stoln Swine, & hast received a stoln Cow, and thou knewest they were stoln. The Defendant pleaded Not-guilty; and after Verdict it was moved, that the Action lay not; And of that Opinion was the whole Court, absente Popham; for the receiving of stoln Goods, knowing them to be stoln, (unless he receives them to maintain the Felon) is not Felony: And although it were objected, that it is a great Slander, and a cause of binding him to the good Behaviour, if it were true, that he received stoln Goods, and therefore cause of Action; as it hath been adjudged for saying, Thou layest in wait to murder one, although he were not charged with Felony, yet the Action lay; Quod fuit concessum per Curiam; Yet the Court held here, that the Action lay not; for it may be he received them, as Bayliff, or Lord of a Mannor, who had Liberty to have Waifs, and Felons Goods, and then it is not any Offence, and it shall not be taken in the worst sence, when it may have any other Construction; As in Doctor Stanhops Case, Thou gettest thy living by swearing, and forswearing, an Action lies not; for he might have the Fines of such as commit Perjury; and although it were urged, That the Construction shall be as of words in the worst part, spoken maliciously, when he saith, Thou art a Knave, and hast received, &c. Yet the Court regarded it not; But, upon the first Motion, adjudged it for the Defendant.

Lea *versus* Exelby.

(2) **A** Sumpsit. Whereas the Defendant was possessed of such a Lease for years, the Inheritance being the Plaintiffs, in Consideration the Plaintiff promised to pay unto him such a Sum of Money such a day, and place, that the Defendant promised super solutionem inde to surrender unto him his Lease, and alledgeth, That he at the day, and place tendered the Money, and that the Defendant had not surrendered his Lease. The Defendant

Defendant pleaded Non Assumpsit, and found against him; and it was moved in Arrest of Judgment, that the Defendant was not to make the Surrender, but upon the payment of the money, or an express tender, and refusal. And the Plaintiff here hath alledged Quod obtulit, but he saith not, that the Defendant refused; which is material, and Issuable; and he might have taken Issue upon the Refusal, if it had been alledged: and although he hath pleaded Non Assumpsit, yet, the Declaration being ill in Substance, the Defendant may well take advantage thereof. Coke, Attorney General, moved, That the Declaration was good, and there needed not any Tender and Refusal to have been alledged; for it sufficeth to alledge, that in consideration he assumed to pay such a Summe, the Defendant assumed to surrender: so, there being an Assumpsit against an Assumpsit, it had been well enough. But all the Court held, that if the promise had been, in consideration he assumed to pay such a Sum, that the Defendant had assumed to surrender, that had been sufficient; for then he is to make his surrender, and he ought to take his Remedy against the other for the Non-performance of his promise; But here it is, that he assumed to pay, and the other assumed to surrender it upon the payment, so as he would not trust to his promise, but when he had paid, he would then surrender it. And in the first Case, he needed not alledge the performance of the promise; But here in this he ought. And when he saith Quod obtulit, and saith not, that the other accepted it, or refused it, his Allegation of the Tender is not to any purpose; for he shall never say, Quod obtulit only, but he ought to plead further, that none was there to receive it, or that he refused; Or he ought to alledge payment, and here it is matter of Substance, for want whereof, the Declaration is not good. Wherefore it was adjudged for the Defendant. And afterwards Coke said, that Willenhalls Case was adjudged, That Tender without alledging a Refusal was not good.

Antt 703

Brown versus Saint John.

Action for these Words; You have committed Burglary in breaking his House, (innuendo the house of one Bennet) & stealing his Goods. After Verdict, it was moved, that an Action lay not; for the breaking of an House may be as a Trespass, and not Felony. And he doth not say whose House he brake, but by the Innuendo, which is not sufficient; So it is uncertain, and therefore adjudged, that the Action was not maintainable.

(3)

Cox versus Humphrey. Quod vide ante, Pasch. 44. Pl. 4.

IT was now moved again by Williams, Serjeant, and the words alledged to be such; Thy Boy (innuendo Ambrose Latham, the Plaintiffs witness Son) hath cut my Purse, and thou hast received it, knowing it, and hast the Rings, & Money, that were there, in thy hand, therefore I charge thee with Felony. And adjudged, that the Action lay not; for it doth not appear, that the Purse was cut feloniously; And then the receiving of the Boy, and of the things which were in the Purse, is not Felony. Wherefore it was adjudged for the Defendant.

(4)

Pophad 210

Ante 877

Latham *versus* Humphrey.

Hill. 44 Eliz. rot. 350.

(5)
2 Cr. 315.
2 Cr. 312.

Action for these words; Thou hast cut my Purse, therefore I charge thee with Felony. After Verdict, it was adjudged, that the Action lay not; for to say Thou hast cut a Purse, without saying Feloniously, it appears not, that he had committed any Felony, wherefore not Actionable.

Blofield *versus* Grymes.

(6)

Scire facias upon a Judgment in Debt. The Defendant pleaded in Barr, that the Plaintiff, upon that Judgment had at another time, brought a Scire facias against the Bayl, and that afterwards he released to the said Bayl all Actions and Demands, &c. And it was thereupon demurred; And, whether this Release to the Bayl shall be a discharge to the Principal. *Quære*; Quia Curia advisare vult.

House *versus* Laxton.

(7)

Ante 773.

Ejectione Firmæ of a Lease from Serjeant Heal; And declares, that he 16 Jan. 44 Eliz. by Indenture dated 2 Jan. demised, &c. The Defendant pleads, that long time before that the Lessor of the Plaintiff had any thing, the Queen was seised in Fee, and by her Letters Patents conveyed it to one T. who Lett it to the Defendant for years, whereby he was possessed, until the Lessor of the Plaintiff entered, and expelled him, and disseised T. and Lett to the Plaintiff, upon whom he re-entered. The Plaintiff saith, that his Lessor was seised in Fee, and Lett to him, prout, &c. Absque hoc, that he disseised the said T. And thereupon the Defendant demurred. Harris, Serjeant, for the Defendant moved, that the Declaration was not good; because it is, that he demised 16 Jan. by Indenture dated 2 Jan. & he doth not say primo deliberat, 16 Jan. For otherwise, it shall be intended to be delivered the day whereon it bare Date. And of that opinion was Gawdy. But all the other Justices held, that notwithstanding the Declaration was good; For, although a Deed shall be intended to be delivered when it bears date, unless the contrary be shewn, yet when it is said, that he demised such a day, by Indenture dated such a day before, it is necessarily to be intended, that it was not delivered the same day it bare Date, but upon the day of the Demise, as it is alledged. Secondly, it was moved, that this Replication was not good, without making Title to the Lessor; And it is not sufficient to say, That the Lessor was seised in Fee, and Travers the Disseisin; For when a special Title is shewn in the Barr, and by that he bestrogs the Title of the Lessor of the Plaintiff intended in the Count,

Count, confessing, that he had not any Estate, but by disseisin: He ought to make a special Replication thereto; and it is not sufficient to say, that he was seised in Fee, for so the Defendant hath confessed; But he ought to shew how he had a lawful Title in Fee, and by what means he came thereto. And in proof thereof; H. 7. 33 H. 6. and 22 H. 6. were cited. But all the Court held it to be a good Replication; for the material matter in the barr alledged is the Disseisin, for thereby the Title of the Lessor of the Plaintiff is confessed, and avoided, and it sufficeth the Plaintiff to maintain a lawful seisin in Fee in the Lessor, and to Travers that which destroys his Title: And he need not make an higher Title; As 22 Eliz. Dy. 366. a. Wherefore Rule was given, that if other cause were not shewn upon the third day of next Term, that Judgment should be entred for the Plaintiff, tunc pro nunc. And afterwards Judgment was given accordingly, and affirmed in a Writ of Error. Ante 671. 1 Rol. 751.

Andrews *versus* the Lord Cromwel.

Trin. 43 Eliz. rot. 49.

ERror to reverse a Judgment given in the Common Bench in an Assise against Andrews, and nineteen others. The Writ being brought by all of them returnable Hill. 43 Eliz. which Record was then returned, but nothing done therein, in the said Term. Quindena Pasch. 43 Eliz. the Lord Cromwel sued a Scire facias, Quare Executionem habere non debet, returnable quinque Pasch. at which day Andrews appeared, & the others exacti non venerunt, & in that Term nothing more was done against Andrews, and the rest. But a Rule in Court given to Andrews to assign his Errors the fourth day of the next Term, at which day Andrews only assigned divers Errors in the Record. And the Lord Cromwel pleaded thereto *in nullo est Erratum*. And now, upon reading the Record, Coke, the Queens Attorney, moved, that they should not proceed to the Examination of Errors, because the Writ of Error was not good; for it is directed to the Chief Justice of the Common Bench, and supposeth, that the Assise was summoned before such, and taken before such, &c. Et Recordum coram vobis residet, ideo vobis precipimus, Quod si Judicium redditum sit, Quod tunc, &c. & the Writ mentioned not, who this Record came into the Common Bench, viz. by Adjournment pro difficultate, as a President was shewn in 10 Eliz. where the Writ made mention, Quod coram vobis venire fecimus propter difficultatem; Or how it was sent thither; for it was said, that a Record may by there by adjournment before Judgment, or removed by a *Mittimus* before Judgment, or by a *Certiorari* after Judgment; for, for the safety of the Record, it is removed oftentimes to remain in the Treasury, and how it comes in, the Writ ought to mention. And so is the Writ in the Register *de Recordo mittendo*, & in Fitz. H. N. B. And, because this Writ did not make any such mention, all the Justices, besides Fenner, resolved, That the Writ was not good, and it should abate; And although in 5 Ed. 6. Dy. where a Judgment was in a Quare Impedit before the Justices of Nisi prius, by the Statute of Westm. 2. and Error thereof being brought,

¶ x x x x 2

brought, Exception was taken; because he doth not shew in the Writ where the Judgment was, and yet held to be good: for there the Record began, and remained in the Common Bench, and where the Judgment was, was not material. But, in this Case, the Record was not at first in the Common Bench, and therefore he ought to shew, how it came thither. But all the Cursitors of the Chancery said, that the Writ in the Register, and Fitz-Herberts Natura Brevium is, where the Record comes into the Common Bench by Writ: but when it comes thither by Delivery to the hands of the Chief Justice of the Common Bench, as here, they have not any such Writ. But Popham, Gawdy, and Yelverton said, that, for as much, as the Express President in Fitz-Herberts Natura Brevium is that this Writ lies, where the Record is brought in the Common Bench for Difficulty; And no President can be shewn, that any other Writ had been ever allowed in any other manner, they held, That this was not now allowable. And Gawdy said, when the Record begins in one place, and is finished in another, there of necessity in a Writ of Error the proceedings in both places ought to be mentioned. And Andrews shewed Presidents, Pasch. 4 H. 5. rot. 109, and Pasch. 5 H. 5. rot. 41. That the Writs there were in such Cases, as they be here. But, the Presidents being viewed were directly to the contrary; Wherefore they held, in regard the Presidents be so, and none to the contrary, That this Writ varying from them was not good, nor allowable. But Fenner conceived, That, forasmuch as this Writ is but a Commission to examine the Errors, although it be not here so formal, as it ought to be, yet, having substance, it was well enough; And the Defendant, having admitted it by pleading In nullo est Erratum thereto, he may not now take advantage thereof. But all the other Justices held, that the Writ not being good, they ex officio ought to abate it. Secondly, they held, that this Assignment of Errors by Andrews only per se, without suing a Summons, and severance of the others, is as Nul, and void: And therefore although the Writ be good, yet they would award Execution; for the Writ of Scire facias, Quare Executionem habere non debet, is as a Spur to cause the Plaintiffs to assign their Errors; And when it is returned Scire feci, and nothing done thereupon, (For this Assignment of Errors by himself only, is as if nothing had been done) Execution shall therefore be awarded; And although there was now a year passed after the Return, and at this time no Judgment is, That there shall be execution, nor that any continuance was entred, yet it is not material: For there never shall need any other Scire facias to be awarded, but Execution shall be taken when there is an apparent default in the Plaintiff, that he would not assign his Errors. Wherefore the Writ was abated, and Execution awarded.

Ant. 448.

Yelv. 7.

Collson *versus* Rofs, & Lever.

ACTION of the Case against the Defendants, late Sheriffs of York; For that, whereas according to the Custom of the City of York, he levied a Plaint of Debt of 15 l. against one Leyton, before the said Sheriffs in the Court of Guild-hall, according to the Custom there and thereupon had Summons awarded returnable at the next Court there, which was returned Nihil; and afterwards had a Capias awarded returnable at the next Court, before the foresaid Rofs and Lever. At which Court such a day holden the Serjeant returned *Cepi corpus, & paratum habuit, &c.* At which Court holden before the said Rofs, and Lever, then Sheriffs, the said Leyton was committed unto the Queens Gaol under the Custody of the said Defendants, there to remain, untill he satisfied the Debt, or the Plaintiff sit inde præclusus: whereupon he there remained from 17 Jan. 43. usque 18 Jan. 43. at which day the Defendants suffered him to go at large, the Plaintiff not being satisfied his Debt, and so went into places unknown, whereby he is deprived of his Debt, unde *Actio accrevit.* The Defendants plead, that they Let him at large by reason of a Writ of Privilege awarded by the Council of York, &c. And it was thereupon demurred, because they did not alledge the Authority of the Council there, &c. And it appears not to the Court, that he might be Privileged there; for it doth not appear, that they had Authority to hold Plea in Debt, so as the Plaintiff might have Justice there, and for that, and other causes, it was held, that the barr was not good, and that the Sheriffs, although they Let him at large by Colour of the Writ of Privilege, yet the Writ not being a good Warrant, they are responsible to the Plaintiff; for they at their peril are to take heed what Warrant they had to let him out of their Custody. But then divers Exceptions were taken to the Declaration by Coke, the Attorney General. First, because a Capias is awarded returnable at the next Court, which ought not to be so, but there ought to be a day certain of the Return. *Sed non allocatur.* For the Process at the most is but erroneous, whereof the Sheriffs shall not take advantage: and the Plaintiff is to declare according to the Record, and he cannot vary from it. Secondly, because the Capias is awarded returnable before Rofs, and Lever, which is not good; For it may be they should die, or be removed before the Writ returned; and therefore it ought to have been awarded returnable before the Sheriffs, without naming their proper names, as of Process awarded out of this Court, or Common Bench are always returnable before the Justices of the Bench without their proper names for the Reasons before. But all the Justices said, it was well enough notwithstanding, when it appears, that they were Sheriffs at the time of the Return as it appears here by the Record that they were; So, although a Writ awarded to the Sheriffs without their proper name is the surest way; for that it may be he may be removed before the executing thereof, but if it be awarded unto him by his proper name, and he be Sheriff at the time of the executing, and return thereof, it

(9)

Noy 45.

Ante. 165.

is well enough; So of Process awarded out of this Court returnable before the Justices by their proper names, it is well enough in Law, although not so in Policy, for the Reason above-said. Thirdly, Because it is not alledged, that the said Leyton was arrested, and if he were not arrested, there cannot any Action be brought for his Escape. Sed non allocatur. For when the Serjeant returned *Cepi corpus, & paratum habeo*, It is to be intended, that he is arrested; but, if he were not arrested, yet the Record is, that he is committed per Curiam to prison, which is sufficient, the party being present in Court, without an arrest. Fourthly, The Commitment is *ibidem remansurus quousque* the Debt be satisfied, or the Plaintiff barred, which is not a lawful commitment, for then he should not be bayled, which is against Law, and the Course of all Courts. But the Court held it to be well enough; For that is the manner of Commitments in all Courts, for the Court is not to demand Bayl, but yet, if he can find Sureties, he shall be bayled, for it is so intended in the commitment. Wherefore, notwithstanding these Exceptions, it was adjudged for the Plaintiff.

Elwyn versus Montford.

(10)

Error in the Erchequer-Chamber of a Judgment in the Queens Bench. The Error assigned, was because there was not any bayl filed for the Defendant. And it was agreed to be clearly an Error, and the Judgment therefore reversed.

Corn versus Paslow.

(11)
Yelv. 15.

Ant. 586.

Error in the Erchequer-Chamber of a Judgment in the Queens Bench. The Error assigned was, because upon a Challenge to the Sheriff, the Ven. fac. was awarded to the Coroners, and returned by them, and at the Nisi prius a Tales was returned by the new Sheriff de Circumstantibus. And it was held to be a manifest Error, and that it was not ayded by the Statute of misconveyance of Process; for it is a Dis-trial.

Grice versus Chambers.

(12)

Error upon a Judgment in Norwich in debt upon an Obligation, Where the Defendant confessed it to be his Deed, but, according to the Custome there, prayed, *Quod inquiretur de debito*; And thereupon the Court awarded a Precept to the Serjeant to make an Inquest to enquire thereof, which Inquest was returned, and found it to a certain Sum, for the which Sum the Plaintiff had Judgment to recover. And this matter was assigned for Error; And, because it was done according to Custome, it was not reversible. And thereupon the Judgment was affirmed.

Brendlofs versus Philips.

DEbt. The Plaintiff declares, That the Defendant, in Consideration of 100 l. paid, granted unto the Plaintiffs Father an Annual Rent of 60 l. Issuing out of the Manor of Dale, for sixty years; with a Nomine poenæ for Non-payment; And that his Father devised the Rent unto him. And for Arrearages of the Rent and Nomine poenæ, he brought the Action. The Defendant pleaded the Statute of Usury, and Issue thereupon, and found against him. And now Godfrey moved in Arrest of Judgment. First, That an Action of Debt lies not for this Rent; But a Writ of Annuity, as long as it continues. Secondly, that this Nomine poenæ was not devised unto him, and therefore it passed not. But Yelverton, Justice, held, that an Action of Debt well lay; And that there was a difference where a Rent for years is granted Originally, and where a Rent or Annuity is granted in Fee, and out thereof a Grant is made for years, there no Action of Debt lies, during the years; But in the first Case it well lay. And in the last point he held, that the Nomine poenæ passed is incident to the Rent, And of that opinion was Fenner, as to the last point; But he doubted of the first. Wherefore, cæteris Justiciariis absentibus, Adjournatur.

(13)

Co. 449.

Co. Litt. 162.b

Gascoyn versus Longvile, in the Court of Wards.

IT was Resolved by the two Chief Justices, the Surbeyor, and Attorney of the Court of Wards; That an Office finding, That one such was seised in Fee at the day of his death; although he doth not find his dying seised, it is sufficient: for that answers well the words of the Writ of Diem clausit extremum. And it shall be intended, that he died seised. But Danbys Case was resolved, that an Office finding that one such held of the Queen the day of his death, without finding the Seisin, or Estate, was void. And it was said, that according to these Resolutions there be many ancient Presidents.

(14)

Noy 45.

Bedingfields Case, in the Court of Wards.

Tenant in Tail Covenanted to stand to seised to the use of himself for Life, and after to the use of his eldest Son, and his Heirs; And after Covenanted with a Stranger, to Levy a Fine to the use of the Stranger, and his Heirs; and levies a Fine accordingly, and dies. Whether the Son shall have this Land by the first Covenant, and that the Fine doth strengthen it, or not? was the Question. And it was Resolved, that the Son should not have it. For when Tenant in Tail Covenanted to stand seised to the use of himself for Life; That is as much as he could lawfully do, And the limitation over is void, and he remained seised as before. And so the said Justices and Counsel of the Court resolved accordingly.

(15)

Noy 46.

Penyston *versus* Lyster, in the Court of Wards.

(16)
Noy 46.

Co. 3. 87. b.

IT was also then resolved at the same time, that where Tenant in Tail bargained, and sold Lands in Fee, the Bargainee levies a Fine with Proclamations, five years pass in the Life of the Bargainer, and afterward he dies, that this Fine shall not barr the Issue in Tail, but that he shall have a new five years after the death of his Father; for the Father by his Bargain and Sale had given all his Right, and against that he could not enter to avoid the Fine; And then, when he died, his Issue is the first to whom the Right descended, wherefore he is within the saving of the Statute. But if Tenant in Tail had been only disseised, and the Disseisor had levied a Fine, and the Tenant in Tail had suffered the five years to pass without claim, that shall bind his Issue; for the Tenant in Tail had a Right at the time of the Fine levied, and therefore the Issue is not within the saving. Wherefore it was Resolved, upon the first Motion, ut supra.

Trin. 43 El. in Communi Banco.

Walter *versus* Pigot, Trin. 44 El. rot. 1031.

(17)
Moor 645.
Hob. 116.
2 Cr. 147.
Yelv. 96.

Co. 10. 123. a.
3. 111 Cr. 418.
2 Cr. 147.

DEbt upon an Obligation de septingenta, & quinquaginta libris. The Defendant demands Oyer of the Obligation, which was concessit se teneri in septuagintis, & quinquagintis libris. The Condition was for the payment of 500 l. at a day, &c. The Defendant pleads variance betwixt the Writ, and Bond. And the Court resolved, that the Plea was insufficient; For Septuaginta shall be well taken for Septingenta, as Viginti for Vigenti; Especially the Intent of the Parties appearing, as it doth by the Condition. Wherefore the Defendant was ordered to answer. And the Plaintiffs Counsel recited a verse to prove it, Ginta signat decem, sed Genta dat tibi centum. And the Defendant pleaded Non est factum. And it was found by special Verdict, and adjudged for the Plaintiff.

Ward *versus* Lavile. Mich. 43, & 44 Eliz. rot. 1207.

(18)
Moor 678.
Hob. 16.
Hob. 16.

REplevin. The Plaintiff counts of the taking apud Dale, without alledging any certain place, as the usual course is to say in quodam loco vocat, &c. And for this cause the Defendant demurred, and the Count held to be ill; for the place is put in the Count to give notice to what the Defendant should make his Title, and answer, that the Writ is too general, and uncertain. Wherefore the Count being against the general form, was adjudged to be ill.

Sir Christopher Heydons Case, Trin. 44 Eliz. rot. 1307.

(19)
1 Cr. 29, 6.

SCire facias upon a Judgment in Debt against Sir William Heydon. Sir William was sued against Sir Christ. Heydon, and his Terr-tenants. Sir Christ. Heydon, and four others were Terr-tenants returned, and thereupon Sir Christ. pleaded, That he was Son and Heir of Sir Will. and pleaded in Abatement of the Writ; because a Scire facias was not sued against him as Heir, pretending that a Scire facias should Issue first against him as Heir, before the Writ should Issue against the Terr-tenants. And the whole Court held the Plea to be ill. And the Writ was adjudged good.

Tuke

Tuke, Administrator of Rich. Tuke, *versus* Check,
& Castrel, Trin. 44 Eliz. rot. 1445.

DEbt for the Arrearages of an Annuity. The Defendant (20)
pleaded a release of all Actions before the day of payment, Co Lit. 292.b.
and after Oyer of the Deed, it was Demurred thereupon, and
held to be no Plea, because a release cannot discharge a Duty,
which was not then in being. Wherefore it was adjudged for
the Plaintiff.

Stebbs *versus* Bennet. Trin. 44 Eliz. rot. 502.

REplevin of the taking of his Beasts in a Place called S. in War- (21)
minster. The Defendant avows the taking of Damage-Fe-
sant in sixteen Acres of Pasture, and made Title to those sixteen
Acres. The Plaintiff saith. That the Place, where the taking
was, contains two Acres of Pasture only, and shews the But-
tals of those two Acres, and made Title unto them: And that the
Defendant de injuria sua propria took the Beasts there, Absque hoc,
that he took the Beasts in prædicto loco vocato S. in Warminster, con-
taining sixteen Acres, prout, &c. And it was thereupon demurred,
and adjudged, that the Travers was ill.

Field *versus* James Winlow, *alias dict.* John W.

Pasch. 44 Eliz. rot. 718.

DEbt, and Counts, Quod cum prædictus Jacobus per nomen Johannis (22)
Winlow, such a day, and year, per quoddam scriptum suum Obliga-
torium concessit, &c. The Defendant demanded Oyer of the Bond,
whereby it appeared, That the Defendant by the name of John
Winlow fecit scriptum, &c. And the Condition was, If James Winlow 2 Cr. 558.
payed, &c. Whereupon the Defendant demurred, Quod Breve præ-
dict. & Narratio minus sufficien. in lege existunt, &c. And all the Court
held, that the Action lay not: For John cannot be James.

Y yyy y

Termino

Termino Michaelis ,
Anno Quadragesimo-quarto & quinto ELIZ.
in Banco Reginae.

The Lord Sands *versus* Pinder.

Trin. 44 Eliz, rot. 90.

(1)

T Respass; Quare clausum fregit vocat. *Cadbury* grounds apud Mottesfont. The Defendant pleads, That ante tempus quo, &c. & prædicto tempore, quo, &c. he was, & adhuc est Clericus, & seifitus de, & in rectoria Ecclesiæ Parochiæ de Mottesfont prædict. in Mottesfont præ. ac de, & in uno messuagio vocat. the Parsonage, parcel Rectoriæ prædict. in Dominico suo, ut de feodo in jure Ecclesiæ suæ prædict. And that he, & all his Predecessors, Rectores Ecclesiæ prædictæ, & all those, whose Estate he hath had in the said House, have had from time, whereof. &c. a Way from that House over the Place, where, &c. to an Hamlet, called Lockerly, infra Parochiam de Mottesfont prædict. to carry his Corn and Tithes growing in the said Hamlet, to the said House, from the said Hamlet, &c. The Issue was upon the Prescription, and found for the Plaintiff, And it was moved in arrest of Judgment, that this Plea was not good: For he alledgeth a Prescription in himself, and all his Predecessors, parsons of the said parish, and sheweth not that he was Parson there, and so he doth not enable himself to the Prescription. But because it was alledged, That he is a Clerk, and seised of the Parsonage in jure Ecclesiæ, although he doth not say, that he is Parson, yet it is good enough: For he cannot be seised in jure Ecclesiæ, unless he were Parson: So it Tant amounts, and therefore well enough. Secondly, Because it is not alledged in what Will the said House is, whereto he claims the way; For it may be it was in another Will. Sed non allocatur. For the Parson shall be always intended to be Resident within his Parsonage: Wherefore it is intended, That the Parsonage-house is within the said Will, where the Parish is alledged to be, (viz. in Mottesfont.) Thirdly, For that the Ven. fac. is only of Mottesfont, and not from Lockerley also, it was therefore alledged, That it was a Mis-Trial: Wherefore, &c. But all the Court held, That forasmuch as Lockerley is mentioned as an Hamlet, infra Parochiam de Mottesfont, it shall be intended, That the Parish, and Will of Mottesfont be both one, and then it shall be taken to be the Hamlet of Mottesfont: For although a Parish may be extended to many Wills, yet it shall not be conceived to be so, unless it be shewn. And to that purpose Gawdy cited Long 5 Ed 4. That where one

Ante 426.
Ant. 837.

one is named of a Parish, it is a good Addition. Wherefore it was adjudged for the Plaintiff.

Clerk *versus* Penkeven.

Action for Words, Thou art a lewd Fellow, for thou hast drawn such a man to Perjury. After Verdict, it was adjudged in the Queens Bench, That the Action lay, and Error brought, and assigned, that the Words were not Actionable; and all the Justices, and Barons agreed, that the Action was maintainable: For it is all one, as if he had said, Thou hast Suborned a man to Perjure himself; wherefore the Judgment was affirmed.

(2)

Baylie *versus* Taylor, Hill. 44 Eliz. rot.

Debt upon an Obligation of 100 Marks, Conditioned; Where- as the defendant, by his Deed of the same Date, had given, and granted to the Plaintiff, and his Heirs, a close of Pasture in Awsterby near Gowby; And whereas the defendant by his Indenture of Mortgage hath already Mortgaged to Jeremy Smith divers Lands, & Tenements in the County of Lincoln, whereby the said Close is either Mortgaged, or supposed to be Mortgaged for a sum of Money, to be paid at a day yet to come: If therefore the said Close be at the day mentioned in the said Indenture redeemed, & set free, & discharged of Incumbrances, that may grow by the said Mortgage. And if the defendant, during the said Mortgage, defend the said Close to the plaintiff, and his Heirs, against the said Jeremy Smith, That then, &c. The defendant pleads, that the said Close was not Mortgaged to J. S. and so he was discharged, &c. The plaintiff saith, that the said Close, Tempore confectionis Scripti Obligatorii prædicti, pignorum fuit prædicto Jeronymo Smith, Et hoc petit, quod Inquiratur, &c. And thereupon they were at Issue, and found for the Plaintiff, and it was moved in Arrest of Judgment, that the Replication was not good: First, because he saith Pignorum fuit, and he shews not to the Court, how pignorum fuit, viz. by Indenture intolled, or Feoffment, so as the Court might judge thereof: As 22 Ed. 4. 40. Sed non allocatur, For the plaintiff is a stranger thereto, and he need not shew it. And the defendant having pleaded Non pignorum fuit, it sufficeth the plaintiff to say Pignorum fuit generally, without shewing how; as if the Tenant pleads Joynt-tenancy on the part of the plaintiff, he needs not shew, of what gift, or how, because he is a stranger thereto, but if he pleads it on his own part, it is otherwise, and therefore this Exception was disallowed. Secondly, because the plaintiff in his Replication saith, Quod pignorum fuit, and he doth not say, That it was not redeemed: For although it were pignorum, yet if he doth not shew that it was not redeemed, he shews not any breach sufficient: For the Condition is, Whereas it is Mortgaged, or supposed to be Mortgaged, if it be redeemed, that then, &c. so as if he will entitle himself to the breach, he ought to shew, that it was Mortgaged, and not redeemed, as Long 5 Ed. 4. 188 is; In Debt upon an Obligation, conditioned for the performance of an Arbitrament, The defendant pleads, Nullum fecerunt Arbitrium The plaintiff saith, Tale fecerunt arbitrium: That is not sufficient, without shewing in what point it is broken, so as the Court may

(3)
Yelv. 24.

Ant. 823.

R. 69.
2 Cr. 227.
Ante 320.
Yelv. 24.

2 Cr. 442.

see whether he hath just cause of Action. And although the defendant by pleading *Quod non pignoratium fuit*, implies, That there was not any redemption, yet it is not material: For so it is done in Case of an Arbitrament, it is implied, that he did not perform it. And of that Opinion was Gawdy; For the plaintiff ought always to shew to the Court, that he hath cause of Action: And therefore if in a Replevin the Parties be at Issue upon the Place, yet the Avowant shall not have Return, unless he shews to the Court good cause in his Avowry to have Return. Wherefore, &c. But Popham, Fenner, and Yelverton to the contrary: For when the defendant pleads *Non pignoratium fuit*, and the plaintiff saith *Pignoratium fuit*, it is a perfect Issue in it self: and therefore the plaintiff concludes his Plea, *Et hoc petit, quod inquiretur per patriam*, &c. But in the Case of the Arbitrament alledged, he shews it, and the defendant ought to rejoyne thereto, before they be at Issue. And Popham said, it differed from the Case here: For there he, who pleads it, is privy to the Arbitrament, and is privy to the Assignment of the Breach: But here the Redemption lies only in the knowledge of the defendant, and not of the plaintiff: and therefore the Plaintiff shall not be enforced to shew that, whereof by Intendment he hath not any Conusance. Wherefore it was adjudged for the plaintiff.

Chambers versus Taylor.

(4)

Action upon the Case in nature of a Conspiracy; For that the Defendant falso & malitiose procured him to be Endicted at the Sessions of the Peace in the County of Middlesex of Felony for stealing a Cloak, and other Goods, &c. and to be imprisoned, until he were acquitted, &c. The Defendant pleaded, That he was possessed of the Goods mentioned in the Endictment, and they were stoln from him by persons unknown, out of his House in High-Holborn in the County of Middlesex, whereupon he made search for them, and found them in the Plaintiffs House, and demanded of him how he came by them; and because he would not restore them, nor say how he came by them, he for the Examination thereof complained to J. S. Recorder of London, and Justice of Peace in London, and Middlesex, and obtained his Warrant to bring the Plaintiff before him, to be examined concerning those Goods, by vertue whereof he was brought before him, and examined, &c. and because he gave various and uncertain Answers, The said J. S. greatly suspected him of the said Felony, whereupon he bound the Plaintiff in a Recognisance of 40 l. to appear at the next Goal-delivery of Newgate, and bound the Defendant in a Recognisance of 40 l. to prosecute, and give Evidence against the Plaintiff concerning the said Felony: Whereupon he at the next Sessions for the County of Middlesex preferred the said Bill of Endictment, prout in the Declaration, &c. and delivered to the Jury upon his Oath all the said Circumstances, whereupon they found the Bill, for which the Plaintiff at the next Goal-delivery at Newgate was committed to Prison, prout, &c. in the Declaration, and there acquitted: No Evidence being given against him, *Quæ sunt eadem Indictament, procuratio, & in prisona detentio, unde se queritur; & hoc, &c.* And hereupon the Plaintiff demurred. And now this Term it was argued by Bacon for the Plaintiff,

Plaintiff, that this Plea is not good, because it is not alledged; that the Plaintiff stole them, nor doth he shew any sufficient cause of suspicion, as common Fame, or that he was taken with the manner, or the like. And although he gave Evidence upon his Oath, That shall not excuse him. It is also alledged in the Declaration, That he falso & malitiose exhibited the Bill, which he ought to have Traversed: But all the Court resolved, that the Plea was good, and needed not any Travers; for when he shews that the Goods were stolen, and found in the House of the Plaintiff, and he would not shew by what lawful means he came by them, That made a good cause of suspicion, and when he was examined thereof before a Justice of Peace, and gave various and uncertain Answers, That aggravated the Suspicion, and was just cause of binding him to the Sessions: And when the party is bound by Recognisance to give Evidence, and he exhibits a Bill, and gives Evidence, that it is a good cause of Justification: For otherwise every one, who exhibits a Bill of Indictment, and gives Evidence against a Prisoner, shall be drawn in question for a Conspiracy. And Popham said, There is no Question but that a Justice of Peace, in furtherance of Justice for the examination of a Felon, may send for any to examine circumstances to prove it. And they all resolved, that the Allegation in the Declaration, that he falso & malitiose procured him to be indicted, is not Traversable, when he alledgeth the especial matter of procuring the Indictment, which the Plaintiff hath confessed by his Demurrer, which, if it were false, the Plaintiff might well have traversed it. Wherefore, without further argument, it was adjudged for the Defendant. Vide 27 Aff. 22. 8 H. 4. 6. Fitz-H. Conspiracy 7. 27. H. 8. 2. and Pains Case ante, Hill, 44. Plac. 7.

Ante 871.

Salter versus Butler. Pasch. 44 Eliz. rot. 361.

Action of Trover and Conversion of Goods in London, The Defendant Justifies: For that one Robert Bash was seised in fee of twenty Acres in Stansted in the County of Hertford, and granted a Rent-charge to Robert Bash, his Executors, and Assigns of 161. per annum during the Life of Frances, the Wife of Robert Bash, which Robert Bash died intestate, and Frances his Wife was Administratrix unto him: And the Defendant, as her Servant, took a Distress in the said twenty Acres, for the said Rent, by the command of the said Frances, and impounded them there; And Traverses the taking, and Conversion of them, in any other place: And it was thereupon demurred, and all the Court held the Plea to be ill: For the Inducement to the Travers (which ought always to be good) is not sufficient cause of Justification for the taking of the Distress; for this Rent was determined by the death of Robert Bash, because there cannot be an Occupant of a Rent. And the Feme is not Assignee by her taking of Administration: For none can make Title to a Rent to have it against the Terr-tenant, unless he be party to the Deed, or conveys a sufficient Title under it. Wherefore it was adjudged for the Plaintiff. And whereas Exception was taken to the Plea, because he traversed the County, the Court did not speak thereto: For that they resolved the substance of the Plea to be Insufficient.

(5)

Noy. 46.
Moor. 664.
Yelv. 9.

Ante 721.

Bustard

Bustard *versus* Coulter. Mich. 43, & 44 Eliz. rot. 247.

(6).
Yelv. 8.
Moor 665.
Post, 917.

Yelv. 8.

1 Rel. 812.

T Respals. Upon Demurrer the Case was, That Jasper Dormer being seised of the Hoyety of the Mannor of Ilbury, to him, his Wife, and his Heirs, Levied a Fine thereof to Bustard (the now Plaintiff) who conveyed it to W. Gregory in Fee, who conveyed it to Darston, and Shelton in Fee, and they exchanged this Hoyety with the Plaintiff for the fourth part of the Mannor of Barton in Fee. This Exchange was executed, afterward Jasper Dormer died; Justina the Wife of Jasper entered into the Hoyety of the Mannor of Ilbury, and defeated the Exchange for her Life. The Plaintiff enters into the said fourth part of the Mannor of Barton, given in Exchange, and being Duffed brings Trespals. And, Whether this Entry were Lawful: Was the Question. And all the Court held, that he might enter, for the Exchange was totally and utterly Defeated, as well where parcel of the Estate is defeated (especially being a Free-hold) as it should be where parcel of the Land given is defeated; As 13 Ed. 4. is. For it would be very hard, where one gives a Possession in Exchange, and that should be defeated by an Estate for Life, or by a Lease for 100 years of the one part, and a bare Reversion should only be left him; that he should content himself therewith, and have nothing during the time of the Eviction. Wherefore in regard the Exchange was intended for the mutual benefit, and advantage of either Parties; and one of them hath it not where part of the Estate is defeated, and a dry Reversion only left him; Therefore the Exchange is defeated for ever. And although it be clear, that an Acre in Possession may be given in Exchange for the Reversion of another expectant upon a Lease for Life, or for years, where no Rent is reserved, and that it shall be good; For they so took it, and no Party was deceived, Yet it is not like the Case in Question; For here he took it as in Possession, not knowing of any such Title of Eviction. But if he had recited, That he had a Reversion expectant, and gave it in Exchange, and the other had accepted thereof, it had been good. And therefore Popham said, if he in Reversion exchange his Reversion for a Possession, it is good. But if he in Reversion disseise his Tenant for Life, or Duffs his Tenant for years, and makes an Exchange in Possession for Lands in Possession; if afterwards Tenant for life, or years, Re-enter; the entire Exchange is defeated: So if Tenant in Tail, Reversion to his right Heirs, bargains and sells the Land in Fee (whereby the Bargainee hath a Fee for the time) If he exchange with another for Lands in Possession, and afterwards the Tenant in Tail dies, and the Issue in Tail Enters, and Defeats the Exchange for his time, There is no doubt but that the entire Exchange is defeated. Quod Coke, Attorney General (who was of Counsel with the Defendant) agreed unto. For a Reversion expectant upon an Estate Tail is esteemed of no value. For it may be cut off by a Common Recovery, which was the reason, that it was adjudged in Doilies Case, that such a Reversion is not assets in debt, or Formedon. And in Billing, & Trapps Case 13 Eliz. that a Reversion upon an Estate Tail is not Assets in a Formedon. But he said, That for a Reversion upon an Estate for Life it is otherwise, and

and therefore an Eviction for Life, or years, shall not Defeat the entire Exchange; because the Law accounts the greater part of the Exchange to remain, and in proof thereof he cited ^{42 Aff.} Pl. 22. That where part of one Parceners part is Evicted for Life, That shall not defeat the entire Partition, which is like to the Case of an Exchange. But the Court denied it to be Law; for they all held, that the entire Exchange was defeated, and gave Rule to enter Judgment for the Plaintiff by such a day, unless other Cause were then shewn. And then Coke moved for the Defendant, That the Replication was not good; because the Estate was conveyed by Fine with a Render to Justine the Feme. And it is not shewn, That this Fine was executed by Entry. And it is clear, That this Fine is always Executory, and therefore a Scir. facias lies upon it: And for that Cause, until it be Executed by Entry, nihil operatur. And although it be alledged, by force whereof she was seised, &c. yet that helpeth not. Secondly it is pleaded, Quod per quandam Indenturam, &c. he bargained and sold the Moety of the Mannor of Ilbury, Habendum the said Moety to W. Gregory in Fee: So in the Premises of the Deed, the bargain and sale is not to any person; and then although the Habendum is to W. G. yet that shall not help. For the Office of an Habendum is only to limit an Estate, and not to give any thing: And there ought to be Grantor and Grantee in the Premises of the Deed, otherwise it is void. And although it be pleaded, that the Indenture is between Bostard on the one part, and W. Gregory on the other part: Yet that shall not help; for Intendments avail not: but it ought to be expressly shewn in the Deed, to whom the Grant was made. Thirdly, because it is pleaded Virtute cujus he was seised, and saith ^{Yelv. 8.} not Vigore Statuti de usibus, &c. as the Common pleading is. And all the Court delibered their Opinion severally; That for the matter in Law they held, that the Exchange was entirely defeated by the eviction of the Estate for Life, because that part of the consideration is defeated. And although it were alledged, that he had notice of the Estate for Life by Intendment, because he was the first that purchased from Jasper, and that the Land by that means came unto him; yet that is not material; because Non constat at the time of the Exchange made unto him, but that the Estate for Life might have been determined by Release, or otherwise. But if it had been particularly mentioned, it might peradventure have been otherwise. But as to the pleading they held, that it ^{Post. 917.} was not good: For first, He cannot be said seised upon a Fine sur Render, without an Entry alledged: And the pleading by force whereof he was seised, &c. doth not supply the entry; But upon a Fine sur Conusance, &c. come ceo, &c. it is otherwise: For that is executed. ^{Post. 918.} Secondly that the Bargain, and Sale by Indenture, without expressing to whom, although it were Habendum to W. G. who was Party to the Deed, was not good for the reasons before alledged. As to the third Exception, They held the pleading to be well enough: For although the usual manner is to say vigore Statuti, yet it being a general Statute, the Court ought to take Conusance thereof, and therefore good: but, because the Record was not in Court, and it appeared not, how these Exceptions came to the end of the Case, they would advise, Et adjournatur. Vide 4 Co. 121. & postea, Hill. 45. Plac. 9

Thomas Russel *versus* John Grange.

(7)

Anne 435.

Assumpsit. Upon Non Assumpsit pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment, because the Record is entred, Et prædictus Thom. venit per Attornatum suum, Et prædictus Joh. per Attornatum suum, Et prædictus Thom. defendit vim, & injuriam, &c. & dicit, quod ipse non Assumpsit. Et de hoc, &c. Et prædictus Thom. similiter, &c. So John the Defendant never pleaded, but Thomas the Plaintiff, and so no Issue joyned between the Parties: And it was moved, that this Plea was Vitious, and not alike, as where the Parties had once pleaded well: But it is a Misprision in the conclusion, as in the Case of 11 H. 7. 2. Peningtons Case: But all the Court (being full) held, That it was a meer Misprision of the Clerk, and well amendable after Verdict: for it shall be intended to be the Defendants Plea, and but the Mis-entry of the Clerks. Wherefore it was ordered to be amended, and was adjudged for the Plaintiff.

Colston *versus* Harris.

(8)

Co. 8. 92. a.

Assumpsit. Whereas Sutes were depending betwixt the Plaintiff and Defendant in the Spiritual Court for Tithes, and they had put themselves in award to J. S. concerning the Premises, and in Consideration of 6 d. given the one to the other, The one assumed to the other to stand to the award of J. S. or to pay 10 l. and alledgeth that J. S. awarded, That the Defendant should pay to the Plaintiff for the Tithes 40 s. at such a day, and that he had not paid it, per quod Adio accrevit. After Non Assumpsit pleaded and found for the Plaintiff, it was moved, That this Arbitrament was void; because it is awarded, That the Defendant should pay 40 s. and there is not any thing awarded for him to have, or to be freed from Sutes, so as he hath not any advantage thereby. And of this Opinion was the whole Court, and, that the Arbitrament being void, the Assumpsit shall not bind him to perform it. Wherefore it was adjudged for the Defendant.

Willymote *versus* Wetton.(9)
2 Cr. 331.

Action upon the Case for these Words used of the Plaintiff by the Defendant to one Street; Go follow Sute against Willymote (innuendo the Plaintiff) for stealing thy two Kine, and hang him, or I will hang thee. And on his further malice offered unto him, If he would Exhibit a Bill of Endictment for stealing the Kine, That he would procure him the value of two Kine; & that he Exhibited a Bill against the plaintiff, &c. After Verdict for the plaintiff upon Not-guilty pleaded, it was moved, That the Action was not maintainable. But Fenner, and Yelverton (being only in Court) held, That the Action was well brought: For the bidding him follow Sute against him for stealing thy Kine, and hang him, imports as much, as that he had Feloniously stollen them, otherwise he could not hang him. Wherefore it was adjudged for the Plaintiff.

Moyl versus Ewer.

T Respass. Upon Evidence, it was moved by Coke Attorney General, where an Indenture of Bargain and Sale between J. S. on the one part, and J. D. on the other part, and in the end thereof a Letter of Attorney to J. N. to make Libery, was produced in Court, that it should be void, because the Attorney was not party to the Deed. But all the Court held it to be good enough: For in many such Indentures are such Letters of Attorney made, and it is a common assurance, and therefore good. Secondly, it was moved upon an Indenture of Feoffment, made by the Prior of Burcester to John Langston of the Hovety of the Mannor of Caverfield, and all his Lands in Caverfield, That he having a Mannor in Caverfield, That the Hovety of the Mannor only should pass: And for the words, And all his Lands in Caverfield, That extends but to other Lands, not parcel of the Mannor, and not to make the whole Mannor to pass: And, if he had not any other Land, these words were void. And of that opinion was Popham. But, in regard it was shewn on the Plaintiffs part, that this Deed being an ancient Deed, viz. 3. H. 7. and therein a Rent of 5 s. 4 d. reserved: And all the Land of the Priory there had been enjoyed under that Grant: And that this Grant was so made, because Langston before had a Mannor in that Vill, and the Prior another Mannor, which peradventure in an ancient time were both but one Mannor, and afterwards divided; So peradventure the Mannor, which the Prior had, was named the Hovety of the Mannor; For these Causes Gawdy, and the other Justices held, That the entire Mannor should pass: But they advised the Jury, if the Case was so, That it should be specially found. But the Jury gave a general Verdict for the Plaintiff.

(10)
Noy. 42.Co. Lit. 52. b.
2 Rol. 8.

Co. 9. 28. 2.

Gore versus Moorton.

Trin 44 Eliz. rot. 783.

Action for these Words, Thou art a forsworn Knave, and that I will prove; for thou wast forsworn in the Hundred-Court (innuendo Stiverton-Hundred-Court) After Verdict for the Plaintiff it was moved, That the Action lay not: For it doth not appear, that it was a Court of Record, nor any Court, whereof the Justices should here take any Conscience. And of that Opinion was the whole Court.

(11)
Yelv. 27.
Mo. 73.

Ant. 135.

Waller versus Campian.

Debt for Rent reserved upon a Lease for years, Supposing, Quod apud Caston, 16 Aprilis Anno 42. Eliz. he Demised such Lands, excepting one Acre, jacent & existent, in Hodeston in Comit. predict. Habendum, from the Annunciation last past, for years, &c. Virtute cujus intravit, & habuit Tenementa predicta, from the said Annunciation, &c. After Verdict it was moved in Arrest of Judgment.

(12)

33333

That

Ant. 169.

That the Declaration was not good: For there was not any Will named, where the Land lay: For the Jacent. & existent. &c. extend only to the Land excepted. But all the Court held, that it refers to both. Secondly, it was moved, that it was alledged, Quod habuit, & occupavit, from the Annunciation last, &c. which was before the beginning of his Lease: And he was thereby a Disseisor, and shall not be said to be in by the Lease; as in Cliffords Case; 7 Ed. 6. Dyer. But all the Court said, that it was well enough: for it shall be intended, that he occupied before the Lease by Agreement: And it is not like, where a Lease is made to have a future Commencement, and he enters before the day of the Lease made. Wherefore it was adjudged for the Plaintiff.

Garnons versus Hodges.(13)
Yelv. 111.
Ant. 888.2 Cr. 125.
Moer. 702.

Assumpsit, in consideration the Plaintiff should use his endeavour, to procure the Defendants Father to assure such Land, that he would give to the Plaintiff 20 l. if he procured the Father to make the assurance; and alledgeth in fact, that he procured, &c. And that the Defendant had not paid, &c. The Defendant pleaded Not Assumpsit, and found for the Plaintiff, and after Verdict it was moved in Arrest of Judgment, that the Declaration was not good, because he doth not alledge the place, where the Procurement was. Sed non allocatur: For the promise is in consideration he should use his endeavour: And now Issue is taken upon the Assumpsit, which is Collateral: Wherefore it is good enough. And it was adjudged for the Plaintiff.

Dag versus Penkeven.(14)
Ante. 899.

Error in the Exchequer-Chamber, of a Judgment in the Queens Bench, in an Action for these Words, Thou art not so honest a man, as thou takest thy self; for thou hast drawn such a man to Perjury. The Error assigned was, That an Action lay not for these Words: For it is not said, that he had suborned any. And it may be said Drawn, because he was examined upon Interrogatories in a Sute, wherein he was Perjured. But all the Justices and Barons held, that the Action well lay; for the Words are of the same Sence, and shall be taken on the worst part, Wherefore the Judgment was affirmed.

Proctor versus Fitz-Williams, in the Exchequer.(15)
1 Cr. 135.

Action for these Words to J. S. the Plaintiffs servant, Thou hast a Traytor to thy Master (innuendo the Plaintiff) adjudged, That the Action lay, it being moved after Verdict in Arrest of Judgment.

Woodward *versus* Thompson.

Error in the Exchequer-Chamber of a Judgment in the Queens Bench. The first Error assigned was, because in Debt by an Administrator he supposed Administration committed unto him by the Archbishop of Canterbury; and doth not alledge, that he was loci illius Ordinarius, or that he had goods in divers Diocesses. Sed non allocatur; for it is well enough, and to be so intended, that he had sufficient Authority to commit it. Secondly, because Administration is alledged to be committed, and he saith not post mortem intestati. But it was held to be good enough: for it is alledged to be committed de bonis intestat tempore mortis sue, & therefore it is necessarily to be intended to be after his death. Wherefore the Judgment was affirmed. (16)

Ant. 879.

Ante 791.

Poultney *versus* Wilkinson.

Action for these Words, Thou art thrice Perjured in thy Answer in Chancery to my Bill; innuendo a Bill exhibited there by the Defendant against the Plaintiff, and an Answer to that Bill. The Defendant demurred, because he alledged not any Perjury in any Particular. And, without Argument it was adjudged for the Plaintiff. (17)

1 Cr. 322.

Currey *versus* Sanderson.

Pasch. 44 Eliz. rot. 171.

Trespas Upon a special Verdict. The Case was, a Copy-holder in Fee surrendered his Copy-hold to the use of one in Tail, with divers Remainders over, who was admitted accordingly, and afterwards surrendered to the use of another in Fee, against whom a Recovery was had in the Copy-hold Court, with Voucher of the Tenant in Tail, who Vouched a Common Vouchee, and died. Whether that was a Discontinuance, or bar to the Estate-Tail? Was the Question; First, it was doubted, whether an Intail might be of a Copy-hold, there being no Custom found either one way, or other? Secondly, Admitting it to be an Estate-Tail, whether a Surrender by it self be a Discontinuance of the Estate-Tail: Thirdly, Whether there may be a common Recovery of a Copy-hold, to bar the Issue in Tail, and those in Remainder? Popham said, That all these Points ought to be well considered, they concerning many Subjects, and therefore they would be well advised, before there should be any Resolution of them. And it was therefore adjourned. (18)

Ante 717.

Ibid.

Stephens *versus* Frances Totty, *nuper uxorem* Henrici Totty.

(19)
1 Rol. 343.
Noy 45.
2 Rol. 301.
Moor 665.

1 Cr. 463.

Co. Lit. 235. a.

1 Cr. 463.

Prohibition. The Case was such, Frances Totty was divorced from her Husband, causa Adulterii in the Husband, and the Sentence of divorce was accordingly. And the Feme sued Stephens in the Spiritual Court for a Legacy, given her by a Stranger. And he pleaded the Release of the Baron, made after the Divorce: which being disallowed in the Spiritual Court, he brought a Prohibition. And it being argued by Doctors, Crompton, & Hudson, they affirmed the Civil Law to be, that such a Divorce is not a Dissolution a vinculo Matrimonii, so as that any of them may marry again; But, it is a separation only, and they be not compellable to Cohabit: But, if they will, they may without any new marrying. And it was said, that if one of them be in dread of the other, for poisoning, or such like cause, it is a good ground for such a Separation by Sentence, &c. And all the Justices held, that in regard this Separation doth not avoid the Marriage absolutely, but they still remained Man and Wife, that this Release of the Baron was good to extinguish the Duty: And that the Books, which spake that, that the Feme shall have again her Goods after Divorce, are to be intended of an absolute Divorce ab initio. But because the Release was obtained by Fraud, without any due consideration, as they conceived, they advised them to a Composition. Et adjournatur.

Seyman *versus* Gresham.

Hill. 44 Eliz. rot. 650.

(20)
Yclv. 28.

Action upon the Case, supposing, That one G. Berisford was Indebted unto him by a Statute Staple in 200 l. and that he sued Execution, and that the Sheriffs of London, by force of that Writ, Impannelled a Jury to enquire what Goods, &c. And that there were divers Goods of the said G. Berisford in such an House in London: And that the Sheriff came with the said Jury, to have a view of them, and to appraise, and seise them for this Debt; and that the Defendant, præmissorum non ignarus, shut the door, and disturbed him to make Execution, &c. The Defendant entitles himself to the Possession of the House, by reason of a Joynt Lease made unto him, and one G. Berisford, and that he had it by Survivorship, and that he shut the door for the Salvation of his Possession. The Plaintiff Replies, that the said G. Berisford mentioned in the Bar, and he, who was obliged in the Statute, were all one person. And it was thereupon Demurred. The principal Question was, Whether this Shutting of the door was a disturbance of the Execution? And whether the Plaintiff might thereupon maintain this Action? And first, it was agreed by the whole Court, That upon a Capias ad satisfaciendum the Sheriff may not break open any mans House, to make Execution, but he is punishable for doing it: But upon a Capias Utlagatum he may well enter any mans House to apprehend him. For no place ought to protect him against the Queen: And

And he being out of the Law shall not have the Protection of the Law. And this Case Tanfield said was resolved by all the Justices of the Common Bench, in Sir Thomas Keimies Case. But whether he might upon a Fieri facias, or Extendi fac. enter the House of any to take Execution of the Goods, and to break the Parties House to make Execution, they doubted. Vide 18 Ed. 2. Execution, 250. 13 Ed. 4. 9. 18 Ed. 4. 4. But if the door be open, there is no doubt, but that the Sheriff might enter to do Execution: For the Law gives him authority thereto, as an Executor may enter to take Goods left there by the Testator. And for this Cause Gawdy, & Popham held, that the Action here well lay; because by the Shutting of the door, the Party was disturbed to have his Execution. But Fenner, and Yelverton e contra, For the Goods being in the Defendants House, who is a Stranger to the Execution, he is not bound to take Conulance of the Sheriffs intent, in coming to make Execution; and his Shutting the Door was lawful. And although there were loss to the Plaintiff, yet it is Damnum sine injuria. And it appears not by what means, that the Goods of the Comulors, which are in the Defendants House, came thither. And if they were taken by the Defendant, as a Trespassor, the Party, whose Goods they are, or the Sheriff upon Execution, may come within the House, if the door be open, to seize them, because the Defendant had them by unlawful means. But if the Defendant had them by lawful means, viz. by Bailment, or otherwise, neither the Party himself, nor the Sheriff can come within the House to seize them. And therefore the Shutting of the door is no cause of Action for the Plaintiff. And therefore the Action lieth not, &c. Et Adjournatur. Note, That afterward, Term. Mich. 2 Jacobi. this cause was argued again. And that Williams agreed with the Opinion of Yelverton, and Fenner, in omnibus; and that the Sheriff might not break any mans House to take Execution, unless in the Queens Case, or for a contempt, &c. Wherefore according to their Opinions, it was adjudged for the Defendant. 5 Co. 91.

Ant. 759.

Ant. 759.

Jennings *versus* Harley.

A Sumplis. Whereas one Basslet was indebted unto him in 50 l. and that he brought Debt, and had Judgment to recover, and thereupon sued a Capias ad satisfaciendum, and an Exigent, and the said Basslet was thereupon Outlawed, and that he intended to sue a Capias Utlagatum; That the Defendant, in consideration the Plaintiff would forbear to proceed upon the Capias Utlagatum, which he had sued out usque ad terminum Paschæ proxime sequent. Assumed, That if Basslet did not pay the Debt, that he would pay it, and alledged in facto a non-performance of the promise. The Defendant pleaded non Assumpsit, and found against him, and after Verdict it was moved by Bacon in Arrest of Judgment, That the Action lay not: For this consideration is against Law, and also void, because this Process is at the Queens Sute, and not at the Parties. But Gawdy, Fenner, and Yelverton held, That the Consideration was good: For it is the Parties Sute, as well as the Queens; for the Party is

(21)

Yelv. 19.

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Yelv. 20.
Ant. 707. 850.

the means to entitle the Queen thereto, and the Party hath the especial carriage thereof: And if the Sheriff suffer the Party arrested upon such a Capias Utlagatum to escape, It is an Escape against the Plaintiff; as it was adjudged in Shaw, and Cutteries Case. Popham e contra: For the Sute is meerly now the Queens Sute, and a means whereby the Party may have his Execution. So as the Queen is Entitled thereto by the Party, so after the Outlawry, the Party is thereto by the Queen, and that issueth for the contempt to the Queen: And, if the Party will not take it, the Queens Attorney may sue it out, and the Queen is not of right bound to satisfie the Party out of the Goods which are seised by this Writ, although she doth it out of Grace many times. But a Petition of Right lieth not in such Case: And although the Plaintiff hath advantage thereof, in regard of the Party, who is taken thereby to be in Execution (which is the reason, that he may have Debt upon the Escape) yet he cannot stay the Execution of this Writ, so the Consideration is void. But, notwithstanding, the other Judges gave Rule, that if other Matter were not shewn before such a day, That Judgment should be entered for the plaintiff: And, that the Defendant might bring his Writ of Error. And no cause was afterwards shewn, &c.

Crisp versus Verral.

(22)
Yelv. 12.
1 Cr. 247. 248.
Ant. 695.

Appeal of Murther against the defendant, late of Sandwich in Comitatus. Kancie, of the death of his Brother apud Sandwich in Comitatu. Kancie. And upon a Capias directed to the Sheriff of Kent, he returned a Non est inventus, And the Defendant appeared to the Writ, and said, That Sandwich prædict. is Parcel of the Cinque-ports, ubi Breve Regine non currit; Qui; quidem les Cinque-ports, nec eorundem aliqua parcella, are within the County of Kent, and demanded Judgment of the Writ. Et quoad the Felony, and Murther Not-guilty. And thereupon the Plaintiff Demurred. Tanfield for the plaintiff, That the Plea is insufficient in matter, and manner: For, as to the matter, if it should be a Plea, by this means Murther would be punished: For he, who did it, would fly out of the Cinque-ports, and they had not any remedy to pursue him, for they cannot award Process of Outlawry, for that ought to be proclaimed in open County, which they have not any Authority to do. And although that in matters, which concerns the Realty, it is a good plea to say, it is within the Cinque-ports: Yet in debt, or trespass transitory against one, who is not a Baron of the Cinque-ports, that it was within the Cinque-ports is no plea: For if a Stranger should commit Trespass there, and depart from thence, and should not be punishable, there would be a failure of Justice, which should not be by reason of any Grant of Franchise, and to that purpose, vide 49 Ed. 3. 24. 50 Ed. 3. 5. 21 Ed. 4. 33 Ed. 3. Jurisdiction 80. 22 H. 7. 90. So here, as this Case is, the Party not being Demurrant there, if this should be a Plea to Oust the Jurisdiction of this Court, the Plaintiff should be without remedy there, and there would be a failure of Justice, wherefore the plea is not good for the Matter. The plea also is double; for if this be a plea, that

1 Cr. 247. 8.

4 Inst. 223.
R. 181.

Sandwich

Sandwich is within the Cinque ports, Then when he saith, that the Cinque-ports are not within the County of Kent, that makes the Plea double: For the Nurther is local, and being laid to be at Sandwich in the County of Kent, to say, that Sandwich is not within the County of Kent, is a good Plea by it self: For, if he had pleaded Not-guilty, he might give in Evidence, that the Fact was not done in the same County. Wherefore the Plea is double. Coke and Godfrey e contra; That the Plea is good, for it appears not to the Court, that if this Plea were allowed, there would be any failure of Justice: But he well might have his appeal there. But if it were so that Justice should fail, that peradventure might be a cause to disallow of this Plea, but that ought to appear by the Replication, viz. That the Party was fled out so, as there was not any remedy against him there. And by the Demurrer it is confessed, That the place where the Nurther was committed, is out of the County of Kent: So by his confession the appeal ought to abate. And for the doubleness, he cannot take advantage after a general demurrer, but he ought to have shewn it for cause. Vide 14 H.8.24. 37 H.6.5. And afterwards all the Justices delibered their opinions severally, that the Plea was not good for the matter, because this Action of appeal is higher then an Action Real, or Personal, and in some sort concerns the Queen. And in those Cases which concern the Queen, that it is within the Cinque-ports, it is not any Plea, as in a Quare impedit.

4 Inst. 223.

1 Cr. 247.

2 Cr. 543.

Wolverston *versus* Meres.

Hill. 43 Eliz. rot. 977.

Action for Words, Edmund Wolverston is a Bankrupt Knave. It was adjudged, that the Action lay, he shewing, that he was a Merchant. And it was affirmed in a Writ of Error, although it was alledged, That he did not say, that he was a Bankrupt, but a Bankrupt Knave, which is an Adjective, and it may be a Bankrupt in Knavery.

(23)

Downing

Downing *versus* Seymour.

Mich. 44, & 45 Eliz. rot. 402.

(24)
Co. Lit. 338. b.

TRESPASS Upon Demurrer: The Case was; Lease was made to Baron, and Feme for years; who enter; the Lessor afterwards Infeoffs the Baron, who died Seised. The Feme Survives, and claims the Term, and betwixt the Feme, and the Heir of the Baron, the debate was, Whether this Term was extinguished? And it was held per totam Curiam, That by the acceptance of the Feoffment the Baron hath surrendered the Term, and it is Extinguished. But if the Conveyance had been by Bargain, and Sale Inrolled, or by Fine, it had been otherwise. And it was adjudged for the Plaintiff.



Termino Hillarii,
 Quadagesimo quinto ELIZABETHÆ,
 in Banco Reginae.

Law *versus* Thom. Sanders.



Assumpsit. The Declaration was in this manner; *Robertus Law* queritur de *Thom. Sanders* in custodia Mareschalli, &c. pro eo videlicet; Cum in consideratione, quod idem *Le Plaintiff* should take to Wife the Daughter of the said Thom. Super se Assumpsit, & eidem *Roberto* promisit to pay unto him 100l. &c. The Defendant pleaded Non Assumpsit, & found for the Plaintiff.

(1)
 Noy 59.

And it was moved in arrest of Judgment, that the Declaration was not good; because it was not alledged, that the Defendant Assumed: But it was thereto answered at the Bar, that it is necessarily to be intended, that the Defendant Assumed: because it is Queritur versus, &c. & he is there named. And in Consideration the Plaintiff would marry his Daughter, Super se Assumpsit, it is of necessity to be intended, that the Defendant did Assume; And now he having pleaded, the Jury hath found, that he did Assume, &c. But all the Court held it to be ill: For a Declaration ought to contain the Substances; otherwise it is not good. And no matter of Substance shall be supplied by Intendment, nor shall the Verdict help it. Wherefore it was adjudged, Quod Querens nihil capiat per billam.

King *versus* Hobs.

Assumpsit. The Plaintiff Declares: Whereas a Capias against the Defendant was directed to the Sheriff of the County of N. to Arrest the Defendant; And the Sheriff had made his Warrant to four, & eorum cuilibet, to Arrest him, whereupon he was Arrested by two of them: That the Defendant Assumed in Consideration, the Plaintiff would discharge him from that Arrest, to pay so much, &c. and alledged in fact, Quod exoneravit eum from the said Arrest; and that the Defendant had not paid, &c. After Verdict, and Judgment in the Common Bench, Error was thereof brought. First, because that this Arrest (the Warrant being made to four, & eorum cuilibet) being made by two, and not by the four, or by one of them only, is not good. But Gawdy, and Yelverton held it to well enough. For being but an Authority

(2)
 Noy 47.
 Yelv. 25.
 Hutton 127.

Co. Litt. 181.5

A a a a a

to

Co. Litt. 181. b

Post. 616.
Pl. C. 7. b.
Co. 9. 25. a.

to make an Arrest, and to Execute such a Warrant : It is not so strictly to be pursued, as an Authority to make Livery, whereby an Estate is Conveyed. For it is made here to four, for the greater aid one of the other ; and therefore three, or two may Execute it very well. But otherwise it is of a Letter of Attorney to make Livery. But Fenner held, That in regard, it is but an Authority, it ought to be precisely executed by four jointly, or by one only. A second Error assigned was ; because he saith Exoneravit eum of the Arrest, and he doth not shew how : But the Court held it to be well enough. For it needs not to be pleaded as a discharge of a Bond, or Rent, which ought to be shewn ; for they cannot be discharged unless by Deed, and it ought to be a perpetual, and absolute discharge ; But the Discharge of an Arrest may be by Composition with the Party for a time, or with the Sheriff, and by divers other means. Wherefore it need not be shewn. And for this Cause it was Reversed.

King *versus* Shore.(3)
Yelv. 32.

Error of a Judgment in the Common Bench, in an Action for words ; Whereas the Plaintiff being an Attorney, the Defendant spake these words of him, He is a pauley fellow, his Credit doth begin to crack, he doth deal on both sides. Judgment being given for the Plaintiff, The Error assigned was, that an Action lay not for these words. But all the Court Resolved, that it was maintainable : for the last words, He doth not deal on both sides, touch him in his Profession, and are very Slanderous. As if one saith to a Lawyer, He is an Abmodexter, there cannot be a greater Slander. Wherefore the Judgment was affirmed.

Chantflower *versus* Priestly, & Doctor Waterhouse, Executors of John Montfishet.(4)
Yelv. 30.
Noy 50.

Ante 219.

Ant. 636.

Covenant, For that the Testator Sold to the Plaintiff twenty Tun of Copperice, and agreed with the Plaintiff, That if he failed of the payment of such a Sum at such a day, That he might quietly have, and enjoy the said 20 Tun of Copperice, and alledge in fact, That the money was not paid at the day ; Et quod non potuit habere, & gaudere the said 20 Tuns of Copperice ; whereupon he brought the Action, and Judgment was against the Defendant by a Nihil dicit, and a Writ of Enquiry of Damages awarded, and 260 l. Damages found, and returned. And it was now moved in Arrest of Judgment, that the Declaration was not good, in that he Assigns not a sufficient breach of the Covenant, Quod non potuit habere, & gaudere, &c. without shewing how, & by whom he was disturbed, is not sufficient. For it ought to appear to the Court, that it was a lawful disturbance, otherwise there is not any Cause of Action ; for the Goods being sold unto him, if he be illegally disturbed, he hath a sufficient remedy, and is not to maintain an Action of Covenant. And of that Opinion was the whole Court. Vide 26 Hen. 8. 3 3 Ed. 3. Covenant 6. But Atkinson moved, that the Defendant came too late to alledge this matter, in regard Judgment was given against him by Nihil dicit. But they all held, he came well enough for the time ; for until the last Judgment he may well inform the Court of the insufficiency of the Declaration : And the Court, seeing it to be insufficient, shall abate it. Wherefore it was adjudged for the Defendant.

Fitz-Williams

Fitz-Williams Case.

Fitz-Williams was Endicted upon the Statute of 8 H. 6. For that he Entred into such an House, and Disseised J. F. injuste & sine Judicio, and yet detains the Possession with force. And, this being found at the Quarter-Sessions in Essex, They awarded Restitution. But the same day, after the Sessions ended, a Certiorari to remove this Endictment was brought, and delivered to Sir Tho. Mildmay, Custos Rotulorum there, praying him to award a Supersedeas, which he refused to do: And the next day after, The Sheriff, by this Writ of Restitution awarded by the Justices of Peace, made Restitution. And now the Endictment, being removed by Vertue of this Writ, it was much debated, whether this Endictment were sufficient, and whether the Restitution were well made; Exception was taken to the Endictment, because it was not pursuant to the Statute. For the Statute is, If any be Disseised, & Ousted with force, or Disseised peaceably, & held out with force, &c. And here the Endictment mentions, that he Entred, & Disseised: But he saith not pacifice, or with force. So it is not pursuant to the Statute. Wherefore it is ill. But Tanfield thereto answered it is well enough, if it be found that he entred with force, or held with force, and it is here found That he yet detains the Possession with force, and to that purpose he shewed a President, Hill, 13 H. 7. rot. 206. where, in an Action upon the Statute of 8 H. 6. the Declaration supposeth the Entry, and Disseisin to be with force, and the Defendant pleaded Not-Guilty, and the Verdict found, That he entred peaceably, but detained with force, and the Plaintiff had Judgment upon it, so the finding of any of them sufficeth. Gawdy; They be not alike: For the Declaration there is sufficient. And although the Verdict find it to be false in some part, yet that is not material. For here the Endictment is not sufficient; because it is supposed, that he entred, and disseised, &c. And he doth not say, whether he Entred pacifice, or manu forti. So it is uncertain: and an Endictment ought always to be certain, and precise in every point. And for that Cause Gawdy, and Yelverton held the Endictment insufficient. But Popham, and Fenner conceived it to be well enough notwithstanding. For when it is found, That he Entred, and Disseised (no force being found) it is intended to be peaceably, and not otherwise. And as touching the Restitution made after the Writ of Certiorari delivered, Gawdy, and Yelverton conceived it to be void, and ill: because by the Certiorari delivered the hands of the Justices of Peace were closed, For the Writ is an express Prohibition unto them, viz, ulterius terminari coram vobis nolumus. So every Act done by their Authority after its Delivery is void. And although the Writ of Restitution was awarded by all the Justices of the Sessions; yet the Writ of Certiorari being delivered to any of them, he ought to have allowed thereof, and awarded a Supersedeas; Quod Popham concessit. That any Justice of Peace might have awarded a Supersedeas. But he conceived, there was a difference betwixt Ministerial Acts, and Judicial Acts. For Judicial Acts mis-done, or not done (as he said) are but Erroneous, and not void: But it is otherwise of Ministerial Acts. And therefore, If a Judgment be given in the Common Bench, and a Writ of Error be brought unto them, It

(5)

2 Cr. 19.

Yelv 32.

8 H. 6. c. 9.

R. 219.

Moor. 667.

Post. 918.

It is a Superfedeas in it self, yet if they award Execution, or had Awarded it before, and do not award a Superfedeas as they ought, and Execution is done, That is but Erroneous: So if an Habcas Corpus out of this Court be delivered to an inferior Court to remove the Cause, or if, being delivered after Judgment, they proceed to Execution, it is but Erroneous and not void. But if Execution be awarded out of his Court, and delivered to the Sheriff, and he makes a Warrant to his Bayliff to Execute it, and afterward, before it be Executed, a Superfedeas is Awarded, & delivered to the Sheriff, and he doth not Counter-mand his Bayliff, But he (not having notice thereof) Executes it, this is void; because it is a Ministerial Act: So here in the Principal Case. And of this Opinion was Fenner, Justice. But afterwards, because they said, The Awarding of Restitution was but matter in the discretion of the Court: and it appears, there was a former Endictment of a forceably Entry found, and removed into this Court, and (this depending) remained here undiscussed; That Endictment being found contrary to the direction of the Justices of Assise, who gave other Order for the peaceable Trial of the Title which the Court conceived to be an abuse to the Justices of Assise, and of this Court: Wherefore, with the consent of all the Justices, Restitution was awarded.

Braban *versus* Bacon. Mich. 43 & 44 Eliz. rot. 336.

R. 47.
Ante 749.

Ant. 914.

- (6) **D**Ebt upon an Obligation, Conditioned to discharge, and save harmless from all Obligations, which he had Entred into for him. The Defendant pleads, Quod exoneravit, & indemnem conservavit from all the Obligations, &c. One Exception was taken, because he shewed not from what Obligations. Sed non allocatur. Because there might be very many of them, wherefore, to avoid Prolixity in pleading, the Law allowed this Plea to be sufficient. Another Exception was, Because he pleaded not Quo modo exoneravit, &c. but generally: And for that Cause it was held to be ill. Et adjournatur.

Lanning *versus* Lovering.

Ant. 77.

- (7) **C**ovenant. For that the Defendant 35 Eliz. Lett unto him the Barton of B. for six years, and Covenanted, That he should enjoy it during the Term quietly, without interruption, and discharged from Tithes, and other duties; and further Covenanted, That if the Tithes were demanded, and recovered against him during the Term, That he should Recoupe in his hands so much of the Rent as the Tithes amounted unto. And for breach hereof, he sheweth, That in 42 Eliz. the Parson sued him for the Tithes of Corn growing there in the years 38 & 39 Eliz. And therefore he brought the Action: Whereupon it was demurred. And it was held by all the Court, That this Sute after the determination of the Term was a breach of the Covenant; For he did not enjoy it discharged, &c. which is not intended of a real discharge: For that appears not to be the intent of the Parties; because it is agreed, That, if he were sued, he should Recoupe as much of the Rent in his hands: but their meaning was, he should be freed from Sute, and payment of it; and he is as greatly

ly prejudiced by a Sute after the Term, as if he had been Sued before the Expiration of the Term, wherefore he is within the Intent of the Covenant. But because it was not alledged, that the Sute was lawful, or that the Cithes were due, (For he was not bound to discharge him from Illegal Sutes) So the breach was not well assigned. It was therefore adjudged for the Defendant.

Ant 675.

Wilmote versus Knowls.

Ejectione firmæ. Upon a Special Verdict, The Case was: One White, and his Feme, were seised of the Land to them, and the Heirs of the Baron; They by Indenture Bargain, and Sell the Land upon Condition, That if they paid such a Sum, before such a day, That they should Re-enter, and have the Land again in their first Estate, with Covenants in the same Indenture for further Assurance; And that all Assurances to be made should be after the Money paid, to the use of the Baron, and his Heirs. The Baron and Feme Levy a Fine accordingly: The Indenture is afterwards Enrolled within the six Months; The Money is paid at the day limited: The Baron Re-enters, and dieth. And, Whether the Feme shall have again this Land during her Life, or the Heir of the Baron? (who was Lessor in this Action) was the Question. And it was moved for the Plaintiff, that the Heir of the Baron should have it; For although by the first part of the Judgment it be limited, that they both should Re-have it after the payment, &c. yet in another part it is limited, That all Assurances shall be to the use of the Baron, and his Heirs after the payment. Then this Fine being levied to the Bargainee, before the Enrolment of the Indenture, he is in by the Fine, and not by the Bargain, and Sale. Then the Fine is to the use of the Baron only. And in proof hereof were cited 6 R. 2. Title Estoppel. 15 Eliz. Bracebridges Case. That a Feoffment to Bargainee after Enrolment, he is in by the Feoffment, and not by the Enrolment. And that 34 Eliz. betwixt Lybb, and Hinde, It was adjudged, That where a Reversion was bargained and sold by Indenture, and before Enrolment, a Fine was Levied by the Bargainor to the Bargainee, and afterwards the Deed was Enrolled; That yet the Bargainee should not have it without Attornment; because he is in by the Fine, and not by the Bargain and Sale. Et ad adjournatur.

(8)
Moor 680.

Co. 4. 71. 2.

Bustard versus Coulters. Quod Vide ante, fol. 902. Mich. 44 & 45. Pl. 6.

IT was now moved against. And all the Court Resolved, that the Exchange was altogether defeated by the Eviction of the Estate for life; and for the Exceptions to the pleading they held them not to be material, as the Case is upon the Record: For as to the first Exception; That the Entry is not pleaded upon a fine ove Render, which is Executory, They held, That it was well enough. For when it is pleaded, Virtute cujus he was Seised in Fee, It is to be intended, That he Entred: For otherwise he could not be Seised, which is the usual pleading in such cases upon Fines ove Render, and have been always admitted to be good. As appears in Plow. Grendons Case, fol. 503. and so are all the Precedents. Wherefore this Exception was disallowed.

(9)
Ante 902.

Ante 903.

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lowed.

Ante 903.

lowed. To the second Exception, it was held, it was helped by the Rejoinder. For although in the Replication he saith not to whom the Bargain and Sale was made; but by the Habendum; Yet the Defendant himself in his Rejoinder saith, Quod been & verum est, The Bargain and Sale was made to W. G. who was the Party to the Indenture. And he mentions not the Habendum; So as it Ascertaines the Court, to whom the Bargain and Sale was. Wherefore it was good enough, notwithstanding these Exceptions; And was adjudged for the Plaintiff.

Prince versus Allington.

(10)
Moor. 677.

Ant. 916.

FAux Imprisonment: For Imprisoning him 20 Junii, and detaining him in Prison for eighteen dayes, &c. Upon Demurrer, The Case was; One recovered in Debt, and had a Capias ad Satisfaciendum delivered to the Sheriff, who made a Warrant to his Bayliff to do Execution. Afterward a Superfedeas was awarded, and delivered to the Sheriff. The Defendant, being his Bayliff, not having notice of that Superfedeas upon 16 Junii Arrested the Plaintiff by Vertue of the said Capias ad Satisfaciendum, who afterwards Escaped. And upon the 20th of June, the Defendant Re-took him, and detained him in Execution. And, Whether this second Imprisonment were lawful, or not: was the Question. And all the Court held, that it was not. For although the first Imprisonment was Legal, he having been taken by vertue of a Warrant, made by the Sheriff before the Superfedeas awarded, and delivered; he (not having notice of that Superfedeas) was therefore excusable, and the Law will not punish him; Yet the second Arrest, and Detainment in prison afterwards, was a wrong, and not excusable. For he being the Sheriffs Servant, and by Intendment having time sufficient given him, to have notice from his Master, ought at his Peril to take notice thereof, and therefore his Act afterwards is not excusable, whereupon (all this matter being disclosed by pleading) it was adjudged for the Plaintiff. Vide 2 H. 7. fol. ultimo, Grathams Case. 8 H. 4. 7. an Outlawry after a Superfedeas awarded is void. 6 H. 7. 15.

Wilmote versus Carn.

(11)

Ante 650.

REplevin of his Beasts taken in such a Close in D. The Defendant Avows, for that one Bidwel was seised in Fee of an House in D. and of divers Lands in D. whereof the place, where, &c. is Parcel, to that appertaining. And he, and his Feme by Indenture Lett the said House and Lands thereto appertaining to I. S. for years, Rendering Rent: Afterward the Feme died. And Bridwell 2 Junii, 26 Eliz. by his will in writing, devised that Land to the defendant in Fee, and died, whereupon he avows for the Rent, &c. The Plaintiff saith, that the said Bidwell by his Will 3 Junii 26 Eliz. devised it unto him in Fee, Absque hoc, That he devised it to the Defendant. And it was thereupon demurred; because by this Plea he Confesseth, and avoydeth the devise to the Defendant. For he pleads it to be by his last Will, which is an Avoydance of the former, and then he ought not to Travers it. Vide 2 Ed. 6. Title, Confess, and Avoyd 66, And to this Opinion the Court Enclined. But then two Exceptions were taken to the Avowry. First, because he pleads, That the Baron was seised in Fee; and that he, and his Feme Lett, &c. which cannot be. Secondly, Because he pleads, That B. was seised

Seised in Fee of an House, and Land thereto appertaining, &c. Which ought not to be in pleading: For Land cannot properly ^{Pl. C. 170.} be sold to be appertaining to an House, although it may pass by such words in a Deed, by the Reputation, and Common Par- lance, and Intent of the Parties. But in pleading, it ought to be so alledged; But that he was seised of such an House, and of such Lands in D. and Lett them by the name, &c. and Aver their usage together. And all the Court held, that for these two Cau- ses the Avowry was ill, and therefore spake not to the Travers. And thereupon Rule was given, that Judgment should be entred for the Plaintiff, unless other matters were shewn, &c.

Goodrichs Case.

A Ccount of the Receipt of 10l. by the hands of the Plaintiffs ⁽¹²⁾ Wife. Defendant wages his Law, and at the day he had ^{Co. Litt. 295. a} to wage his Law, it was doubted whether it lay; because the Re- ceipt is supposed to be by anothers hand. But because a Receipt by the hands of the Wife of the Plaintiff, or Defendant, is all one Re- ceipt by their own hands, He was received to wage his Law.

Sonham *versus* Trundle.

T Respass of Battery. The Defendant pleaded Excommencement in ⁽¹³⁾ the Plaintiff ipso facto, for that he had stricken in the Church- ^{St. 5. E. 6. c. 4.} yard, by the Statute of 5 Ed. 6. without shewing an Excommence- ment by the Ordinary, or under his Seal. And for this Cause it was Ruled to be ill. For although the Statute saith, that he shall be Excommunicated ipso facto, yet that is to be intended after ^{Ante 680.} a Sentence Declaratory, or Conviction. For, otherwise, there were not any means for his Absolution. Wherefore the whole Court Resolved it to be no Plea, Popham absente. And gave Rule, that it should not be received. But that a Nihil dicit be entered, unless other sufficient Plea be pleaded by such a day.

Hainsworth *versus* Pretty. Hill. 44. & 45 Eliz. rot. 1060.

T Respass. Upon a Special Verdict, The Cause was found to be; ⁽¹⁴⁾ One Thomas Pretty was Seised in Fee of the place, where, &c. ^{Noy. 51.} and had Issue Richard, Robert, John, and Michael, Sons, and Parnel ^{Ante 833.} a Daughter. And by his Testament devised to Robert, John, and Michael his Sons, and the said Parnel, to every of them 20l. to be paid unto them, when they attained to the age of twenty one years. And further devised to the said Rich. his eldest Son all his Lands, Habendum to him, and his Heirs, Upon Condition he should pay to his other Children the said Sums appointed unto them accord- ing to the Intent of his Will; And if he refused the payment of the said Sum, or Sums of Money, That then neither he, nor his Heirs shall have, or enjoy the said Lands, any Devise, Title, Descent, or Interest to the contrary notwithstanding; But that the said Sons, and Daughters should have it to them, and his Heirs. And it was further found, That Thomas Pretty the Devisor died, the said younger Children being within age; And that Richard Pretty Entred, and afterwards Robert attained to his age of twenty one years, and demanded the said 20l. of R. P. who refused to pay it. And that afterwards Rich. Pretty died Seis- ed, having Issue Thomas his Son, under whom the Plaintiff claims. And that the Defendant in his own Right, and of the said Robert, Entred. Et si supre totam materiam, &c. Vid Ante, Trin. 43.

But

Co. Litt. 240. b.

But because by the Defendants negligence no Judgment was then Entred; it was now argued again at the Barr, and all the Justices (the Court being full, viz. Popham, Gawdy, Fenner, and Yelverton) Resolved, that the Defendants Entry was lawful. For this Devise to the Eldest Son, and his Heirs, is void by way of Devise; But it is an immediat Devise, or Limitation to the younger Children, if the Eldest Son performs not the Condition which may well be: as a Devise, that his Executors shall sell his Land, if his Heir pays not unto them such a Sum; in the Interm the Freehold shall descend to his Heir. Secondly, they held, that for Non-payment of any of the Sums, all the Land is forfeited, and all the Children may enter. Thirdly, That notwithstanding this refusal of payment, and Rich. P. dying Seised, and the Descent to his Son, (For so it was pretended, that it was a Descent which should Toll the Entry of the Devisees) That this Descent shall not hurt them. For it is not as a Descent by a Stranger after a Devise, before the Entry of the Devisee, which peradventure might take away their Entry; because it is not here an immediate Devise, but it is Quasi a Devise upon a Limitation, or upon a Condition broken, which no Descent shall take a way, or prejudice: As it is in Scolastica's Case. Wherefore it was adjudged for the Defendant.

(15)

Ryles Case.

Ryle, and others were Endicted of Burglary. Godfrey took Exceptions to the Endictment, Because it was Burglariter frequerunt, &c. where it ought to have been Burglariter. For there is not any such word as Burglariter. And it hath been adjudged, that an Endictment, Quod Murdervalt, where it ought to be Murdravit, was held to be naught for this Cause. Quod Gawdy concessit, and said, That he remembred such a Case to be so Resolved here, since he came to the place. But the Court held, that the Cases were not alike. For Burglariter is as good a word as Burglariter, and as often used in Endictments as the other, and divers Presidents were shewn to that purpose. Wherefore it was Resolved to be well enough. 4 Co. 39. b.

Ayliff *versus* Archdale. Mich. 44 & 45 Eliz. rot. 1660.

(16)

Moor 679.

1 Rol. 729.
Co. Litt. 172. a.

The Case upon Demurrer was: The Plaintiff had paid certain Money for the necessary Meat and Drink of the Defendant being an Infant, and took an Obligation in the double Sum for the payment thereof: And Whether this were good, or voidable? was the Question. And the whole Court held it to be void. But if he had taken an Obligation of the very Sum, which he laid out for his necessary maintenance, it had been otherwise.

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